

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 January 2023

Public Authority: Bristol City Council

Address: The Council House
College Green
Bristol
BS1 5TR

Decision (including any steps ordered)

1. The complainant requested information from Bristol City Council (“the Council”) about Avon Mutual Bank (“the Bank”), specifically a copy of a due diligence report. The Council refused to provide the requested information, citing the commercial interests exemption under section 43(2) of FOIA as its basis for withholding the information.
2. The Commissioner’s decision is that the Council has correctly applied section 43(2) to some of the withheld information, however, for much of the withheld information the exemption is not engaged.
3. The Commissioner requires the Council to take the following step to ensure compliance with the legislation.
 - Disclose the withheld information, other than the information for which the Commissioner has decided that the exemption is engaged, as listed in the confidential annex to this notice.
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

5. On 10 April 2022, the complainant wrote to the Council and requested information in the following terms:

“I'd like to request a copy of the due diligence report (and related documentation including appendices etc.) carried out by RSM for the Avon Mutual Bank.”

6. The Council refused to provide the requested information, citing the commercial interests exemption under section 43(2) of FOIA as its basis for withholding the information. It upheld its position at internal review.

Reasons for decision

7. The following analysis sets out why the Commissioner has concluded that the Council has correctly applied section 43(2) to some, but not all, of the withheld information.
8. The withheld information, which the Commissioner has viewed, comprises a report produced by the consulting firm RSM in November 2021 about the Bank for the Council and the report's appendices. The Bank is a new community bank, which is still in the early stages of development (at the time of the request the Bank was yet to gain a bank licence and still raising the capital required for it to launch). In February 2022 the Bank announced that the Council would be investing a further £100,000 following the due diligence process carried out by RSM. The Council had previously invested £200,000 in the Bank. The report and appendices contain a variety of information, including background context of the environment in which the bank will operate, competitor analysis, specific details of the proposed operating model of the Bank, RSM's assessment of the Bank's proposition and RSM's recommendations.
9. Section 43(2) provides 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).”
10. In order for a prejudice-based exemption, such as section 43, to be engaged the Commissioner's approach is 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 '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 person's commercial interests?

11. The Council's position is that to disclose the information it has withheld under section 43(2) would be likely to prejudice the commercial interests of the Bank. It argues that, "the offering of banking services is competitive in nature, as banks must compete for customers in order to remain financially viable. Any information which has a bearing on the bank's ability to compete is therefore commercial in nature".
12. The term 'commercial interests' is not defined in FOIA; however, the Commissioner has considered his guidance on the application of section 43¹, 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."
13. The Commissioner accepts that the interests in question are the commercial interests of the Bank.

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

The causal relationship

14. The Council argues that, as it contains detailed description and analysis of the viability of the Bank, the services it offers, the strategies it employs, and the wider context in which it operates which has led it to take specific business decisions, disclosure of the due diligence report and its appendices would be likely to provide a competitive advantage to the Bank's competitors who would be able to take business decisions based on the requested information, resulting in harm to the commercial interests of the Bank.
15. The Commissioner accepts that a causal relationship exists between the disclosure of detailed description and analysis of the viability of the Bank, the services it plans to offer and the strategies it employs/plans to employ and the prejudice to commercial interests that the council described, where this information is not already in the public domain. This includes RSM's assessment of the Bank's proposition and RSM's recommendations.
16. The Commissioner does not accept the Council's argument that a causal link exists between the disclosure of, "the wider context in which it operates which has led it to take specific business decisions" and the prejudice to commercial interests that the council described.
17. The Council specifically addressed the question of whether the exemption is engaged with respect to information about the context in which the Bank operates at internal review. It stated, "I did consider if it would be possible to disclose the information with suitable redactions made, however the information is fundamentally concerned with the viability of Avon Mutual Bank, and even information about the wider context of the bank is framed in such a way as to be relevant to business decisions made by the bank. I therefore concluded that it was not possible to provide a redacted version of the document due to the inferences that could be made from any information which would be supplied".
18. Having considered the withheld information the Commissioner does not accept the Council's arguments regarding the impact of disclosure of the information about the wider context in which the Bank operates. Much of this information is already in the public domain, the principle example of this is the many statistics included which are taken from studies and reports which are already in the public domain. The Commissioner does not agree with the Council's assessment that this information is framed in such a way that to disclose it would allow the Bank's competitors to infer information that would give them a competitive advantage. Even in the case of the competitor analysis, the Commissioner does not accept that the disclosure of the majority of the information about the

competitors (which is already in the public domain), which would therefore disclose the criteria upon which the competitors were compared, would reveal anything significant about the Bank's services and strategies.

