

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 July 2012

Public Authority: Aldenham Parish Council
Address: The Radlett Centre
1 Aldenham Avenue
Radlett
Hertfordshire
WD7 8HL

Decision

1. The complainant has requested information relating to the possible development of Salters Field.
2. Aldenham Parish Council (the "council") provided some information but withheld the majority of the requested information because it was "commercially sensitive". The council's internal review upheld its initial handling of the request.
3. The Commissioner's decision is that the council failed to demonstrate that the commercial interests exemption was engaged, failed to confirm or deny whether the requested information is held and failed to issue a valid refusal notice.
4. The Commissioner requires the public authority to disclose the withheld information to the complainant.
5. The public authority 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 the Act and may be dealt with as a contempt of court.

Request and response

6. On 13 December 2011, the complainant wrote to the council and requested information in the following terms:

- “1) Details of any open marketing exercise undertaken by the council for the sale and or grant of a lease or other legal interest in Salters Field and the identity of all expressions of interest / bidders.*
 - 2) The basis upon which the council first engaged with and continues discussions with this third party.*
 - 3) If no competitive tendering exercise was or is being conducted – please supply the name of the third party and copies of all correspondence and email between the two parties and additionally any exchange of correspondence between Aldenham Parish Council and Hertsmere Borough Council on the subject over the period whilst discussions have taken place with the third party or 5 years whichever is the longer period.*
 - 4) Minutes of any council meetings concerning Salters Fields over the period referred to in 3 above.”*
7. The council responded on 11 January 2012. In relation to part 4 of the request, it provided copies of relevant minutes that were in the “public domain”. In relation to request parts 1-3, the council confirmed that it “...cannot answer this point as this matter is commercially sensitive.”
 8. Following an internal review the council wrote to the complainant on 6 February 2012. It stated that it was upholding its initial handling of the request.

Scope of the case

9. The complainant contacted the Commissioner to complain about the way his request for information had been handled.
10. The Commissioner confirmed with the complainant that the scope of his investigation would be confined to a consideration of the council's response to parts 1-3 of the request. However, during the course of his investigation, the council provided the Commissioner with further information falling within the scope of request part 4 and confirmed that it was relying on the exemption in section 43(2) in withholding this information from the complainant. The Commissioner has, therefore, included this matter within the scope of his investigation.
11. Of the additional information provided to the Commissioner in relation to request part 4, the Commissioner has identified a number of documents (see annex) which he considers contain environmental information which falls to be considered under the Environmental Information

Regulations 2004 (EIR). The council's handling of this element of the request under the EIR has been addressed in a separate decision notice (ICO reference: FER0454855).

Reasons for decision

Section 1(1)(a) – Duty to confirm or deny whether information is held

12. Section 1(1)(a) of FOIA requires a public authority to inform a requester whether it holds the information specified in the request. This is known as 'the duty to confirm or deny'.
13. In most cases, a public authority will be able to comply with its duty to confirm or deny under section 1(1)(a) – in other words, it will be able to respond to a request by at least informing the requester whether or not it holds the information. In most cases where information is held, a public authority will go on to consider whether information should be provided under section 1(1)(b), or whether it is subject to an exemption in Part II of the FOIA.
14. There may be occasions when complying with the duty to confirm or deny under section 1(1)(a) would in itself disclose sensitive or potentially damaging information that falls under an exemption. In these circumstances, the FOIA allows a public authority to respond by refusing to confirm or deny whether it holds the requested information. This is called a 'neither confirm nor deny' (NCND) response.¹
15. In this instance, the Commissioner notes that, despite refusing the request under an exemption in Part II of the FOIA it has not relied on an exclusion from the duty to confirm or deny; however, in responding to the request, the council failed to explicitly confirm or deny whether the requested information is held.
16. The Commissioner has concluded that the council has breached section 1(1)(a) of the FOIA. He requires it to write to the complainant to confirm or deny whether the information specified in each part of the request is held.

