

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 8 September 2020

Public Authority: Plymouth City Council
Address: Windsor House
Plymouth
PL6 5UF

Decision (including any steps ordered)

1. The complainant requested information from Plymouth City Council ("the Council") relating to pest control visits. The Council refused the request under section 43(2) (commercial interests) of the FOIA.
2. The Commissioner's decision is that the Council correctly applied section 43(2) of the FOIA. Therefore, the Commissioner does not require the Council to take any steps as a result of this decision.

Request and response

3. On 27 January 2020 the complainant wrote to the Council and requested information in the following terms:

"Please can you provide me with the following information on visits to premises by the Plymouth City Council Pest Control team during 2019 from January to December inclusive.

The following details of each occasion when pest control staff have visited a property to deal with a problem:

- *Location (post code and street name)*
- *Date*
- *Problem (including which pest)*

Please specify whether any incident was a repeat visit, if possible."

4. On 17 February 2020 the Council responded and confirmed that it does hold the information to the request. The Council stated that the information is exempt under section 12 of the FOIA *"as its disclosure would or be likely to prejudice the commercial interests of the authority."*
5. On the same day the complainant asked the Council for an internal review.
6. On 9 March 2020 the Council provided its internal review response and maintained its original position to withhold the information. However, the Council said that the original reason for withholding the information should have stated section 43(2) (commercial interests) and not section 12 of the FOIA.

Scope of the case

7. The complainant contacted the Commissioner on 11 March 2020 to complain about the way his request for information had been handled.
8. The following analysis focuses on whether the exemption at section 43(2) of the FOIA was cited correctly.

Reasons for decision

Section 43(2) – prejudice to commercial interests

9. Section 43(2) of the FOIA states that information is exempt if its disclosure 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 exemption can be engaged on the basis that disclosing the information either "would" prejudice commercial interests, or the lower threshold that disclosure "would be likely" to prejudice those interests. The term "likely" is taken to mean that there has to be a real and significant risk of the prejudice arising, even if it cannot be said that the occurrence of prejudice would be more probable than not.
11. For the Commissioner to accept that prejudice *would* result, she must be satisfied that this outcome would be more likely than not. The Council considered that disclosure of the requested information "would be likely" to prejudice its own commercial interests.

12. The withheld information consists of the dates, the problems and the location with regards to pest control visits.
13. The Council explained why it considered disclosure of the requested information would be likely to result in a loss of commercial opportunities for the Council. It said that *"The Council's pest control service already has to be transparent in publishing its prices for domestic pest control treatments on the Council's website. This already allows our competitors to know exactly what we charge for each domestic service and enables them to undercut our prices."* The Council is of the view that disclosure would place even more information about its business into the public domain, this includes prices for domestic services, pests treated by the Council and the locations where the work was carried out. The Council believes that disclosure of information about pests in a particular area, would enable competing businesses to target those areas, which would be undercutting the Council whilst doing so. It further explained that *"As the requested postcode information will also include commercial areas of the city, our competitors will also be able to aim specific marketing campaigns towards companies and organisations where the Council is already doing business, potentially securing contract opportunities away from the Council using our own data."*
14. The Commissioner accepts on the basis of this reasoning that the information in question is commercial in nature. The next step is for the Commissioner to consider the prejudice which disclosure would or would be likely to cause and the relevant party or parties that would be affected.
15. For Section 43(2) to be engaged three criteria must be met:
 - Firstly, 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 commercial interests;
 - Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the withheld information and the prejudice to those commercial interests; and
 - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met, meaning whether there is at least a real and significant risk of the prejudice occurring.

16. With regards to the first criterion, the Commissioner accepts that the prejudice envisaged would likely be to the commercial interests of the Council. Therefore, the Commissioner is satisfied that the first criterion is met. This is not to say that she agrees it will happen; simply that the criterion is met.
17. The Council argued that disclosure of the withheld information would be likely to harm the Council's business and reputation. It stated that disclosure of information about pests in a particular area, would enable competing businesses to target those areas, which would be undercutting the Council. This, it said, would lessen the Council's service's ability to fairly compete in this particular market.
18. The Council stated that disclosure would be likely to result in a loss of income to the Pest Control Service and the wider Public Protection Service. It argued that disclosure would provide the Council's competitors in the pest control business with information about the extent of its business, i.e. the number of treatments of each type applied and the geographical areas in which the Council applied them.
19. The Council reiterated that its service is already frequently undercut by its competitors who are able to ascertain its prices for domestic services. Therefore, the Council considers that with additional information about the areas in which it operates, competing businesses would be able to advertise key services in those areas.
20. The Council said that if customers were able to receive a similar standard of service at a lower price than the Council can afford to charge, they are likely to take that opportunity which would result in a reduced share of the market for the service and consequently, less income to support Public Protection services, e.g. noise or waste investigations.
21. The Council considers that disclosure would likely detract from its viability as a completely cost recovery service. It explained that a significant reduction in market share would mean that the service would be less able, or be unable to serve its purpose as an income generating enterprise. If the service is unable to fulfil this function in supporting itself and providing any funding for other services in the wider Public Protection Service, it would be closed.

