

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 September 2015

Public Authority: Royal Parks (an executive agency of the Department of Culture, Media and Sport)

Address: The Old Police House
Hyde Park
London W2 2UH

Decision (including any steps ordered)

1. The complainant has requested the percentage given to The Royal Parks ("TRP") from the sale of Christmas trees at Bushy Park. TRP refused to provide this citing section 43(2) (commercial interests exemption). It upheld this at internal review. During the course of the Commissioner's investigation, there was some uncertainty as to whether TRP actually held the requested information.
2. The Commissioner's decision is that TRP holds the requested information and cannot rely on section 43(2) as a basis for withholding it.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the requested information.
4. 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

5. On 28 January 2015, the complainant requested information of the following description:

"Under the provisions of the FOIA 2000, I would like to know the percentage of the Christmas tree sales at Bushy Park was given to Royal Parks for all the years that this arrangement has been offered up to and including 2014".

6. On 9 February 2015, The Royal Parks responded ("TRP"). It said

"The income The Royal Parks receives is a return paid to us as part of a tendered contractual agreement. Under this agreement The Royal Parks benefits from a fixed rental income across the shops our concessionaire operates in three of our parks, and a percentage of all sales over and above this rent.

Under the terms of Section 43(2) [prejudice to commercial interests exemption] of the FOIA we cannot disclose the precise terms of the guaranteed minimum rental and percentage of sales we received because it would be likely to prejudice the commercial interests of our concessionaire in any future tendering process. We have to respect the confidentiality of that tender process and are therefore not in a position to release the commercial terms of the contract.

7. The complainant requested an internal review on 9 February 2015. He said:

"The Royal Parks signage stated that a percentage of the purchase price of Christmas trees would be donated to the Trust, in which case there should have been a mechanism in place to respond to people, such as myself, who wished to know how much of our purchase benefitted the Royal Parks".

8. The Department for Culture, Media and Sport ("DCMS") (to whom the complainant was directed where he wished to request an internal review) sent him the outcome of the internal review on 26 March 2015. It said:

"[It was] satisfied that the exemption has been applied correctly to the information in question, and that the Royal Parks were correct in their assessment that the public interest lies in withholding the information. In reaching [its] conclusion, [it] considered the fact that disclosure of certain information could prejudice the commercial interests of the Royal Parks, tenderers and/or third parties. Release of this information could also compromise the Royal Park's [sic] ability to negotiate terms of contracts in future negotiations which could have a damaging effect on their ability to get value for money. There is therefore a strong public interest in ensuring that the commercial interests of all relevant parties are not prejudiced by the release of such information."

Scope of the case

9. The complainant contacted the Commissioner on 13 March 2015 to complain about the way his request for information had been handled.
10. The Commissioner had a telephone conversation with TRP on 2 June 2015 during which it appeared unclear to him that the information described in the request (the "requested information") was actually held. TRP had given an overview of the steps it would need to take in order to provide the requested information where it is not exempt.
11. The Commissioner has therefore first looked at whether the information described in the request is held by TRP. Where he is satisfied that it is held, he will consider whether the requested information is exempt from disclosure under section 43(2).
12. The Commissioner has also established that TRP is an executive agency of DCMS and that it is therefore the relevant public authority for the purpose of this decision notice.¹
13. The complainant clarified in an email exchange with the Commissioner that he wanted to know the percentage that is given to TRP and not the actual amount.

Reasons for decision

Is the requested information held by TRP?

14. Section 1(1) of FOIA provides that -

"Any person making a request for information to a public authority is entitled -

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him."

15. In considering whether the requested information is held, the Commissioner has had regard to his own guidance.² He has also
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¹ <https://www.gov.uk/government/organisations/royal-parks>

considered the detail of TRP's contract with its licensee that explains the arrangement between the two. TRP's website has a reference to purchasing a tree at the parks in 2014 where it says "Money from the sales of Christmas trees goes towards supporting the work of TRP."³ It is not clear from the website whether that this is a fixed amount or a percentage figure.

16. TRP explained in its refusal notice of 19 February 2015 that "The Royal Parks benefits from a fixed rental income across the shops our concessionaire operates in three of our parks, and a percentage of all sales over and above this rent". More detail about the precise working of this arrangement is set out in the contract between the parties provided by TRP to the Commissioner.
17. The Commissioner is satisfied that the licensee holds the building blocks from which the requested information can be calculated. It would not be a straightforward calculation and a number of factors would need to be considered. For example, the Commissioner also notes from TRP's website that, in 2012, it was possible to buy other items as well as Christmas trees from its licensee, namely lights, decorations, stands, natural wreaths and garlands, and mistletoe.⁴ Sale of these items would need to be taken into consideration when calculating Christmas tree sales versus total sales. Also, Christmas trees are sold at locations within TRP property other than Bushy Park. Sales figures for those other locations would also need to be taken in to consideration when calculating the requested information. However, the calculations themselves would involve addition, subtraction and the use of percentages. This is not, in the Commissioner's view, particularly complex, nor would it require special skill.
18. Having established that building blocks are held in the Licensee's figures the Commissioner has gone on to determine whether these figures are,

