

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 January 2017

Public Authority: Bristol City Council
Address: City Hall
PO Box 3176
Bristol
BS3 9FS

Decision (including any steps ordered)

1. The complainant has requested information relating to the rental of Eastville Park. Bristol City Council provided some of the information and withheld other information under the exemption for prejudice to commercial interests, section 43(2) of the FOIA.
2. The Commissioner's decision is that Bristol City Council has failed to demonstrate that section 43(2) is engaged.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the withheld information to the complainant.
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 May 2016, the complainant wrote to Bristol City Council (the "council") and requested information in the following terms:

"This is regarding the renting out of Eastville Pk to the group known as 'Love Saves The Day' from approx 20th May to approx 6th June.

1, Local Councillors are claiming LSTD pay £10,000's in rent to BCC which goes directly back to the Parks Department. Can you please confirm how much they pay in rent and where exactly does this money go.

2, Local Councillors also claim LSTD pay £10,000's in donations to Eastville Park to cover the cost of losing a community asset for over 2 weeks over the summer. Can you please confirm exactly how much additional money comes from LSTD (not including the rent) and where exactly does it go."

6. The council responded on 24 June 2016. It provided some information but withheld the rental figure specified in part 1 of the request under the exemption for prejudice to commercial interests – section 43(2) of the FOIA.
7. Following an internal review the council wrote to the complainant on 20 September 2016. It provided further information but confirmed that, in relation to the application of section 43(2), it was maintaining its position.

Scope of the case

8. On 21 September 2016, following the internal review, the complainant contacted the Commissioner to complain about the way their request for information had been handled.
9. The Commissioner confirmed with the complainant that her investigation would consider whether the council had correctly applied section 43(2) to the withheld information.

Reasons for decision

Section 43(2) – commercial interests

10. The council has withheld the sum paid by Love Saves The Day to the council for rental of Eastville Park.
11. Section 43(2) 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.
12. "Commercial interests" in the context of this exemption encapsulates a wide variety of activities. In this case, the withheld information relates to the rental fee paid to the council for use of Eastville Park. The Commissioner is satisfied that the withheld information relates to a commercial activity and falls within the scope of the exemption.
13. In order for the exemption to be engaged it is necessary for it to be demonstrated that disclosure of information would result in some identifiable commercial prejudice which would or would be likely to be affect one or more parties.
14. The ICO has been guided on the interpretation of the phrase 'would, or would be likely to' by a number of Information Tribunal decisions. The Tribunal has been clear that this phrase means that there are two possible limbs upon which a prejudice based exemption can be engaged; i.e. either prejudice 'would' occur or prejudice 'would be likely to' occur.
15. With regard to likely to prejudice, the Information Tribunal in *John Connor Press Associates Limited v The Information Commissioner* (EA/2005/0005) confirmed that 'the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk' (Tribunal at paragraph 15).
16. With regard to the alternative limb of 'would prejudice', the Tribunal in *Hogan v Oxford City Council & The Information Commissioner* (EA/2005/0026 & 0030) commented that 'clearly this second limb of the test places a stronger evidential burden on the public authority to discharge' (Tribunal at paragraph 36).
17. The council has confirmed that disclosure of the information would be likely to prejudice its own commercial interests.
18. The Commissioner has gone on to consider the nature of the prejudice.

The nature of the prejudice

19. The council has stated that its site fees are available on its website but the "exact fee" set is subject to a review of the proposed event by the Site Permissions Team and there is an element of negotiation to this.
20. The council has confirmed that commercial events are expected to pay market rates and fees and charges are benchmarked against other council's fees and charges for hiring land for outdoor events. It has stated that it will not negotiate lower than this unless the event organisers for an event demonstrates the event will bring significant social and/or economic benefits to the city.
21. The council has argued that disclosure of the fees for Love Saves The Day ("LSTD") would be likely to weaken its negotiating position for any future events of a similar size that come to Bristol over the next few years. It has suggested that another event organiser could use the figure to negotiate a lower fee, i.e. make a case that they should have to pay a lower fee than LSTD for "...whichever reasons they choose to put forward."
22. The council has argued that withholding information charged for large events allows it to negotiate fees in relation to future events in isolation and thereby bring in more money to the public purse due to having a stronger negotiating position.
23. The Commissioner notes that generic fees for rental of the site are published on the council's website but that there is latitude for the actual fee charged to a lease. The council's website makes it clear that actual charges levied are decided on a case by case basis.
24. Whilst the Commissioner is not privy to the criteria which the council considers during such negotiations it is clear that the standard published fee represents a starting point.
25. The council has argued that publishing the sums paid in this instance would be likely to inhibit its ability to negotiate the best possible deal as a future provider may use the information as leverage for a lower price.
26. The Commissioner is mindful that negotiations will always provide scope for manoeuvre with both parties seeking to obtain the deal which will suit their own interests. Of course, neither party is under any obligation to accept the sum proposed at the outset of a negotiation.

27.

28. In this case, the Commissioner does not consider that it automatically follows that disclosing a previous rental fee would be likely to inhibit the council's ability to negotiate effectively. As is made clear on the council's website, the precise rental fee in each case is itself determined on a case by case basis, presumably via a consideration of the relevant facts which form the basis for the negotiation.
29. As the factors which determine whether a higher or lower fee are at the council's discretion it appears to the Commissioner that the council is free to accept or dismiss an event organiser's offer or "whichever reasons they choose to put forward" for a low bid. That a prospective leaser has knowledge of previous fees charged does not inhibit the council's negotiating position as, assuming there is some transparency to the criteria applied, it is free to make the case that there is variation between two or more different events.
30. On the basis of the council's submissions the Commissioner does not consider that it has been shown that disclosure of the information would be likely to result in the ascribed prejudice. As she has determined that the exemption is not engaged she has not gone on to consider the public interest test.

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: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.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

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