

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 August 2012

Public Authority: Bury Metropolitan Borough Council
Address: Town Hall
Knowsley Street
Bury
BL9 0SWT

Decision (including any steps ordered)

1. The complainant made a five part request for financial information about a charity, Bury Metropolitan Arts Association (BMAA), held by Bury Metropolitan Borough Council (the council). The council provided some information but withheld the remainder relying on section 41 and section 43(2) as the information that had been provided in confidence and the remainder would prejudice commercial interests. During the course of the Commissioner's investigation, the council also agreed to provide some further information to the complainant.
2. The Commissioner's decision is that the council has correctly relied on section 41 and section 43(2) to withhold the remainder of the requested information. Accordingly, he does not require the council to carry out any steps.

Request and response

3. On 7 December 2011 the complainant made the following request for information under the FOIA:

*"1. Full copy of the minutes taken at the Executive meeting held at the New Kershaw Centre, Deal Street, Bury on the 9th November 2011.
2. Full copy of the document: "A report of the Executive Members for Finance and Leisure, Tourism and Culture" with respect to financial support for Bury Met Arts Association, submitted at the Executive meeting of the 9th November 2011.
3. Full copy of the Bury Met Arts Association lease details concerning the Derby Hall, including rents & business rates payable to Bury MBC.*

- 4. Full cost of maintenance repairs, property and equipment/infrastructure modifications/renewal carried out at the Derby Hall, financed by Bury MBC during the last six years.*
- 5. Total amounts of grants paid by Bury MBC to the Bury Met Arts Association during the last six years."*

4. The council responded on 3 January 2012 and provided information under point 1 of the request but refused to provide the remainder relying on section 41, information provided in confidence, section 22, information for future publication, and section 43(2), information which would be likely to prejudice commercial interests.
5. Following an internal review, the council wrote to the complainant on 15 February 2012. It revised its position with regard to point 4 and part of point 3 of the request and provided this information. It continued to withhold the following information for the following reasons:
- The council relied on both section 41 and section 43(2) to withhold information in response to point 2 (the report) as it had been provided in confidence and was commercially sensitive.
 - In response to point 3, the council released the lease but withheld the rental amount under section 43(2) as it was commercially sensitive information.
 - Finally, with regard to point 5, the council withheld the total amount of grants paid to BMAA in the last six years relying on section 43(2) as it was commercially sensitive.

Scope of the case

6. The complainant contacted the Commissioner to complain about the way his request for information had been handled. Initially he was concerned about the council's decision to withhold information relating to points 2, 3 and 5.
7. In the course of the investigation, the council confirmed that it was prepared to disclose the information requested at point 5, and therefore this decision notice will not consider that information.
8. The Commissioner therefore considers the scope of the case to be whether the council was correct to rely on section 41 and/or section 43(2) to withhold the information requested at points 2 and 3.

Reasons for decision

9. The council relied on both section 41 and section 43(3) to withhold information in this case. The Commissioner will consider each exemption in turn.

Section 41 provided in confidence

10. Section 41 of FOIA provides:

"Information is exempt information if-

- a) it was obtained by the public authority from any other person (including another public authority), and*
- b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person."*

11. The council has relied on this exemption only in respect of the report requested at point 2 of the complainant's request.

(a) Was the withheld information obtained by the council from another person?

12. The council explained that the report had been drafted by officers of the council. However, it stated that much of the information in the report had been obtained from the Chief Officer of BMAA through discussions about BMAA's financial situation. The discussions were for the purpose of enabling the council to make a decision about providing financial support. Further information was obtained by the council from BMAA's accounts. The Commissioner is therefore satisfied that information about BMAA's financial situation was obtained from another person. He has therefore gone on to consider whether disclosure would constitute an actionable breach of confidence.
13. However the Commissioner notes that there is information in the report where the council is discussing internal matters where it does not discuss information which has been provided to it by BMAA. He is satisfied that this information does not fall within the exemption at section 41. He has considered this information further under section 43 later in this analysis.

(b) Would disclosure of the withheld information constitute an actionable breach of confidence?

14. In order to determine whether disclosure would constitute an actionable breach of confidence the Commissioner considered the following questions:

(i) Does the withheld information possess the necessary quality of confidence?

(ii) Was the withheld information imparted in circumstances importing an obligation of confidence?

(iii) Would unauthorised disclosure cause a detriment to the party providing the information or to another party?

(iv) If parts (i)-(iii) are satisfied, would the public authority nevertheless have a defence to a claim for breach of confidence based on the public interest in the disclosure of the withheld information?

(i) Does the withheld information possess the necessary quality of confidence?

15. In the Commissioner's view information will have the necessary quality of confidence if it is not otherwise accessible and is more than trivial. Having reviewed the withheld information, the Commissioner is satisfied that it is clearly more than trivial in nature as it concerns the financial information about a charity.

16. With regard to whether the information is otherwise accessible, the Commissioner notes that BMAA's annual report for the year ending 31 March 2011 contains some limited information about the request for financial support. This includes the amount and length of the loan and also highlights that the main reason for needing it as being the unplanned deficit from a major project. The Commissioner considers that a limited amount of information in the report is in the public domain, and therefore cannot be considered as confidential.

17. However, whilst it is accepted that small sections of the report are in the public domain due to the annual report, the majority of the information provided by BMAA is not. As the limited information is already available, the Commissioner does not consider there is any merit in ordering its disclosure here. He has therefore gone on to consider the remainder of the information.

(ii) Was the withheld information imparted in circumstances importing an obligation of confidence?

18. The council has explained that BMAA entered into discussions with the council for the sole purpose of requesting financial support. Whilst assurances of confidentiality were not explicitly given to BMAA with regard to the discussions and the sharing of accounts information, the council maintains that due to the circumstances of the discussion and the nature of the information, confidentiality was implied. In addition to this, BMAA has informed the council that it considers the information to be confidential.
19. The nature of the information which was withheld in this instance together with the manner in which it was provided to the council leads the Commissioner to agree that the information which was provided to the council was intended to be held under a duty of confidence.

(iii) Would unauthorised disclosure cause a detriment to any party?

20. The council put forward the argument that the disclosure of the information which contains confidential discussions about the financial situation of BMAA and which led to the request to the council for financial support would be likely to be detrimental to the commercial interests of BMAA. Whilst BMAA is a not for profit organisation, it is a commercial entity and engages in commercial activity in order to compete as a viable business and to be able to continue providing arts and entertainment services to Bury residents as part of the council's cultural strategy.
21. The council's arguments are discussed in a confidential annex to this decision notice which has been sent only to the council.
22. Further to the arguments in the confidential annex, the council has also argued that disclosure of the withheld information could prove detrimental to BMAA and other organisations as they would be far less able to trust the council. As a result, the free flow of information to and from the council would be hindered. This would prevent the council from performing its functions to the full because people or organisations would be discouraged from confiding in the council if they did not have a degree of certainty that confidence would be maintained. The council has explained that in order to fulfil the objectives of its cultural strategy, it works in partnership with BMAA and that trust is essential to ensure a workable relationship.
23. The Commissioner is of the view that the disclosure of the information has the potential to cause detriment to BMAA and in turn to residents

who use its services and to the council in terms of ensuring and maintaining workable business relationships. He therefore accepts that a duty of confidence is owed to BMAA in respect of the information provided to the council which forms part of the report and which is not in the public domain.

(iv) Is there a public interest defence to the disclosure of the information?

24. Section 41 is an absolute exemption and therefore there is no public interest test to be applied under FOIA. However, in common law a duty of confidence can be overridden if the public interest in disclosure outweighs the public interest in maintaining the duty of confidence. The Commissioner has therefore considered the public interest arguments in favour of maintaining the duty of confidence and the public interest arguments in favour of disclosure.

