

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 July 2020

Public Authority: The London Borough of Brent
Address: Brent Civic Centre
Engineers Way
Wembley
HA9 0FJ

Decision (including any steps ordered)

1. The complainant submitted a request to the London Borough of Brent (the Council) seeking information about the payments it receives from JC Decaux for the use of advertising boards in the borough. The Council refused to disclose the information relying on section 43(2) (commercial interests) of FOIA.
2. The Commissioner's decision is that the Council is entitled to rely on section 43(2) of FOIA to withhold the information and that in the all circumstances of the request the public interest favours maintaining the exemption. However, the Council breached section 17(1) by failing to issue a refusal notice citing section 43(2) within the time period required.
3. No steps are required.

Request and response

4. The complainant submitted the following request to the Council on 29 October 2019:

'We would like to know the following details about the above contract [2019 JC Decaux Concession Contract for Six-Sheet

Advertising Across the Borough] made in 2019 between JC Decaux and Brent Council:

- 1. How many Six Sheet Advertising Monoliths displays have JC Decaux secured across Brent Council?*
 - 2. What are the specific locations of each display (postcodes)?*
 - 3. How long does the contract run for?*
 - 4. What payments does the Borough of Brent receive for these displays and at what frequency?*
 - 5. How will the money received be spent?'*
5. The Council responded on 15 November 2019 and provided the information requested with the exception of the information sought by question 4. The Council explained this information was considered to be commercially sensitive.
 6. The complainant contacted the Council on 24 November 2019 and asked it to conduct an internal review of the decision to withhold this information.
 7. The Council provided her with the outcome of the internal review on 11 December 2019 which explained that the withheld information was covered by a confidentiality clause in the Council's contract with JC Decaux.
 8. Subsequent to the complainant contacting the Commissioner about this matter, the Council provided her with a more detailed internal review response on 10 February 2020. This explained that the withheld information was considered to be exempt from disclosure on the basis of section 43(2) (commercial interests) of FOIA.

Scope of the case

9. The complainant contacted the Commissioner on 11 December 2019 in order to complain about the Council's handling of her request. She argued that it was in the public interest for the requested information to be disclosed.

Reasons for decision

Section 43 – commercial interests

10. Section 43(2) of FOIA states 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).'

The Council's position

11. The Council argued that the commercial interests of JC Decaux would be damaged if details of the payment information were released to the public. This is because the provision of the amounts charged by Council would hinder the ability of the company to negotiate with other organisations and local authorities. The Council explained that when it consulted JC Decaux about this request it confirmed this position and explained that *'This is commercially sensitive information that cannot be released. The council is not allowed to release any financial information regarding the sites as we have a clause in the contract to prevent this.'*
12. In light of this the Council argued that releasing the specific details of the income the Council receives from JC Decaux for advertising would damage its business relationship with the company. The Council explained that it must retain the commercial confidence of third parties when they choose to engage in commercial activities with it. The Council argued that release of this information may jeopardise this commercial confidence and lead to reputational damage that would harm council finances. Furthermore, the Council argued that the withheld information would provide other companies with very useful commercial information thus giving them an unfair competitive edge in a tender process involving the Council.

The Commissioner's position

13. In order for a prejudice based exemption, such as section 43(2), 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 – ie, 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 more than a hypothetical possibility; rather there 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.
14. With regard to the first criterion of the three limb test described above, the Commissioner accepts that the potential prejudice described by the Council – both to its commercial interests and those of JC Decaux – relate to the interests which the exemption contained at section 43(2) is designed to protect.
 15. With regard to the second criterion, the Commissioner is satisfied that disclosure of the information about pricing has the potential to harm the commercial interests of JC Decaux for the reasons set out by the Council. Furthermore, she is persuaded that the resultant risk of prejudice occurring to JC Decaux's commercial interests is clearly one that is more than hypothetical and therefore the third criterion is met. In reaching this view, in the Commissioner's opinion it is logical to assume that if the details of the costs that JC Decaux agreed to pay the Council were to be disclosed then this would clearly put JC Decaux at a disadvantage when negotiating potential contracts with other councils for similar displays. That is to say these councils would be aware of the amount that JC Decaux had previously agreed to pay for such displays thus giving them an advantage over JC Decaux in any negotiations or bidding process.
 16. For similar reasons the Commissioner is also satisfied that if the withheld information was disclosed this would also place the Council at a disadvantage in a future negotiation or bidding process with other companies in relation to selling advertising space.
 17. On this basis the Commissioner has concluded that section 43(2) is therefore engaged.
 18. However, in reaching this conclusion the Commissioner would emphasise that she is not persuaded that the Council's commercial interests would be harmed because disclosure would damage its relations with JC Decaux. Whilst the damage to the relationship may be an outcome of such a disclosure, in the Commissioner's view the Council has not

explained how such an outcome would then have a prejudicial effect on its own commercial interests.

Public interest test

19. Section 43(2) is a qualified exemption and therefore subject to the public interest test set out in section 2(2)(b) of the FOIA. The Commissioner has therefore considered whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the withheld information.

Public interest in maintaining the exemption

20. The Council argued that there was a clear public interest in ensuring that both its own and the commercial interests of JC Decaux were not harmed.

Public interest in disclosing the withheld information

21. The complainant argued that it was in the public interest to know how much revenue a local authority is raising by selling public pavement space to an outside body. She argued that pavements within the borough are already very cluttered and thus there should be a demonstrable and quantifiable benefit in them being used for advertising. Furthermore she argued that a confidentiality clause in such a commercial arrangement should not prevent the public (after the contracts have been signed) to judge if the public are getting an acceptable monetary value for the restrictions of pedestrian movements.

Balance of the public interest test

22. The Commissioner recognises that there is significant public interest in the Council being open and transparent about the relationships it enters into with commercial organisations. In the particular circumstances of this case the Commissioner recognises that the complainant has concerns about the Council's decision to allow JC Decaux to allow pavements for advertising. Disclosure of the withheld information would provide a clear insight into the financial benefit the Council has received in return from this decision and thus would allow a more informed discussion about the use of the space in the borough in this manner.
23. However, in the Commissioner's opinion there is very strong and inherent public interest in ensuring fairness of competition and in her view it would be firmly against the public interest if a company's commercial interests are harmed simply because they have engaged in business with a local authority. Furthermore, the Commissioner believes that there is an inherent, and very strong, public interest in ensuring that a public authority's ability to secure value for public money is not

undermined. The Commissioner accepts the complainant's argument that a confidentiality clause in a contract cannot act as a guarantee that information will never be disclosed under FOIA. However, in the circumstances of this case, and for the reasons set out above, she has concluded that the public interest favours maintaining the exemption contained at section 43(2) and withholding the information falling within the scope of the request.

Section 17 – refusal notice

24. Section 17(1) of FOIA explains that if a public authority refuses a request then it must provide the requester with a refusal notice citing which section of the legislation is being relied on and explain why this applies. A public authority must do this within 20 working days.
25. In this request the Council failed to provide the complainant with a refusal notice citing section 43(2) within this time period and therefore breached section 17(1) of FOIA.

Right of appeal

26. 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@justice.gov.uk

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

27. 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.
28. 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

Jonathan Slee
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