

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 January 2024

Public Authority: Cumberland Council
Address: Whitehaven Commercial Park
Moresby Parks
CA28 8YD

Decision (including any steps ordered)

1. The complainant requested various information (including a financial report) in respect of the planned public swimming pool based at the Wave Centre in Maryport. Cumbria County Council ('the Council') initially refused to provide a copy of the report citing section 44(1) (Prohibitions on disclosure). Following the Commissioner's investigation, the Council withdrew its reliance on section 44(1) in favour of section 43(2) (Commercial interests) of FOIA. It also provided a copy of the report to the complainant outside of the provisions of the FOIA having received confirmation from the author of the report that a restricted disclosure with conditions was acceptable to it.
2. The Commissioner's decision is that the Council was entitled to refuse to provide a copy of the report under the provisions of the FOIA and that its application of section 43(2) FOIA was correct.
3. The Commissioner does not require any steps.

Request and response

4. On 1 May 2023, the complainant wrote to the Council and requested the following information in respect of a planned swimming pool based at the Wave Centre in Maryport:

- “1. I would like a copy of the planned public swimming pool financial running cost report, that the Labour Council made their decision on to foreclose the pool project.
2. I would like a copy of the minutes of the meeting that took place on the 25 April 2023, whereby the Councillors foreclosed the public swimming pool project due to financial running costs.
3. I would like a copy of the repair report for the public swimming pool based at Netherhall Community Sports Centre, Netherhall School.”
5. The public authority responded on 24 May 2023. It provided a link in response to item two of the request, and stated that it did not hold relevant information in respect of item three, advising the complainant to redirect their request to Netherhall School Maryport. In respect of item one, the Council confirmed that it was refusing to provide the report on the basis of section 44(1) FOIA.
6. Following an internal review the Council wrote to the complainant on 9 June 2023. It confirmed that it was upholding its original decision to refuse item one of the request on the basis of section 44(1) FOIA.

Scope of the case

7. The complainant contacted the Commissioner on 24 July 2023 to complain about the way item one of their request for information had been handled. They argued that the full financial report should be released into the public domain so that the public can have the opportunity to scrutinise the financial running cost report.
8. As previously specified, during the course of the Commissioner’s investigation the Council withdrew its reliance on section 44(1) FOIA in favour of section 43(2). Although Mott MacDonald (author of the report) subsequently gave the Council permission to disclose the report to the complainant, it was subject to conditions and not disclosed under the FOIA. Additionally, GLL Ltd, (the company currently running the Wave Centre and who’s figures the report is based on), has stated that if it had been consulted prior to the restricted disclosure of the report, it would have objected on the basis that disclosure of the information it provided to Mott MacDonald would prejudice its own commercial interests and those of the Council.
9. The scope of the Commissioner’s investigation is therefore to consider the Council’s application of section 43(2).

Reasons for decision

Section 43(2) – prejudice to commercial interests

10. 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).”

11. In order for a prejudice-based exemption, such as section 43, to be engaged the Commissioner considers 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?

12. The Council has argued that the disclosure of the withheld information would prejudice the commercial interests of GLL and its own commercial interests.

13. 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."

14. The withheld information constitutes a report written by Mott MacDonald using the financial and commercial information of GLL (the leisure company who have the current contract to occupy the Wave Centre).
15. The Commissioner accepts that the interests in question are the commercial interests of GLL, and the Council.

The causal relationship

16. The Council has recently contacted GLL for its views on the disclosure of the report. GLL stated that Mott had no right to agree to release its confidential data even on a restricted basis and had they been consulted, they would have objected.
17. GLL further stated that the data it provided to Mott included working budgetary information for the existing Wave Centre operation with additional 'what if' information based on the possibility of the construction of a swimming pool on the Wave Centre site. GLL considers that the disclosure of this information would prejudice its own commercial interests and those of the Council in the following ways:

"The data provided shows in great detail the methodology, income and expenditure of GLL's current operating budget for the Wave Centre which is a standalone contract forming part of the former Allerdale leisure contract. Given the likely forthcoming bid process for the operation of this facility moving forward we feel the release of this data into the public realm would provide alternative operators and bidders with precise detail of GLL's mode and method of operation of the facility and extensive detail of its income and costs which we feel would give competitors an unfair advantage in any bid process. This would be in prejudice to our commercial interests and would distort competition in that market."

18. The Council has argued that further disclosure would also jeopardise the current commercial relationship between itself and GLL. It added that it would not want to compromise this relationship any further and given the amount of media presence surrounding the wave centre and running

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

costs, it is in the Council's commercial interests to maintain a healthy relationship with the current provider, who could also be a future provider after the next tender.

19. The Commissioner is satisfied that a causal relationship exists between the disclosure of the report and the prejudice to the commercial interests of GLL and the Council as described above.

The likelihood of the prejudice occurring

20. The Council considers that disclosure of the information 'would' cause the prejudice specified. The Commissioner has therefore considered whether the chance of prejudice occurring meets the threshold of being more probable than not.
21. The Commissioner has considered the commercial interests of each relevant party and considers both GLL and that the Council's arguments persuasive. He accepts that the detail provided by GLL in the report is relevant to its current operating budget for the Wave Centre and that disclosure of this information into the public domain would result in the prejudice outlined by both GLL and the Council, particularly given the future tendering process.

The Commissioner's conclusions

22. The Commissioner has decided that the Council was correct to rely on the section 43(2) exemption to refuse this request. Since section 43(2) is a qualified exemption, he must therefore go on to consider the public interest test required by section 2 of the FOIA.

Public interest test

23. 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".

Factors in favour of disclosure

24. The Council does not appear to have provided any factors in favour of disclosure of the information in its response to the Commissioner. However, the Commissioner notes that there will always be a public interest in transparency and accountability in relation to the spending of public money.
25. Access to this information may also give interested parties a better understanding of, and confidence in how money is spent. The Commissioner notes that as a local authority, it is required under the local government Transparency Code to publish expenditure over £500 and via the procurement regulations.

Factors in favour of maintaining the exemption

26. GLL stated that:

"...we believe there is a public interest in protecting the commercial interests of GLL and the Council and ensuring they are able to compete fairly. Giving competitors access to this data enables them to bid to beat the incumbent operator as opposed to providing their best bid price and ensuring the process gives best value and consequently would negatively affect our ability to negotiate or to complete in a commercial environment."

27. The Council argued that:

- Disclosure of this information would negatively affect its ability to negotiate or to compete in a commercial environment if it became known that they had disclosed commercially sensitive information into the public domain.
- There is a public interest in ensuring that public procurement can be conducted effectively and that organisations bidding for public work should be able to do so without fear that their commercially sensitive information will be released to competitors. It added that given the current developments with the Wave Centre and timeliness of the contract going out to tender, it did not want to discourage bidders in future tenders.

Commissioner's analysis

28. As stated previously, the Commissioner recognises that there is a general public interest in the disclosure of information in order to provide transparency to the public about how public money is being spent.

29. However, the Commissioner has already acknowledged that the envisaged prejudice would be likely to occur. He considers that GLL and the Council's arguments are strong in identifying likely issues which would arise from a disclosure of the withheld information. These issues would be likely to affect the commercial interests of the Council's commercial negotiations in the forthcoming tender process and in the future, and as a result, would be likely to be detrimental to its ability to achieve best value for money in future negotiations. This would not be in the public interest.

30. For this reason, 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 requested information.

Right of appeal

31. 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
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

32. 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.
33. 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

Catherine Dickenson
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