

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 13 June 2022

**Public Authority:** Middlesbrough Council  
**Address:** P.O. Box 500  
Civic Centre  
Middlesbrough  
TS1 9FT

### **Decision (including any steps ordered)**

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1. The complainant requested information regarding the leasing of a car park. Middlesbrough Council (the "council") disclosed some information and withheld other information under the exemption for commercial interests – section 43(2) of the FOIA.
2. The Commissioner's decision is that the council has failed to demonstrate that section 43(2) is engaged in relation to information in part 1 of the request.
3. The Commissioner requires the council to take the following steps to ensure compliance with the legislation.
  - Disclose the withheld information, ensuring that any third party personal data is redacted.
4. The council must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of FOIA and may be dealt with as a contempt of court.

## Request and response

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5. On 14 January 2021, the complainant wrote to Middlesbrough Council (the "council") and requested information in the following terms:

*"1 Did the council lease a facility known as Amber Street Car Park to the Psyche retail clothing store and if so, what was the actual annual income received from this lease by Middlesbrough Council for each of the last 3 years?"*

*2 What justification did the council use to establish this parking facility?"*

*3 Who paid for the Psyche branding that has been used to inform Psyche customers of the parking facility?"*

*4 What was the cost of establishing this facility, promoted as being primarily for Psyche Customers and did the former owner or owners of Psyche contribute to this cost?"*

*5 Will the 'Psyche car park' facility at Amber Street be made available to the new owners of Psyche, (Mike Ashley's Fraser Group) on the same terms?"*

*6 Will Middlesbrough Council receive or has it received a payment for any rights over this land that may now be enjoyed by Fraser Group?"*

6. The council responded on 15 February 2021. It disclosed information and withheld some of the information identified in part 1 of the request under the exemption for commercial interests – section 43(2) of the FOIA.
7. On 24 March 2021 the complainant asked the council to carry out an internal review. The council sent the outcome of its internal review on 22 July 2021. The review addressed other queries subsequently raised by the complainant, disclosed some additional information, and confirmed that it was maintaining its position in relation to the application of section 43(2).

## Scope of the case

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8. The complainant initially contacted the Commissioner on 30 June 2021 to complain about the council's failure to respond to their request for internal review. Following the council's review response the complainant subsequently submitted a further complaint on 24 August 2021.

9. The Commissioner confirmed with the complainant that his investigation would consider whether the council had correctly withheld information under the exemption in section 43(2) of the FOIA.

## **Reasons for decision**

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### **Section 43(2) – Commercial interests**

10. Section 43(2) states 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).”

11. The term ‘commercial interests’ is not defined in the FOIA; however, the Commissioner has considered his guidance on the application of section 43, which clarifies that:

“A commercial interest relates to a legal person’s ability to participate competitively in a commercial activity. The underlying aim will usually be to make a profit. However, it could also be to cover costs or to simply remain solvent.”<sup>1</sup>

12. In order for a prejudice-based exemption, such as section 43, to be engaged the Commissioner believes that 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 the applicable interests within the relevant exemption;
  - Secondly, 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
  - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met, i.e., disclosure ‘would be likely’ to result in prejudice or disclosure

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<sup>1</sup> <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/section-43-commercial-interests/>

'would' result in prejudice. In relation to the lower threshold, the Commissioner considers that the chance of prejudice occurring must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority. The anticipated prejudice must be more likely than not.

Does the information relate to a commercial activity?

13. The withheld information consists of a lease for a car park between the council (the landlord) and Psyche Limited (the tenant).
14. The Commissioner is satisfied that the withheld information relates to a commercial activity, namely, the rental of council property.

The likelihood of prejudice occurring

15. In order for the exemption to be engaged it is necessary for it to be demonstrated that a disclosure of the information would result in some identifiable commercial prejudice which would, or would be likely to, affect one or more parties.
16. The Commissioner has been guided on the interpretation of the phrase "would, or would be likely to" by a number of First-tier Tribunal (Information Rights) ("the Tribunal") decisions. The Tribunal has been clear that this phrase means that there are two possible limbs upon which a prejudice-based exemption can be engaged; either prejudice 'would' occur, or prejudice 'would be likely to' occur.
17. With regard to 'would be likely to' prejudice, the Tribunal in *John Connor Press Associates Limited v The Information Commissioner* (EA/2005/0005) confirmed that "the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk" (Tribunal at paragraph 15).
18. With regard to the alternative limb of 'would prejudice', the Tribunal in *Hogan v Oxford City Council & The Information Commissioner* (EA/2005/0026 & 0030) commented that "clearly this second limb of the test places a stronger evidential burden on the public authority to discharge" (Tribunal at paragraph 36).
19. The council has argued that the commercial interest in this request is its own, specifically relating to the annual income received from the lease of a council car park. The council considers that disclosing the information would be likely to prejudice its commercial interests in this regard.

The prejudice that would be likely to occur

20. In order for the exemption to be engaged an authority must identify some form of prejudice which disclosure would cause and explain the causal relationship between the placing of the information in the public domain and the resulting harm.

21. The council has argued:

"In order to operate effectively in this market, the Council is required to undertake studies which informs both its decision making process and future planning as well as ensuring public funds are spent and protected appropriately

Although the lease was terminated....the information in our view is still commercially sensitive and to release the information into the world at large would jeopardise the Council's future negotiations and significantly weaken our position to compete for resources fairly, negotiate best possible price for contracts and promote lawful and open competition."

22. Having considered the council's submissions and referred to the withheld information it occurred to the Commissioner that the information itself, on the face of it, appeared to be generic in nature. It was, therefore, unclear how disclosure would result in the undermining of the commercial activity identified.

23. It further occurred to the Commissioner that the information related to a lease that was no longer live and he suggested to the council that, following the pandemic, it seemed unlikely that the commercial conditions upon which the lease was signed were still applicable. It followed from this that disclosing the information was unlikely to give other parties any insights into the current state of the commercial landscape that would result in the identified prejudice occurring.

24. The Commissioner approached the council in relation to the above and suggested that it might wish to consider disclosing the information or explaining further why it considered the exemption applied.

25. The council declined to disclose the information and argued:

"...the Annual Rent is commercially sensitive and to release this would be commercially detriment to the council's future ability to negotiate leases competitively. The Council must ensure that its business activities are confidential to maintain business confidence from its customers."

26. Firstly, the Commissioner notes that, since the passing of the FOIA, it is not a given that "confidential" information cannot be disclosed. It is incumbent on an authority to explain why, in any given case,

information should not be disclosed and link this to a relevant exemption.

27. The Commissioner recognises that commercial interests can be prejudiced by the disclosure of information which would result in a party changing its strategy in relation to negotiations. Where such a change of strategy would result in harm to another party involved in negotiations and where this harm would only come about because of a disclosure under the FOIA, the Commissioner acknowledges that there are grounds for the application of section 43(2).
28. In this case, the Commissioner is not convinced that the harm the council has identified would result from the disclosure of the information. Moreover, he considers that the arguments provided by the council are speculative and generic in nature and do not properly explain how disclosure of the specific information would result in harm occurring.
29. In conclusion, the Commissioner has not been persuaded by the council's arguments in respect of the application of section 43(2) to the withheld information.
30. For the above reasons, the Commissioner finds that prejudice to commercial interests would not be likely to occur through disclosure of the information in question. This means that the Commissioner's conclusion is that the exemption provided by section 43(2) is not engaged. As this test is not met, there is no requirement for the Commissioner to consider the public interest test and at paragraph 3 above the council is now required to disclose the withheld information.

## Other matters

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31. Although they do not form part of this decision notice the Commissioner would like to note the following matters of concern.

### **Section 45 code of practice – internal review**

32. The code of practice issued under section 45 of the FOIA (the “code”) sets out recommended practice in relation to the carrying out of internal reviews.

33. Paragraph 5.4 of the code states:

“Requests for internal review should be acknowledged and the applicant informed of the target date for responding. This should normally be within 20 working days of receipt.”<sup>2</sup>

34. Paragraph 5.5 states:

“If an internal review is complex, requires consultation with third parties or the relevant information is of a high volume, public authorities may need longer than 20 working days to consider the issues and respond. In these instances, the public authority should inform the applicant and provide a reasonable target date by which they will be able to respond to the internal review. It is best practice for this to be no more than an additional 20 working days, although there will sometimes be legitimate reasons why a longer extension is needed.”<sup>3</sup>

35. In this case the complainant asked the council to carry out an internal review on 24 March 2021. The council sent the outcome of its review on 22 July 2021.

36. The Commissioner considers that it is likely that the council’s practice in this case did not conform to the recommendations of the code. He expects that, in future, it will ensure that it conforms to the code and follows the recommendations contained in his published guidance.

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/744071/CoP\\_FOI\\_Code\\_of\\_Practice\\_-\\_Minor\\_Amendments\\_20180926\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/744071/CoP_FOI_Code_of_Practice_-_Minor_Amendments_20180926_.pdf)

<sup>3</sup> Ibid.

## Right of appeal

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37. 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: 0203 936 8963

Fax: 0870 739 5836

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

38. 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.
39. 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 .....**

**Ben Tomes**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**