Public interest arguments in favour of maintaining the duty of confidence

25. In considering the arguments in favour of upholding the obligation of confidence, the Commissioner has given weight to the public interest in preserving the principle of confidentiality. As discussed above, he acknowledges that the consequence of the disclosure of any confidential information can be, to some degree, to undermine the principle of confidentiality which concerns the relationship of trust between confider and confidant. People could be discouraged from confiding in public authorities if they did not have a degree of certainty that such confidences would be respected.
26. With specific reference to this case, BMAA is a key partner of the council in achieving its cultural strategy. BMAA does this by contributing to a number of the key objectives in the strategy and it is also a central element in Bury's cultural quarter. The council explained that in order to maintain this partnership, a trustworthy and workable relationship is essential. If BMAA could not be assured that information about its financial situation would not be disclosed, it is less likely to share such information with the council. Given the nature of the partnership between the council and the BMAA, and the current difficult financial times, it is paramount that the council is given access to full and frank information about the financial situation of the BMAA and other organisations it works with and supports. This is in order to exercise diligence when making decisions to spend or loan public funds, and to ensure that the most appropriate decisions are taken to aid the public and ensure the continued meeting of the council's strategies, rather than purely to help the organisation itself.

27. An additional public interest argument is considered in the confidential annex to this decision notice.

Public interest arguments in favour of disclosure

28. The central public interest in favour of disclosure in this case is in the transparency and accountability in the decision of the council to provide financial support to BMAA. Where possible, the council should be accountable for its decisions, particularly in the use of public funds. Information about the financial situation of BMAA and the circumstances in which financial support was required would go some way to do this.
29. However, the council has explained that the process of awarding funding is open and transparent. In addition to this, as discussed above at paragraph 16, there is already some information about the council's loan to BMAA in the public domain in BMAA's 2010-2011 annual report. Therefore the public interest in the expenditure of public funds is served to some extent without the disclosure of further detailed information about the financial circumstances of BMAA.
30. There is also a further public interest in the information being disclosed as this would highlight the checks and balances the council took prior to agreeing to provide financial support to BMAA. This would raise confidence in the council's financial management. It might also highlight issues as to whether other options could have been considered.

Balance of the public interest

31. The Commissioner has considered all of the above factors and has decided that the public interest in disclosing the information did not outweigh the public interest in maintaining confidences in this instance. Although he recognises the strong public interest in the information being disclosed in this instance, the nature of the information would mean that its disclosure would be likely to have a detrimental impact on BMAA. His decision is therefore that the information was held under an actionable duty of confidence.
32. The Commissioner's decision is therefore that the council was correct to withhold part of the information from the report under section 41 of the FOIA. He has therefore gone on to consider the application of section 43(2) in relation to the information in the report which was not obtained by the council from BMAA, and also the rental amount withheld in relation to point 3 of the request.

Section 43(2) Commercial interests

33. Section 43(2) provides an exemption from disclosure of information which would or would be likely to prejudice the commercial interests of

any person (including the public authority holding it). This is a qualified exemption, and is therefore subject to the public interest test.

34. In this case with respect to the remaining information in the report not caught by section 41, the council has stated that disclosure of this would be likely to prejudice its own commercial interests. This is primarily in relation to the property occupied by BMAA for which the council is the landlord. The information requested at point 3 of the request, the rental amount, is also included in the report. Therefore the Commissioner has considered the councils arguments with regard to the application of section 43(2) in respect of all the remaining withheld information in this case.
35. In order to determine whether the exemption is engaged the Commissioner will first consider whether the prejudice claimed relates to commercial interests of the trust or the third party.
36. The term 'commercial interests' is not defined in the FOIA. However the Commissioner has considered his awareness guidance on the application of section 43(2). 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."*
37. As the withheld information in this case relates to the council's decision to provide financial support to a third party, and also to its position as landlord of a property including the rental rates and the commercial options available to it in respect of that property, the Commissioner is satisfied that it is commercial information.
38. In its submissions to the Commissioner, the council stated that the commercial interests of BMAA would be likely to be prejudiced. However, as it is not clear that the council had sought BMAA's view on this matter, the Commissioner has only considered the arguments advanced in respect of the likely prejudice to the council's own commercial interests.
39. As the commercial interests exemption is qualified, the final step will be for the Commissioner to address the balance of the public interest.

What is the nature and likelihood of prejudice?

40. The council has explained that release of the remaining information contained in the report including the rental amount would be likely to prejudice its commercial interests in terms of its position as landlord of Derby Hall and other properties. It has stated that the disclosure of the terms of the loan it has agreed with BMAA would also be likely to prejudice the council's commercial interests.

41. The Commissioner has had regard to the withheld information and notes that much of the council's discussion in the report was concerned with the options available to it with respect to Derby Hall if it did not offer financial support and consequently BMAA was unable to continue operating. The council has stated that if BMAA ceased to operate, it is highly likely that it would no longer lease Derby Hall and therefore the property would become vacant. The discussions about the various options which could be pursued for Derby Hall would therefore be likely to prejudice the council's position in negotiating rates and terms with new tenants as any prospective tenant of the property would have a considerably strengthened bargaining position with knowledge of the previous terms and the council's bottom line.
42. It has also argued that even if BMAA were to continue to occupy Derby Hall, the nature of the discussions in the withheld information would be likely to prejudice its negotiating position with other current and future tenants in respect of other properties. This is particularly with regard to the rental amount currently paid by BMAA to the council for Derby Hall. The council has advised that the disclosure of the rental amount paid by BMAA would put current and potential tenants of other properties in a strengthened position in negotiations as it would effectively provide a figure to aim for.
43. The Commissioner considers that the information in question identifies key information which could be used by current and prospective business tenants and would therefore be likely to adversely affect the council's position to negotiate favourable tenancy agreements.
44. Having considered the arguments advanced by the council, the Commissioner accepts that the disclosure of the remaining information from the report including the rental amount in relation to point 3 of the request would be likely to prejudice the council's position in respect of securing favourable terms on business rents. Therefore, he accepts that the council's commercial interests would be likely to be prejudiced and so the exemption is engaged.

Public interest in favour of disclosing the information

45. In weighing the balance of the public interest arguments the Commissioner has considered submissions from both the council and the complainant.
46. The council accepts that there is a public interest in openness accountability and transparency of public spending and in allowing individuals to understand the decisions made by public authorities.

47. The complainant has argued that the public has a right to know whether BMAA is in financial difficulties, the reasons for this, and the details of the loan including how it is paid by BMAA. He is particularly concerned about the use of public money to fund events which carry 'significant risks' particularly if such events do not serve the cultural needs of the people of Bury.

Public interest in favour of withholding the information

48. As outlined above, disclosure of the information would be likely to prejudice the council and would damage its commercial position with regard to obtaining the best rental arrangements for the property it leases. The public interest is therefore served by enabling the council to make the most of the assets it owns and generate income in times when councils are facing cuts and difficult decisions about the allocation of limited resources. The Commissioner has therefore considered that there is a strong public interest in protecting the council's negotiating position in order to obtain the best income from the assets it owns.
49. The council has also explained that the public interest in accountability and transparency has been served to some extent by the disclosure of the meeting minutes which outlined the decision to provide financial support to BMAA. Further to this, the Commissioner considers that the availability of BMAA's annual report for the financial year ending on 31 March 2011 also serves the public interest in the accountability of public spending.
50. In addition to this, as referred to in paragraph 32, there is already some information about the council's loan to BMAA in the public domain in BMAA's 2010-2011 annual report. Therefore the public interest in the expenditure of public funds is served to some extent without the disclosure of further detailed information about the financial circumstances of BMAA.

Balancing the public interest

51. In balancing the public interest arguments in this case, the Commissioner acknowledges that there is a strong public interest in promoting the accountability of the expenditure of public money. However, this has to be counterbalanced by the public interest in ensuring the council is able to obtain the best value for the assets it owns in order to maximise the limited public funds it has available to spend. The Commissioner is of the view that ensuring that the council's negotiation position is not compromised is particularly important in the current climate of limited public sector funding.

52. After considering these points the Commissioner has decided that the public interest in disclosure is outweighed by the public interest in maintaining this exemption. Therefore the withheld information from the remainder of the report including the rental amount is exempt from disclosure under the section 43(2) commercial interest exemption and should not be disclosed.

Summary

53. In summary it is the Commissioner's decisions that the council was correct to rely on section 41 to withhold part of the report as requested in point 2. In addition, he also considers that the council was correct to rely on section 43(2) to withhold the remaining information from the report and also the rental amount as requested in point 3.

Right of appeal

54. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

55. 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.
56. 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

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