

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 2 February 2017

Public Authority: Wolverhampton City Council
Address: Civic Centre
St Peter's Square
Wolverhampton
WV1 1SH

Decision (including any steps ordered)

1. The complainant has requested information relating to Bushbury Crematorium. The Council refused to provide the requested information under section 43(2) FOIA.
2. The Commissioner's decision is that the Council has correctly applied section 43(2) FOIA to the withheld information.
3. The Commissioner requires no steps to be taken.

Request and response

4. On 6 October 2016 the complainant requested information of the following description:
 1. Which slots - between 09:00 and 17:00 – were booked for a service at the Bushbury Crematorium on each week day during January 2015?
 2. What was the approximate origin of residence of service users of the Bushbury Crematorium in respect of all services which took place during January 2015 by way of postcode district (i.e. WV1, TF11 etc).
5. On 1 November 2016 the Council responded. It refused to disclose the requested information under section 43(2) FOIA.
6. The complainant requested an internal review on 16 November 2016. The Council sent the outcome of its internal review on 14 December 2016. It upheld its original position.

Scope of the case

7. The complainant contacted the Commissioner on 15 December 2016 to complain about the way his request for information had been handled.
8. The Commissioner has considered whether the Council was correct to apply section 43(2) FOIA to the withheld information.

Reasons for decision

Section 43 – commercial interests

9. Section 43(2) of the FOIA 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.
10. The term 'commercial interests' is not defined in the FOIA, however, the Commissioner has considered his awareness guidance on the application of section 43. 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."*¹
11. The withheld information relates to the specific service provided at Bushbury Crematorium and the level of usage of that service within the range of bereavement services provided by the Council. The Council confirmed that the bereavement service is provided within a competitive environment. The Commissioner considers that information relating to the level of service usage provided by the Council does fall within the scope of the exemption.
12. Having concluded that the withheld information falls within the scope of the exemption the Commissioner has gone onto consider the prejudice which disclosure would or would be likely to cause and the relevant party or parties which would be affected.

¹ See here:

http://www.ico.gov.uk/for_organisations/guidance_index/~/_media/documents/library/Freedom_of_Information/Detailed_specialist_guides/AWARENESS_GUIDANCE_5_V3_07_03_08.ashx

The nature of the prejudice

13. The Council explained that the release of transactional information relating to one specific element of the bereavement service would provide competitors with an advantage in terms of targeting offers to maximise profitable areas of commercial activity without the burden of subsidising potential loss making activities.
14. It said that a competitor equipped with the withheld information, developing a crematoria service within the area, would put them at a targeted advantage and this would lead to a significant annual loss of income to the Council.

Likelihood of prejudice

15. In *Hogan and Oxford City Council v the Information Commissioner* [EA/2005/0026 and 0030] at paragraph 33 the Tribunal said:

"there are two possible limbs on which a prejudice-based exemption might be engaged. Firstly the occurrence of prejudice to the specified interest is more probable than not, and secondly there is a real and significant risk of prejudice, even if it cannot be said that the occurrence of prejudice is more probable than not."
16. In this case the Council has argued that disclosure would be likely to prejudice its own commercial interests.
17. The Council must therefore demonstrate that there is a real and significant risk of prejudice occurring. The Council has said that there is an ongoing planning application and public enquiry for the provision of a facility to provide these services in a bordering area to the Council (a neighbouring authority, South Staffordshire District Council).
18. The Commissioner considers that the withheld information would therefore be likely to be of relevance to the neighbouring service and if successful would be likely to impact upon the service currently provided by the Council due to the close geographic location.
19. The Commissioner considers that section 43(2) FOIA was correctly applied and she has therefore gone on to consider the public interest test in this case.

Public interest test

Public interest in favour of disclosure

20. The Council did not present any public interest arguments in favour of disclosure.

Public interest in favour of maintaining the exemption

21. The Council argued the level of central government grant has decreased in recent years resulting in increasing budgetary pressures and the need to develop income streams to support the continued delivery and sustainability of Council services within a commercial environment. It is therefore crucial for the ongoing viability of the bereavement service that it is able to operate in this commercial market place in a fair way and on a level playing field with its competitors.

Balance of the public interest

22. The Commissioner does consider that there is a public interest in disclosure of information that would demonstrate that the Council is providing public services in an efficient and effective manner.
23. However the Commissioner must balance this with the fact that the Council is providing such services within a competitive environment. That is not to say that there should be no commercial competition in this area but there is a public interest in the playing field being level and the Council not being put at a commercial disadvantage.
24. As there is a current planning application for provision of the same or similar services to those currently offered by the Council in a bordering area, the Commissioner considers that the public interest in ensuring the Council is not put at a commercial disadvantage outweighs any public interest in disclosure. Section 43(2) FOIA was therefore properly engaged.

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: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.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

Gemma Garvey
Senior Case Officer

Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF