

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 May 2024

Public Authority: Westminster City Council
Address: Westminster City Hall
64 Victoria Street
London
SW1E 6QP

Decision (including any steps ordered)

1. The complainant has requested from Westminster City Council ('the Council') the year-on-year income it received from leasing a particular site for advertising. The Council disclosed some information, but it refused to disclose the income it received for the most recent two financial years, citing section 43(2) (Commercial interests) of FOIA.
2. The Commissioner's decision is that the Council was entitled to apply section 43(2) to withhold that information.
3. The Commissioner requires no steps as a result of this decision.

Request and response

4. On 1 December 2023, the complainant wrote to the Council and requested information in the following terms:
 - "1. Revenue paid to the City of Westminster for advertisements displayed on the hoarding surrounding the Shaftesbury Memorial Fountain (Eros) from November to January for each of the following years: 2023-24 to 2014-15
 2. The cost incurred by the City of Westminster for erecting the hoarding surrounding the Shaftesbury Memorial Fountain (Eros)

from November to January for each of the same years: 2023-24 to 2014-15.”

5. The Council responded on 20 December 2023. For point (1) of the request, it disclosed revenue income figures for the years 2014/15 – 2021/22. It refused to disclose information for 2022/23, citing section 43(2) of FOIA. It made no mention of the income for 2023/24. For point (2) of the request, it said that there was no cost to the Council.
6. On 2 January 2024, the complainant requested an internal review of the decision to withhold the 2022/23 revenue income figures. The Council responded on 3 January 2024. It maintained that section 43 had been correctly applied.

Scope of the case

7. The complainant contacted the Commissioner on 4 January 2024 to complain about the way his request for information had been handled. He disagreed with the application of section 43(2) to withhold the revenue income figures.
8. During the Commissioner’s investigation, the Council clarified that section 43(2) had been applied to withhold the revenue income figures for 2022/23 **and** 2023/24.
9. The Council also argued that section 43(1) was engaged in respect of the third party’s interests, as its particular arrangements for the site constituted a trade secret. However, it has not provided submissions capable of substantiating this claim, and so the Commissioner has not considered it further.
10. The analysis below considers the Council’s application of section 43(2) of FOIA to withhold the revenue income figures for 2022/23 and 2023/24.

Reasons for decision

Section 43 - Commercial interests

11. Section 43(2) of FOIA states that information is exempt if its disclosure under FOIA would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).
12. In order for section 43(2) to be engaged, three criteria must be met:

- the harm which the public authority envisages must relate to someone's commercial interests;
 - the public authority must be able to demonstrate a causal relationship between disclosure and prejudice to those commercial interests. The resultant prejudice must be real, actual or of substance; and
 - the level of likelihood of prejudice being relied upon by the public authority must be met (ie it must be shown that disclosure would, or would be likely to, result in prejudice occurring).
13. The Council said that at the time of the request, the most recent revenue period specified in the request (November 2023 – January 2024) was still 'live', that disclosure would reveal the pricing applied to a unique project and that it was very much "current-market relevant" information.
14. It said that information about recent income achieved from the site forms the cornerstone of the Council's pricing strategy for the coming years and that it will imminently be inviting new bids for the site. Explaining that its own commercial interests would be harmed, it said:
- "...the council therefore believes that the information remains market-relevant until the exercise is completed.
- Further, given this is a unique project at this time, the current value is market-sensitive. As a result, disclosing the requested information at this time would thereby undermine their ability to attract higher revenues for the public purse and/or impact the ability of the council to attract quality bids. This may be in terms of price, offerings for the price, and/or ranges of services for the price."
15. The Council said that, following consultation with the third party licensee that held the most recent contract for the site, it was satisfied that disclosure would also harm their commercial interests:
- "...[the third party] has demonstrated that they have provided a project which is particular to the location, and there is no similar existing project which would serve to standardise their proposal in this regard. To that end, [the third party] has identified a unique selling point in this regard, which promotes competition in the industry resulting in "me too" offerings, which would be to the commercial disadvantage of [the third party] depending on the size and structure of the organisation making the bid.
- As a result, it is considered that disclosure to the world at large would enable competitors to use it for their own advantage, thereby

undermining and causing harm to [the third party's] commercial and financial position, and potentially affecting the viability of the project itself (thereby further impacting on the council's interests).

... Disclosure at this time would only serve to benefit commercial rivals that would be able to financially exploit the information for their own commercial and financial benefit."