¹ See the Commissioner's guidance here:
http://www.ico.gov.uk/for_organisations/freedom_of_information/guide/~/_media/documents/library/Freedom_of_Information/Detailed_specialist_guides/when_to_refuse_to_confirm_or_deny_section_1_foia.ashx

Section 43(2) – Prejudice to Commercial Interests

17. Section 43(2) of the FOIA provides an exemption from disclosure of information which 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. The council has applied the exemption to all 4 request parts and the Commissioner will consider, in each instance, whether it has been applied correctly.

Does the withheld information fall within the scope of the exemption?

18. The term 'commercial interests' is not defined in the FOIA, however, the Commissioner has considered his awareness guidance on the application of section 43. This comments that:

"...a commercial interest relates to a person's ability to participate competitively in a commercial activity, i.e. the purchase and sale of goods or services."²

Request 1 – "Details of any open marketing exercise undertaken by the council for the sale and or grant of a lease or other legal interest in Salters Field and the identity of all expressions of interest / bidders." and Request 2 – "The basis upon which the council first engaged with and continues discussions with this third party."

19. Requests 1 and 2 identify information of a type which is akin to a tendering exercise. The Commissioner accepts that details of such an exercise, including details of any bids received from interested would fall within the above definition of a commercial activity and, therefore, fall within the scope of the exemption.

Request 3 – "If no competitive tendering exercise was or is being conducted – please supply the name of the third party and copies of all correspondence and email between the two parties and additionally any exchange of correspondence between Aldenham Parish Council and Hertsmere Borough Council on the subject over the period whilst discussions have taken place with the third party or 5 years whichever is the longer period."

² Published here:

http://www.ico.gov.uk/for_organisations/guidance_index/~/_media/documents/library/Freedom_of_Information/Detailed_specialist_guides/AWARENESS_GUIDANCE_5_V3_07_03_08.aspx

20. The Commissioner notes that the withheld information relates to negotiations between the council and other parties regarding the technical, commercial aspects of the sale of Salters Field. He is, therefore, satisfied that the information falls within the scope of the exemption.

Request 4 – “Minutes of any council meetings concerning Salters Fields over the period referred to in 3 above.”

21. Having viewed the withheld information, the Commissioner notes that this consists of minutes of ‘confidential’ council meetings which relate to the council’s consideration of its options regarding Salters Field and relevant decision making. As this information relates to the council’s ability to negotiate best value solutions in relation to the sale of a good, the Commissioner has concluded that it falls within the scope of the exemption.
22. Having concluded that all the withheld information falls within the scope of the request the Commissioner has gone onto consider the prejudice which disclosure would cause and the relevant party or parties which would be affected.

Relevant interests

23. In applying the exemption across all parts of the request, the council explained that it was considering its options regarding Salters Field and confirmed that it considered that “....the disclosure of information regarding previous proposals might well prejudice the future process of ascertaining the best route forward for maximising the asset value.”
24. According to the arguments provided, the relevant commercial interests which disclosure would be likely to prejudice are, therefore, those of the council itself. The Commissioner has gone on to consider the nature of the supposed prejudice.

Likelihood of prejudice

25. Section 43(2) consists of 2 limbs which clarify the probability of the prejudice arising from disclosure occurring. “Likely to prejudice” means that the possibility of prejudice should be real and significant, and certainly more than hypothetical or remote. “Would prejudice” places a much stronger evidential burden on the public authority and must be at least more probable than not.
26. In this instance, despite being given opportunities to do so during the Commissioner’s investigation, the council did not confirm which limb of the exemption it was relying upon. The Commissioner considers that, where the level of prejudice has not been specified then, unless there is

clear evidence that the higher level should apply, the lower threshold should be used³.