² https://ico.org.uk/media/for-organisations/documents/1169/determining_whether_information_is_held_foi_eir.pdf

³ <https://www.royalparks.org.uk/news/blog/top-ten-things-to-do-in-the-royal-parks-this-christmas> (Item 5)

⁴ <https://www.royalparks.org.uk/parks/bushy-park/bushy-park-news/buy-your-christmas-tree-in-bushy-park,-richmond-park-or-greenwich-park>

in fact, held by TRP. In determining this point, the Commissioner has had regard for other relevant guidance he has published on this point.⁵

19. The Commissioner is satisfied from the terms of the contract between TRP and the Licensee that TRP has ready access to the Licensee's figures, for example, for oversight purposes. TRP may not routinely calculate the requested information but, in the Commissioner's view, it could do so where it has access to it.
20. TRP has the right under the contract to verify that it is receiving all the monies that it is entitled to. In the Commissioner's view, it has a business purpose and a ready opportunity, should the need arise, to access and calculate the requested information. As part of the contract, it is provided with gross and net sales figures per site. In other words, it routinely holds some of the building blocks that would be needed to calculate the information. It has ready access to the other building blocks and would be entitled to access them for its own purposes.
21. The Commissioner has concluded, therefore, that TRP holds the requested information even if it is located in the licensee's figures. In reaching this view, he has had regard for the terms of TRP's contract with its licensee which explains that it is regularly provided with some of the building blocks necessary to make the calculation required. The contract says that it is entitled to access those additional building blocks that it would need to complete the calculation.
22. Having concluded that TRP does hold the information the Commissioner has considered whether the information is exempt under section 43(2) of the FOIA as TRP asserts.

Section 43

23. Section 43(2) of the FOIA provides an exemption from disclosure for 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.
24. 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 states that:

⁵ https://ico.org.uk/media/for-organisations/documents/1148/information_held_by_a_public_authority_for_purposes_of_foia.pdf

"a commercial interest relates to a person's ability to participate competitively in a commercial activity, ie the purchase and sale of goods and services"

25. In this case, TRP has outlined to the Commissioner that it considers the exemption applies because disclosure of the withheld information would be prejudicial to its commercial interests and the commercial interests of the current licensee, "Pines and Needles".
26. As regards its own commercial interests, TRP explains that where other parties become aware, through disclosure, of its current contractual terms, this would prejudice its position with regard to any organisations tendering in the future. It explained that it was expected to generate a large portion of its own income, although it was a public body, and should not undermine its position through disclosure so that it made best use of the finite funds available to it.
27. As regards the commercial interests of "Pines and Needles", TRP did not seek its view because, for reasons outlined above, it was now of the view that it, TRP, did not hold the requested information. However, it explained the tendering process which applied in this case and provided information about the scoring criteria it had used when selecting "Pines and Needles" as its licensee. It explained that providing the requested information would give any future competitors of "Pines and Needles" an unfair advantage in that they would be in a position to undercut "Pines and Needles" once the requested information was in their possession.
28. The Commissioner is satisfied that the requested information relates to a commercial interest – the percentage that must be given to TRP when undertaking Christmas tree sales on its property. He is also satisfied that the activity involved – the sale of Christmas trees and associated paraphernalia - is conducted in a competitive environment. Although TRP only allows one business to sell Christmas trees on its property, this agreement is made following a competitive tendering exercise. This is, of course, not the only retail outlet where local residents could purchase Christmas trees.
29. Having concluded that the withheld information is relevant to the scope of the exemption, the Commissioner has gone on to consider the prejudice test and whether the relevant party or parties would be affected or would be likely to be affected.
30. Section 43(2) consists of two limbs which clarify the probability of the prejudice arising from disclosure. The Commissioner considers that "likely to prejudice" means that the possibility of prejudice should be

real and significant, and certainly more than hypothetical or remote. He considers that "would prejudice" places a much stronger evidential burden on the public authority and must be at least more probable than not.

31. It is important to consider the use of the term 'prejudice' in the context of the exemption at section 43. It implies not only that the disclosure of information has some effect on the applicable interest, but that the effect must be detrimental or damaging in some way. The authority must be able to show how the disclosure of the specific information requested would, or would be likely to, lead to the prejudice.
32. TRP explained that in respect of its commercial interests and separately to Pines and Needles' commercial interests, prejudice would be likely to arise. This, it implies, is more than a hypothetical or remote likelihood.
33. The Commissioner recognises that TRP has a genuine interest in obtaining best value from its contract with its licensee. The Commissioner notes from the information provided by TRP that it reaches a decision on which bidder to use based on a whole range of factors. The Commissioner does not intend to set what those factors are on the face of this notice but they are not solely financial. He also accepts that a business who wishes to be successful in its bid will be able to comply with the other factors that TRP looks for based on whether it is financially viable to do so – if the deal makes business sense. Where any competitor can obtain financial advantage from the requested information in order to strengthen its financial ability to comply with all the factors required by TRP, the Commissioner accepts that this could be detrimental to both TRP's and its current licensee's commercial interests. However, the Commissioner does not see how this advantage could be obtained from the requested information.
34. The requested information here is the percentage on the sale of a Christmas tree which a licensee has paid over to TRP since it has been allowing commercial enterprise to offer these goods for sale on its property up to 2014. As already explained above, a certain amount of calculation would be required from the building blocks available to TRP in order to produce this information. The requested information is not the building blocks, it is information which can be calculated from the building blocks. The Commissioner accepts that the building blocks themselves include information which, if disclosed, would give rise to commercial prejudice – for example, the rent which the licensee must pay to be able to sell goods on TRP property.
35. The Commissioner also accepts that margins are inevitably tight for any business, especially a small business, and it can only operate where it is

