Freedom of Information Act 2000 (FOIA)

Decision notice

Date: **9 December 2019**

Public Authority: **Calderdale Council**
Address: **Town Hall**
Crossley Street
Halifax
West Yorkshire
HX1 1UT

Decision (including any steps ordered)

1. The complainant has requested correspondence and/or communications between Calderdale Council and specified third parties. The requested information concerns the Gentleman Jack television programme filmed at Shibden Hall which is within the Council's area. The Council provided the complainant with some of the information it holds but refused to supply other information on the grounds that it is exempt by virtue of section 43(2) of the FOIA.

2. The Commissioner's decision is that Calderdale Council has properly applied section 43(2) of the FOIA to the information it is withholding.

3. No further action is required in this matter.

Request and response

4. On 6 February 2019, the complainant wrote to the Council and requested information in the following terms:

"Please note that my reference to the council in the questions below should be taken to mean the council leader and his/her office; the Chief

Executive and his/her office, the council's press and public relation's team, the council's legal department; the council's planning department; any staff or department(s) with specific responsibility for the property known as Shibden Hall and any staff or department with specific responsibility for working with film and TV production shoots in the council's geographical area.

Please note that the reference to Shibden Hall in the questions below should refer to any staff working at the property and or any of the property's trustees.

i. Since 1 January 2017 have any of the following organisations and individuals written to the Council and or the property known as Shibden Hall. Please note that I am only interested in that correspondence of communication irrespective of whether it took place before filming of the drama began, during filming or after filming was completed. I am still interested in all correspondence and communications even if the same drama had a different title at any stage of the research, planning and production process.

   a. Lookout Point, a London based television production company.
   b. The BBC.
   c. HBO.
   d. Sally Wainwright, the writer and creator of Gentleman Jack and anyone acting specifically on her behalf.

ii. If the answer to question one is yes can you please provide copies of correspondence and communication including emails. Please do redact any confidential financial information from the documents. But do include copies of any photographs, drawings, maps and diagrams which were submitted along with the correspondence and communication.

iii. During the aforementioned period did the council and or Shibden Hall write to any of the aforementioned organisations and individuals listed in question one. Please note I am only interested in that correspondence and communication which in any way relates to the upcoming BBC/HBO drama Gentleman Jack. I am interested in all correspondence and communication irrespective of whether it took place before filming of the drama began, during filming or after filming was completed. I am still interested in all correspondence and communication even if the same drama had a different title at any stage of the research, planning and production process.

iv. If the answer to question one is yes can you please provide copies of this correspondence and communication including emails. Please do redact any confidential financial information from the

documents. But do include copies of any photographs, drawings, amps and diagrams which were submitted along with the correspondence and communication."

5. The Council responded to the complainant's request on 6 March 2019. In answer to his question 1, the Council confirmed that it held correspondence / communication from Lookout Point and the BBC but none from HBO or Sally Wainwright.

6. The Council responded to part two of the request by refusing to provide the correspondence it holds which it had received from Lookout Point. The Council's refusal cited section 43 of the FOIA.

7. The Council provided the complainant with copies of its correspondence with the BBC which it redacted of third party personal data in reliance on section 40(2) of the FOIA.

8. In answer to the complainant's question 3, the Council advised the complainant that it holds correspondence/communication from the Council or Shibden Hall to Lookout Point and the BBC but none to HBO or Sally Wainwright.

9. The Council refused to disclose its correspondence/communications with Lookout Point in reliance on section 43 of the FOIA. The Council provided the complainant with copies of its correspondence/ communications sent to the BBC, which it redacted of third party personal data in reliance on section 40(2) of the FOIA.

10. Following his receipt of the Council's response the complainant wrote to the Council on 6 March 2019 to request an internal review. The complainant asserted that the FOIA carried a presumption in favour of disclosure, and that information can only be legitimately withheld in reliance on one of the appropriate exemptions. He argued that disclosure should not depend on the written permission of a third party.