Nature of the prejudice

27. The council has not provided the Commissioner with separate arguments in relation to each part of the request covered by the exemption but has, instead, submitted a single, overarching position. In short, this is that disclosure of the information would be likely to prejudice the council's ability to maximise the commercial utility of Salters Field for the benefit of the community.
28. The Commissioner considers that an evidential burden rests with public authorities to be able to show that some causal relationship exists between the potential disclosure and the prejudice and the prejudice is, real, actual or of substance. In the Commissioner's view, if a public authority is unable to discharge this burden satisfactorily, reliance on 'prejudice' should be rejected.
29. The Commissioner's view is that "prejudice" means not just that the disclosure of information must have some effect on the applicable interest, but that this effect must be detrimental or damaging in some real way. If a "trivial or insignificant" prejudice is claimed, such that it cannot be said to have any real detrimental or prejudicial effect, then the exemption should not be accepted.
30. At the time the request was made, the council had ceased relevant discussions with third parties and it was seeking to improve Salters Field itself. In the furthering of this goal, the council explained that it was in the process of opening discussions with the County & Borough Councils. The Commissioner understands that the council considers that it is these discussions which would be affected by disclosure.
31. The Commissioner notes that the withheld information all relates to activities (negotiations with third parties) which, according to the council's explanation, had been discontinued at the time of the request.
32. The Commissioner's general view that the timing of a request can determine the relative commercial sensitivity of information. For example, where a request is received after a tendering process has been

³ The relevant guidance is available here:
<http://www.ico.gov.uk/foikb/PolicyLines/FOIPolicyLikelihoodofprejudice.htm>

completed it is less likely that disclosure would have an impact on those proceedings⁴.

33. In this case, although the council continues to explore its options in relation to Salters Field, it is not explained how or why the disclosure of this record of a closed process would prejudice its own commercial activities in this regard.
34. The Commissioner considers that the council has not explained what specific form the prejudice would take; namely, it has not clarified how its commercial interests in relation to the development or sale of Salters Field would be inhibited by disclosure of the withheld information - it has simply stated that disclosure would have an effect on these matters.
35. In cases where an authority has failed to explain the nature of an implied prejudice and failed to demonstrate the causal link between any such prejudice and the disclosure of information, the Commissioner is not obliged to generate relevant arguments on an authority's behalf.
36. In this instance, the Commissioner considers that the council has failed to explain the nature of the prejudice which would be likely to result from disclosure of the requested information. He has, therefore, concluded that the council has failed to demonstrate that the exemption is engaged. As he does not consider that the exemption applies, the Commissioner has not gone on to consider the public interest arguments.

Section 17 – Refusal notice

37. Section 17(1) of the FOIA requires that a public authority which is relying on a claim that information specified in a request is exempt from disclosure must give the applicant a notice (a "refusal notice") which:

"(a) states that fact,

(b) specifies the exemption in question, and

⁴ The relevant guidance is published here:

http://www.ico.gov.uk/for_organisations/guidance_index/~/_media/documents/library/Freedom_of_Information/Detailed_specialist_guides/AWARENESS_GUIDANCE_5_V3_07_03_08.aspx

(c) states (if that would not otherwise be apparent) why the exemption applies."

38. Section 17(7) of the FOIA requires that any notice issued under section 17(1) should contain particulars of any procedure for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure. A notice should also contain particulars of the right to complain to the Commissioner conferred by section 50 of the FOIA.
39. The Commissioner considers that, in failing to properly specify the exemption in question and explain why the exemption applies, the council breached section 17(1) of the FOIA. In failing to provide details of a complaint procedure, or state that it does not provide one and, in failing to provide details of the right to complain to the Commissioner, the council breached section 17(7) of the FOIA.

Right of appeal

40. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

41. 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.
42. 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

Andrew White
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Annex – Schedule of documents relating to request 4 containing Environmental Information

“Planning for the future of King George V area – notes from meeting held at 10.00am on Thursday 24 February 2010...”

“Planning for the future of King George V area – notes from a meeting held at 10.30am on Tuesday 12 April 2011...”

“Planning for the future of King George V area – notes from meeting held at 4pm on Wednesday 10 August 2011...”

“Amended (3) Heads of Terms, Appendix 4, May 2011”

“Draft Heads of Terms 14 July 2011, Appendix 5”