19. The Commissioner also notes that some of the information which can be characterised as detailed description and analysis of the viability of the Bank, the services it plans to offer and the strategies it employs/plans to employ is already in the public domain, for example its intended customer base, the type of products it intends to offer and its economic, social and environmental objectives.
20. As the Commissioner is not satisfied that a causal relationship exists between the disclosure of any information that is already in the public domain or information about the wider context in which the Bank operates and the prejudice to commercial interests that the council described, his decision is that the exemption is not engaged for this information.
21. The Commissioner has gone on to consider the likelihood of prejudice occurring only for the information not already in the public domain pertaining to detailed description and analysis of the viability of the Bank, the services it plans to offer and the strategies it employs/plans to employ.

The likelihood of the prejudice occurring

22. The Council argued that a disclosure of the information 'would be likely' to cause the prejudice it had foreseen. The Commissioner has therefore considered whether the chance of prejudice occurring meets the threshold of being a real and significant risk.
23. Regarding the likelihood of prejudice occurring the Council provided the following arguments:

"When considering how likely it is that the envisioned harm would materialise, I have considered the range of circumstances that the harm could occur; the frequency of those circumstances; and how certain it is that the harm would occur in those circumstances. In this case I consider there to be a relatively limited number of circumstances that the harm could occur, and which are infrequent (new local banks are not created regularly, and there are a limited number of existing local banks); however, when such circumstances arise it would be highly likely that the envisioned harm would occur. Any new or existing bank will certainly need to be aware of the environment they operate in and the actions of their competitors. If the requested information

were disclosed, it is almost certain that competitors would seek to make use of it for their own advantage. On balance, I find that the envisioned harm 'would be likely' to materialise. This means that it is less probable than not, but still a real and substantial possibility."

24. The Commissioner has considered the likelihood of prejudice occurring only for the information not already in the public domain pertaining to detailed description and analysis of the viability of the Bank, the services it plans to offer and the strategies it employs/plans to employ. With respect to this information, the Commissioner accepts that, if it were disclosed, there is a real and significant risk that competitors would use this information to gain a competitive advantage. The Commissioner's view is therefore that prejudice to the commercial interests of the Bank would be likely to occur if this information were to be disclosed.

The Commissioner's conclusions

25. The Commissioner's decision is that the exemption is engaged with respect to the information not already in the public domain pertaining to detailed description and analysis of the viability of the Bank, the services it plans to offer and the strategies it employs/plans to employ.
26. The Commissioner has provided a list to the Council of the information for which he has decided the exemption is engaged in a confidential annex to this notice.
27. Since it is a qualified exemption, he must therefore go on to consider the public interest test required by section 2 of FOIA.

The public interest

28. The test, as set out in section 2(2)(b), is whether "in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information". The Commissioner has carried out the public interest test only for that information for which he has decided the exemption is engaged.

The public interest in the disclosure of the information

29. The Council considered the following factors in favour of disclosure:

"In favour of disclosure, I find that there is a general public interest in transparency. Bristol City Council has invested in Avon Mutual Bank, and therefore there is a clear public interest in transparency regarding the basis and viability of such an investment in order that Bristol City Council can be held accountable for the funds it administers."

The public interest in the exemption being maintained

30. The Council considered the following factors in favour of withholding the information:

“In favour of maintaining the exemption, I find that there is a public interest in ensuring a free and fair marketplace in which organisations are not provided with an unfair advantage over their competitors. Further, harm to the commercial interests of Avon Mutual Bank would result in harm to the financial interests of Bristol City Council and any other investors. Whilst the exemption does not consider financial interests, there is clearly a public interest in ensuring that Bristol City Council can extract the best value from the funds it administers.”

and

“I have paid particular attention to the significant role that banks play in the ability of the public to access goods and services. In my view, ensuring that such a marketplace is free and fair, even at a local level, is overwhelmingly in the public interest.”

The Commissioner's analysis

31. The Commissioner recognises that there is a strong public interest in transparency about the basis of the Council's investment of public money in the Bank and the Bank's viability.
32. However, the Commissioner has already acknowledged that the envisaged prejudice would be likely to occur. He considers that prejudice to the commercial interest of the Bank would be likely to occur if this information were to be disclosed. This is because if it were disclosed, there is a real and significant risk that competitors would use this information to gain a competitive advantage. Given the Council's investment of public money in the Bank, providing a competitive advantage to the Bank's competitors would not be in the public interest as it would prevent the Council from getting the best value from this investment.
33. In addition the Commissioner considers there is a public interest in ensuring a free and fair marketplace for banking services in the local area in order to allow the local population the best possible access to banking services.
34. For these reasons, the Commissioner's decision is that the public interest in the exemption being maintained outweighs that in the information being disclosed on this occasion. The Council was not,

therefore, obliged to disclose the information for which the Commissioner has decided the exemption is engaged.

Right of appeal

35. 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

36. 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.
37. 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

Victoria James
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