11. On 29 April the Council wrote to the complainant to advise him of its internal review decision. The Council confirmed its original decision to withhold correspondence/communication to and from Lookout Point in reliance on section 43(2) of the FOIA. The Council referred to its location agreement with Lookout Point which contains a clause requiring the Council not to make any disclosure of information without the express permission of Lookout Point.

Scope of the case

12. The complainant contacted the Commissioner 9 May 2019 to complain about the way his request for information had been handled.

13. The complainant was particularly concerned about the Council's reference to an agreement with Lookout Point and the clause preventing the Council from making a statement or announcement about the intended programme without the express consent of Lookout Point.

14. The complainant believes that the Council, agreeing to this clause, means that it has opted out of its obligations under the Freedom of Information Act and The Environmental Information Regulations, and is therefore contrary to the spirit of both information access regimes. The complainant points out that both the FOIA and the EIR contain provisions to protect confidential financial information.

15. The Commissioner advised the complainant that the focus of her investigation would be to determine whether Calderdale Council is entitled to withhold information from you in reliance on Section 43(2) of the FOIA.

Reasons for decision

16. Section 43(2) provides an exemption from disclosure where the requested information would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).

17. The Commissioner considers that three criteria must be met for the exemption to be engaged:

- the actual harm which 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;

- 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 which is alleged must be real, actual or of substance; and

- it is necessary to establish whether the level of likelihood of the prejudice being relied upon by the public authority is met. In other words, disclosure 'would or would be likely' to result in prejudice.

18. The term 'commercial interests' is not defined in the FOIA. In the Commissioner's guidance on section 43 (Freedom of Information Act Awareness Guidance No 5)[1] the Commissioner considers 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".

19. The Commissioner must consider the prejudice that disclosure of the withheld information would cause in respect of the Council's commercial interests, and to any other party or parties that would be affected.

20. Section 43(2) has 2 limbs: They concern the probability of the prejudice occurring, should the withheld information be disclosed. The Commissioner considers that "likely to prejudice" means that the possibility of prejudice should be real and significant and certainly more than hypothetical or remote. "Would prejudice" places a much stronger evidential burden on the public authority and must be at least more probable than not.

21. For the purpose of this case, the Council has identified three parties whose commercial interests would, or would be likely to be prejudiced if the withheld information was disclosed. The parties concerned are:

    - Calderdale Council,
    - Lookout Point Limited, and
    - Philip Fearnley Photography Limited (trading as Halo Vue Aerial Photography).

Calderdale Council's commercial interests

22. The Council has provided some background information which it considers is relevant to its application of section 43(2).

23. The Council says it was approached by Lookout Point - the film production company, to film the Gentleman Jack programme at the home of Anne Lister at Shibden Hall, and at other locations within Calderdale Council's area.

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1 https://ico.org.uk/media/fororganisations/documents/1178/awareness_guidance_5_v3_07_03_08.pdf

24. According to the Council, the filming of Gentleman Jack has had a huge positive impact its small local authority area, with publicity generated nationally leading to a large increase in visitor numbers and the need to increase the Hall's opening hours to meet the visitor demand.

25. The Council says that the scenes filmed around Calderdale have added to the attraction of the area and there has been an increase in tourism recorded across the Authority. Additionally, there has been increased interest in the Council's area from other film makers who are considering its use for other projects.

26. The Council argues that the disclosure of the withheld information would damage its working relationship with Lookout Point Limited if it was to disregard the non-disclosure clause contained in its Location Agreement. It says, this "could lead to legal action being taken against the Council, which would incur both a monetary penalty and reputational damage". Moreover, "It would mean that Lookout Point would be less likely to wish to enter into arrangements to film in Calderdale again in the future, which would damage our future income as we are already aware that a second series of "Gentleman Jack" has been commissioned.

27. In addition to the above the Council says that disclosure of the withheld information would damage its reputation more widely in the television and film production industry and affect the Council's ability to generate income in future from this source.

28. To disclose details of the sums charged by the Council for the services provided to Lookout Point Limited would give neighbouring local authorities the ability to undercut the Council by offering these services at a lower price.

29. Likewise, the Council argues that disclosure would damage its relationship with Philip Fearnley Photography Limited. It points out that Philip Fearnley Photography is a local business and that some of the withheld information is comprised of that company's method statement. The Council considers that disclosure of this information, without the company's consent, would damage the Council's reputation within the local community and result in making it less likely that both they and other similar companies would tender for work in future, which would then prejudice our interests in operating the most competitive tender process possible.

Lookout Point Limited's commercial interests

30. The withheld information includes details of Lookout Point's negotiated rates with suppliers and vendors.

31. A second series of "Gentleman Jack" has been commissioned and therefore Lookout Point will have to undertake a procurement exercise and re-negotiate these fees. The disclosure of the information would reduce their ability to negotiate the best price for these goods and services.

32. Details of payments made by Lookout Point form part of Gentleman Jack's production budget. The Council therefore argues that disclosure of this information at a time when a second season of the programme is pending would reveal sensitive cost information that has not yet been presented to the BBC and HBO.

33. Additionally, the withheld information contains details of Lookout Point's insurance and liability information. The Council asserts that, should this information be released into the public domain, it would reveal the company's risk exposure in relation to the production of Gentleman Jack and this could adversely affect their bargaining position with other commercial entities.

34. Also contained within the withheld information is the location agreement. This document includes details of the agreed fees and payment schedule.

35. Lookout Point has advised the Council that it wants to preserve its ability to re-negotiate these fees in good faith and without the external interference which occur were the details released. These fees also form part of the programme's budget which would again reveal sensitive programme cost information and in turn be to the disadvantage of Lookout Point.

Philip Fearnley Photography Limited's commercial interests:

36. The withheld information contains a copy of Philip Fearnley Photography Limited's 'Site Survey, Risk Assessment and Method Statement'. The Council asserts that the disclosure of this document would give that company's competitors an unfair advantage in what is a commercial environment. The Council says that disclosure would give competitors access to the detailed methodology of the company's work process when it receives a task from a client, and also their process when conducting a risk assessment. This information could be used to benefit other businesses operating in this field in respect of any future tender process for a similar piece of work.

37. To substantiate its assertions, the Council has provided the Commissioner with copy of a letter from Lookout Point Limited, dated 11 July 2019, which expresses its wish that the information requested by the complainant is not disclosed at that time. The letter sets out how the

withheld information would be prejudicial to the company's commercial interests if it was disclosed. Lookout Point's refers to specified pieces of information within the withheld documentation and addresses how their release would be detrimental.

38. Additionally, the Council has provided the Commissioner with a copy of the Location Agreement of 12 April 2018 which it entered into with Lookout Point Limited.

39. The Council referred the Commissioner's attention to section 4.4 of that agreement where it states that the Council will not "make any statement, announcement or give any information directly or indirectly relating to the programme, this agreement, the internal affairs of the company or the commercial relationship of the company with any financing partner to any journalist, critic or correspondent of any newspaper or publication or to any person, film or company by whom repetition or publication of any statement, announcement or information might reasonably be anticipated", without the prior consent of Lookout Point Limited.

40. The Council approached Lookout Point Limited to ask the company to review the information which the complainant has asked for and to determine whether it could be released. On 11 July 2019, the company wrote to the Council and confirmed its objection to the potential disclosure and made clear that it would likely reveal 'sensitive programme cost information', adversely affect Lookout Point's bargaining position with other commercial entities', 'interfere with Lookout Points ability to re-negotiate a location fee in good faith', and 'reveal sensitive programme cost information and disadvantage Lookout Point'.

41. Having set out the foregoing position, the Council has advised the Commissioner that it considers the higher threshold of 'would prejudice' is relevant to its application of section 43(2). It says, "If we were to overturn Lookout Point's request that the information remains withheld at the present time, the likelihood of them entering into further agreements with the Council for filming would without question be reduced". This is particularly important given that a second series of "Gentleman Jack" is to be made this would reduce the expected income that this would generate for the Council.

42. The Commissioner has examined all of the information which is relevant to the complainant's request, which the Council is withholding. She has also considered all of the representations made in respect of the Council's application of section 43(2) of the FOIA.