commercially viable to do so. That said, the percentage paid to TRP per sale of Christmas tree is only one figure. Another competitor business may be able to speculate in general terms how much it costs to operate and maintain a Christmas tree selling business on TRP property.

However, it will not learn from the requested information, for example, how much "Pines and Needles" pays to purchase the trees wholesale, or how much it costs "Pines and Needles" to arrange delivery to site. The requested information does not reveal how much "Pines and Needles" pays in wages to its staff or in insurance or other liabilities. While a competitor may speculate on the detail of the contract where it is aware of the requested percentage, it will not be able to extrapolate a great deal from it because other information about the contract or about the rates that "Pines and Needles" pays for other costs is not available.

36. The Commissioner notes that in the contract between TRP and its licensee, reference is made to the requirements of the FOIA. It must therefore expect a certain amount of transparency on TRP's part that may not be mirrored by other private sector clients. Use of retail sites on TRP property provides the licensee with a certain amount of prestige and publicity for the licensee. "Pines and Needles" own website identifies other prestigious customers that it has. It also provides a table comparing its goods and services to those of competitors showing what might be termed its "added value" service as well as its competitiveness on price.⁶ Inevitably, it relies on its margins to provide this added value service but the Commissioner does not accept that disclosure of the requested information would be likely to prejudice its commercial interests to the benefit of its competitors.
37. TRP argued that this was a live contract, at least at the time of the request. The Commissioner accepts that where a contract is live, weight must be added to arguments as to likely prejudice. However, this is a fairly unique situation. The Commissioner considers that the sale of Christmas trees is likely to drop off dramatically after 24 December. The request was made over a month after this date. While other items may be sold (perhaps at a discount) after that date, the Commissioner considers that "Pines and Needles" ability to sell Christmas trees at the date of the request would be unlikely to be compromised.
38. Further, the Commissioner considers it is not unreasonable for customers to know how much of their individual purchase is given to TRP. When a business operates on the premises or property of a public

⁶ <https://www.pinesandneedles.com/price-pledge>

authority and declares that a percentage of its sales go to that public authority, it should have no reluctance in explaining what that percentage is. There is a strong public interest in a public authority being open about monies it is obtaining from public donations. In the case of the complainant, he chose to purchase a Christmas tree at Bushy Park because he learned from onsite signage that a percentage of his purchase was going to TRP. The retailer had a unique selling point – purchasing its goods also benefited TRP. The complainant was attracted to that offer when he could easily have gone elsewhere.

39. By disclosing this information, TRP is not revealing other commercially sensitive information about “Pines and Needles”. It is not revealing, for example, wholesale prices obtained by “Pines and Needles”, insurance premiums and salaries paid. None of that other information is in the public domain, nor can it be extrapolated from the requested information. Disclosure would not reveal what TRP expects its licensee to pay in rental costs for use of sites on its property, nor would it reveal specific detail from its contract with the licensee. TRP is being asked to disclose a percentage number that can be calculated from more sensitive building blocks to which it has access. A person may be able to learn the amount given to TRP from each tree sale at one of three sites but that does not reveal the full picture of TRP’s arrangement with its licensee as set out in the contract. Without knowledge of how many trees were sold in total, year on year, it is impossible to determine the licensee’s gross profit in respect of Christmas trees at one or all of the sites. It is also not possible to determine the licensee’s gross profit in respect of any other items on sale at the sites. Net figures are also not available because there is no information in the public domain that would reveal the licensee’s other costs.

Section 43 - conclusion

40. In light of the above, the Commissioner is not satisfied that the exemption is engaged in this case. He considers any prejudice to “Pines and Needles” commercial interests to be remote rather than likely. He also considers that prejudice to TRP’s commercial interests are remote rather than likely. TRP’s ability to obtain best value in its commercial enterprises would not be significantly undermined. TRP looks at a range of factors as well as income when considering which bid to choose. The Commissioner accepts that bidders’ ability to provide those factors depends on the profit margins they can achieve. However, he does not accept that provision of the requested information reveals details of how that profit margin is achieved. Also, its licensees, when engaging in a contract with TRP, are made fully aware that TRP has obligations under the FOIA. By working with TRP, they are gaining access to a relatively

high profile spot with the added cachet of supporting the work of TRP in a way that may appeal to potential customers such as the complainant.

Right of appeal

41. 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@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

42. 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.
43. 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

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