22. The Council argued that disclosure would be likely to result in a loss of its reputation and consequently loss of business. It said that *“Laypersons who are potential customers would, understandably, be likely to infer from the disclosure of data about repeat visits that the Council provided a sub-standard service and are not a reliable operator.”* The Council therefore believes that these potential customers would likely be deterred from purchasing its services if the requested information was disclosed.
23. Having considered the arguments, together with withheld information, the Commissioner is satisfied that the Council demonstrated that a causal relationship exists between the potential disclosure of the information being withheld, and the prejudice to its commercial interests. Therefore, the Commissioner considers that the second criterion has also been met.
24. Turning to the third criterion, the Council said that the consequences of releasing the information would be likely to result in; a loss of commercial opportunities for the Council, a loss of income to the Pest Control Service and the wider Public Protection Service, and that this would be likely to damage the Council's reputation which could threaten the ability for it to continue to provide its services in this area, and consequently loss of business.
25. The Commissioner has considered these details and she believes that the Council has clearly demonstrated that the disclosure of the information, would be likely to have a detrimental impact on its commercial activities; specifically, that loss of revenue would be likely to occur through a wider loss of confidence in its ability to provide this service. The Commissioner accepts that this would be likely to prejudice the Council's commercial activities in this area.
26. In light of the Council's submissions, it is clear that disclosing the withheld information could result in competitors undermining the Council by accessing the prices the Council charge for domestic services, and details of the pests treated and also the locations of the work conducted.
27. Having viewed the withheld information and considered the arguments made, the Commissioner accepts that prejudice to the commercial interests of the Council would be more likely than not to result through disclosure of the information in question. She therefore finds that disclosure would result in prejudice to the commercial interests of the Council and, on this basis, section 43(2) of the FOIA is engaged.

Public interest test

28. Having found that the exemption is engaged, the Commissioner has gone on to consider the public interest factors in favour of disclosing the withheld information and of maintaining the exemption. Although the Commissioner has found the section 43(2) exemption is engaged, the information may still be released if the public interest in disclosing it outweighs the public interest in maintaining the exemption.

Public interest arguments in favour of disclosing the withheld information

29. The complainant argued that disclosure of the requested information is in the public interest as it provides accountability for the expenditure of public money. He considers that the operation of pest control has an important role in promoting public health, which would be supported by disclosure. The complainant is also of the view that disclosure would improve the ability of the Council to compete for customers. Therefore, potentially increasing income and improving the Council's financial position by publicising the Council's pest control operation.
30. The complainant stated that *"other local authorities take the view that it is in the public interest to actively publish the details of their pest control callouts."* In order to support this claim, the complainant directed the Council to a link to the information published by Coventry City Council which charges for its pest control services. He highlighted that the information published includes the date of callout, pest involved, postcode and area.
31. The Council said that it recognises that there is some level of public interest in disclosing this information. There is a general public interest in transparency which would be furthered by disclosures informing the public about the activities carried out by the Council. Also, in understanding the discretionary services that the Council offers to people in addition to the statutory services which it provides.
32. Whilst no public funds are used in the provision of this service, the Council reported that it had identified a general public interest in understanding how local government generates revenue to supplement income received from Central Government and Council Tax revenue.
33. With regards to public health, the Council stated that there is a public interest in the facts of where, why and how frequent treatments for pests are carried out.

Public interest arguments in favour of maintaining the exemption

34. The Council argued that disclosure of the withheld information which relates to the extent of its business, would disadvantage the Council as it would provide its competitors with information about when and where the Council provided services in the city, and therefore, where in the city there may be further need for these services.
35. With regards to the complainant's reference to Coventry City Council as a local authority that does publish the type of information requested, the Council stated that Coventry City Council operates in a different market and has a different approach to pest control. The Council quoted to the Commissioner, an extract from Coventry City Council's website, and explained that its pest control service operates on only a partially commercial basis, as opposed to the Council's wholly commercial basis. Therefore, the Council believes that the disclosure of such information *"is likely to have little, if any, negative impact on their (Coventry City Council's) viability."*
36. The Council explained that *"there is an increasing, urgent need to maintain income to the Council in the highly pressurised financial circumstances that currently face local government."* It stated that the profits from this service supplements the Council's income, which helps to maintain other essential services operated in the public interest. Consequently, the Council said, this helps to ensure that Council Tax remains as low as possible. The Council argued that as customers are able to shop around to other suppliers who are able to undercut the Council's published charges, that this puts the Council's service at a competitive disadvantage. The Council reported that it has evidence to support the fact that previous employees have used commercial information about its service to target its business and domestic customers. This, it explained, undercuts its offering, and secures business away from the Council.
37. The Council considers that there is a public interest in ensuring fair commercial competition in a mixed economy. It believes that disclosure of the requested information would unfairly disadvantage the Council, as this would lead to an overall distortion of competition in the local pest control market. The Council said *"when aiming to increase the commercial viability of our pest control service the Council found it impossible to benchmark against local providers. This is because all other pest control operators in Plymouth are private companies, none of whom are required to publicly disclose information about their prices, treatments, or minute detail of the geographical areas they cover."*

38. The Council argued that disclosure of the information about the extent of its pest control operations, would enable its competitors to target the areas in which the Council does business. It said that it would also, in the domestic aspect of that market, enable the Council's competitors to undercut its prices whilst doing so. The Council further argued that the likely consequential loss of a significant share of the market would undermine the viability of the Council's pest control service. This it said, could result in the closure of the service.
39. The Council is of the view that the benefits of a competitive pest control market would likely be lost to the public as a result of disclosure of the withheld information. This fair competition the Council said, encourages better quality services, better prices and more options for consumers, meaning value for money.
40. The Council believes that disclosure of this information would likely cause unwarranted reputational damage to the Council's pest control service. It said that *"laypersons would be likely to infer from the disclosure of data about repeat visits that the Council provided a sub-standard service, are not a reliable contractor, and, therefore, be deterred from buying this service."* The Council argued that such damage to the service's reputation would be unwarranted. This, it explained, is because a standard procedure involves multiple treatments for particular pests and that a layperson is unlikely to be aware of this.
41. The Council reported that it is only one of a number of competitors in the Plymouth market. It explained that pest control services in Plymouth are provided by a number of private companies and individuals, and that treatments may also be applied by householders on a DIY basis. The Council said that *"as no company within the market is obliged to publish, or has published, information similar to that which the Council is being asked to disclose, there is no information available about the levels of pest activity in Plymouth or the size of the pest control market."* The Council considers that in the absence of comparable information from its competitors, the requested information is of limited value to the public. Therefore, the Council believes that there is not any significant detriment to the public interest arising from it withholding this information.

Balance of the public interest arguments

42. The Commissioner accepts that there is a strong and legitimate public interest in the openness and transparency of public authorities with regard to their decision-making processes. This is because it promotes the aims of transparency and accountability, which in turn promotes greater public engagement and understanding of the decisions taken by public authorities.

43. In this case, the information relates to pest control visits, and the Commissioner recognises that the complainant has concerns about the expenditure of public money and the Council's pest control operation. Disclosure of the withheld information would provide an insight into the Council's business, including the prices charged for domestic services, pests that have been treated and the locations in which this work was carried out. The Commissioner accepts that disclosing the information would enable competing businesses to target the particular areas, and consequently undercutting the Council.
44. The Commissioner considers that there is a strong and inherent public interest in ensuring fairness of competition, and in her view it would be firmly against the public interest if the commercial interests are harmed. She also considers that protecting the Council's ability to operate effectively within a competitive market, by not disclosing information that competitors could use to its commercial disadvantage, outweighs any public interest arguments for the information's disclosure.
45. Given the level of likelihood that commercial harm would occur should the information be disclosed, the Commissioner has decided that the balance of public interests currently favours maintaining the exemption.

Conclusion

46. The Commissioner's conclusion is that the public interest in disclosure of the withheld information is outweighed by the public interest in maintaining the section 43(2) exemption. Therefore, the Council was not obliged to disclose the requested information.

Right of appeal

47. 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

48. 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.
49. 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

Phillip Angell
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