43. The Commissioner has decided that all three of the criteria listed at paragraph 18 are met and therefore the exemption provided by section 43(2) is engaged.

44. The Commissioner must now go on to consider where the public interest lies in respect of the disclosure or withholding of the requested information.

The public interest test

45. The Commission recognises the public interest inherent in the disclosure of information which promotes accountability and transparency. This is especially the case in matters which concern the actions and decisions of a public authority which affect the general public and which impact the public purse.

46. The Commissioner also recognises the local public interest associated with the disclosure of information regarding the making of the Gentleman Jack programme at locations within the Council's area. This has required the closure of Shibden Hall to members of the public on filming days and the closure of roads and car parks for filming and accommodating crew vehicles.

47. To a lesser degree, the Commissioner acknowledges the interest of public which the filming and transmission of this BBC drama has generated.

48. Weighed against the above are the detrimental effects that disclosure of the requested information would have on the commercial interests which the Council has identified.

49. The Commissioner considers that section 4.4 of the Location Agreement is a contractual clause which, if breached, would result in legal action against the Council. It is particularly broad in its scope and is certainly wider than the section 43(2) exemption. The Commissioner certainly accepts that a breach of the Location Agreement would result in legal action against the Council which would be detrimental to the public purse.

50. The Commissioner accepts that disclosure of the communications with Lookout Point Limited would potentially damage the Council's relationship with Lookout Point and might result in the company choosing to use other locations outside of Calderdale's area for future filming of Gentleman Jack and other future projects. In the Commissioner's opinion this would negatively affect the public purse both in direct income from production companies and indirect income from the tourism generated by using Calderdale locations for filming.

51. Likewise the Commissioner cannot ignore the possible effects on the local economy that disclosure might bring about. She recognises that local businesses have benefitted from the increased number of visitors to the area. These visitors, together with the film crews, have generated increased trade which would also be adversely affected if this ceased. This would not be in the public interest.

52. The Commissioner accepts that the Council promotes transparency in relation to payments received for services and any actions which may affect the local community. She is content that the Council will disclose information regarding the income it receives from the Gentleman Jack programme in the future, at the appropriate time and when it can no longer harm the Council's commercial interests.

53. Information regarding the closure of Shibden Hall to visitors whilst filming took place was widely publicised and appropriate notices were placed regarding any temporary road closures.

54. The Commissioner does not agree with the complainant's assertion that by agreeing the section 4.4 clause in the Location Agreement, the Council has effectively opted out of its obligations under the Freedom of Information Act and The Environmental Information Regulations, and has acted contrary to the spirit of both information access regimes.

55. Section 4.4 of the Location Agreement does not prevent the lawful disclosure of information under the provisions of the FOIA or the EIR. This fact is evidenced by the Council's refusal notice of 6 March 2019 and its internal review decision of 29 April 2019. Both of these made clear that the Council had considered the complainant's request under the provisions of the FOIA and as a result of that consideration the Council applied the section 43(2) exemption.

56. The Commissioner is clear that section 4.4 of the Location agreement does not prevent a public authority from disclosing recorded information under section 1 of the FOIA. Rather, it is a clause which creates grounds for a breach of contract.

57. In terms of the complainant's request, section 4.4 alerted the Council of its need to rely on a lawful exemption under the FOIA. In the Commissioner's opinion, the Council's reference to the section 4.4 clause was to illustrate a potential contractual breach rather than it being a prohibition to a potential disclosure of information under the FOIA. That potential contractual breach is not the single issue which determines whether the Council's commercial interests would be prejudiced by disclosing the requested information: It is however one of the issues considered by the Council.

58. When the complainant referred the Commissioner to the provisions of the FOIA and EIR which are designed to protect confidential financial information, he is in essence acknowledging the approach taken by the Council.

59. On balance, the Commissioner considers that the public interest in maintaining the exemption outweighs that in disclosing the withheld information. She is content that the commercial interests identified by the Council would be prejudiced if the information requested by the complainant was to be disclosed. The Commissioner has found no public interest factors which outweigh that prejudice.

Right of appeal

60. 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

61. 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.

62. 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 .....

Andrew White
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