16. With regard to the three criteria set out in paragraph 12, the Commissioner is satisfied that the prejudice envisaged by the Council relates to its commercial interests and those of the third party. His guidance¹ explains that a commercial interest relates to a legal person's ability to participate competitively in a commercial activity – in this instance, the leasing of a public asset as advertising space.
17. Next, the Commissioner has considered whether a causal link exists between the disclosure of information about recent pricing and prejudice to the Council's future ability to obtain the best price for the site. The complainant argued that there was no evidence that the information, if disclosed, would be seen by anyone with an interest in tendering to lease the site, or that it would 'skew' any future tendering process. However, disclosure under FOIA must be treated as being to the world at large and so account must be taken of any harm that may be caused by the information being accessed by interested parties.
18. At the time of the request the Council was preparing to tender for fresh bids to lease the site. Knowledge of the recent price achieved would make it more difficult for the Council to negotiate higher rates than had recently been charged. Clearly, this would result in the Council not securing an optimum deal for the site. The Commissioner therefore accepts that a causal link exists between the disclosure of information about recent pricing and prejudice to the Council's commercial interests. He is satisfied that the prejudice is real and of substance.
19. The Commissioner also accepts that it would be commercially damaging to the third party, if, at the time of the request, it was made public how much it had paid to lease the site, both in terms of commercial rivals competing against it for the renewed contract, and its negotiating position with other location providers.
20. Lastly, the Commissioner considers that the envisaged prejudice 'would' occur, as the information relates to a prime central London location

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

which, at the time of the request, the Council was preparing to lease again. ('Would' prejudice means that if the information is disclosed, it is more probable than not that the harm identified would occur, although it is not absolutely certain.)

21. As the three criteria set out in paragraph 12 are met, the Commissioner is satisfied that the exemption provided by section 43(2) is engaged.

Public interest test

22. Section 43(2) is subject to the public interest test, as set out in section 2 of FOIA. This means that although the exemption is engaged, the requested information must be disclosed unless the public interest in maintaining the exemption is stronger than the public interest in disclosure.

Public interest arguments in favour of disclosure

23. The complainant has not offered any public interest arguments in favour of disclosing the information.
24. The Council acknowledged the inherent public interest in transparency and accountability regarding its decisions and financial transactions.

Public interest in maintaining the exemption

25. The Council argued that it was vital to preserve confidentiality surrounding recent pricing for the site in order to secure the most advantageous commercial arrangements for the public purse. It also said:

"...it is considered that maintaining the exemption would serve to protect the council's interests at this time, and ensure that the market exercise attracts better, more quality bids. This is [sic] turn would generate greater revenue for the public purse and improved services as a result.

It also believes that maintaining the exemption would support a more transparent market exercise which will produce more favourable outcomes for the council and increase public confidence in the council's ability to maximise value from [sic] money from its assets."

Balancing test

26. When balancing the opposing public interests in a case, the Commissioner will decide whether it serves the public interest better to

disclose the withheld information, or to withhold it, because of the interests protected by the relevant exemption.

27. The Commissioner accepts that, generally speaking, there is a presumption running through FOIA that openness is, in itself, to be regarded as something which is in the public interest. He also recognises the need for transparency and accountability on the part of public authorities, as regards the use of publicly owned assets by the private sector.
28. However, the Council has emphasised its need to be able to participate competitively in the commercial market. The Commissioner's guidance lists a number of public interest arguments that should be considered against disclosure, which include 'competition' – there is undoubtedly a public interest in allowing public authorities to withhold information which, if disclosed, would negatively affect their ability to compete commercially.
29. Other listed arguments that are relevant in this case include the Council's ability to generate income for the public purse and preserving the negotiating position of the third party.
30. The Commissioner accepts that providing the requested information would jeopardise the Council's ability to maximise the income it can generate in future negotiations on the site. Disclosing information which would put the Council at such a disadvantage would not be in the public interest.
31. There is significant public interest in not prejudicing the commercial interests of the Council when securing best value for public money. Having accepted in this case that disclosure would be damaging to the Council's commercial interests, and to those of the third party, the Commissioner can see no stronger arguments for disclosure which are capable of justifying that potential for damage.
32. The Commissioner's decision is, therefore, that the Council was entitled to rely on section 43(2) of FOIA to withhold the information.

Right of appeal

33. 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

34. 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.
35. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Samantha Bracegirdle
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF