

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 25 October 2022

**Public Authority:** London Borough of Waltham Forest  
**Address:** Waltham Forest Town Hall  
Forest Road  
Walthamstow  
E17 4JF

### Decision (including any steps ordered)

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1. The complainant has requested contract and fees information concerning the management of hire of a local park for a market. London Borough of Waltham Forest disclosed some of the information held but withheld some of the information under Section 43(2) of the FOIA (prejudice to commercial interests).
2. The Commissioner's decision is that London Borough of Waltham Forest correctly withheld the relevant information under section 43(2) and that the public interest favours maintaining the exemption.

### Request and response

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3. On 11 November 2020, the complainant wrote to London Borough of Waltham Forest (the Council) in connection with the management of hire of a local park (Lloyd Park) for a market and requested information in the following terms:

*'Can you clarify what the terms and conditions of use of this space are for this purpose, and what the fee is that this organisation pays for the use of this site in this way, i.e. please can you provide a copy of the contract that underpins this arrangement. Please treat this as a freedom of information request if it is easier to do so to be able to explain this situation to residents and how this has been determined to be the best value use of this site at this time.'*

4. The Council responded to the request on 18 November 2020 and explained that:

*'The Market organisers hire out the space under the Council's normal terms and conditions, please see attached. Please note that The Parks Service have only had one other enquiry of this nature outside of the enquiries received from [name redacted]. Based on [name redacted] insistence to have the organisers of the market are removed from trading, my line manager has asked me to investigate why [name redacted] is insistent that these organisers should not be allowed to rent the space at Lloyd Park. We have answered all the enquiries since May 2019 and still [name redacted] is requesting that Waltham Forest remove the current organisers and this has raised concerns. The Market has put in place from the outset a Local Trader policy'.*

The Council provided the complainant with a link to the policy and with the current ratio of traders. The Commissioner notes that this was not a valid response under the FOIA, as the Council did not confirm whether or not they held the contract which the complainant had asked for a copy of.

5. The complainant consequently wrote to the Council on 19 November 2020 and advised that:

*'Appreciate that this seems to have run on as an issue, and residents have a right to ask questions about the management of public spaces and public value for money. As far as I can see the lack of clarity over this issue has led to this being a drawn out series of emails which is frustrating for all concerned, as I'm not sure why such information is proving so difficult to provide. From the answers I've seen to date it isn't clear how and why this contract has been issued in this manner, and how concerns about the low level of local involvement in this – which your figures below confirm as they show less than a third of the market is in fact provided by local traders on a consistent basis – are being addressed. This was a stated aim of the market and its marketing, and the councillors involved in this correspondence have said this was an intention for the site as well. I am unclear as to why the social enterprise element of the trading contingent is relevant to these concerns and would welcome clarification'.*

6. The complainant reiterated that her request for information *'on this contract, its value and how it is being managed'* was an FOI request, and that she would appreciate confirmation that it was being treated as such.
7. Having had no response from the Council to her email, the complainant sent a chaser email on 31 December 2020. The Council responded by

return and apologised for the lack of response, explaining that an intended email response had been inadvertently left in a draft folder.

8. The Council stated that they had explained that *'there isn't a contract with the market, we rent space on a weekly basis which is the same process as we would rent out space in another park or open space'*. The Council stated that they had been very clear about this in their previous correspondence. However, the Commissioner notes that the Council's response of 18 November 2020 had not provided such explanation or clarity.
9. The Council explained that, *'much of the produce sold on the farmers market cannot be produced and sold from within the borough, hence the traders coming in from outside. Walthamstow Farmers market trade from locations all over the country so there is nothing unusual with traders coming from outside the borough'*. The Council advised that the fee is commercially sensitive and as they would not share it with other market providers they would not be disclosing it, but stated that *'it is in excess of what we hoped to achieve'*.
10. The Commissioner notes that this was again, not a valid response under the FOIA, since the Council failed to specify which exemption was being applied to withhold the information requested, and the reasons why.
11. The complainant responded and asked the Council to confirm under which exemption(s) of the FOIA they were withholding the information. The complainant advised that, *'I'm slightly confused to hear this, given you have previously stated that this isn't a contract that has been tendered publicly for other commercial bids to be made for this site. It would be great to have details of when this was advertised for commercial tender and the spec, given what you say'*.
12. On 4 January 2021 the Council wrote to the complainant and acknowledged her new information request, and on 29 January 2021 the Council provided the complainant with a response to her linked requests of 11 November 2020 and 4 January 2021. The Council stated that they had completed their search for the information requested and a copy of the information that could be disclosed was attached. The Council advised that the information supplied had been provided by the department responsible for the service delivery. The Council advised that some of the information held, specifically the hire rate of the market in Lloyd Park, was exempt from disclosure under section 43(2) (prejudice to commercial interests) of the FOIA.
13. The complainant requested an internal review of the decision on 10 March 2021. The complainant stated that she wished to draw the Council's attention to previous correspondence which she had had from the Council on this matter, *'which sets out that no commercial tendering*

*was done of this contract, and thus it would be helpful to identify whose commercial interests are being protected'. The complainant stated that as the Council is a public body 'there is a clear public interest for the taxpayer for the decisions made regarding the use of public spaces and public funds'.*

14. The complainant cited a number of emails sent from local councillors in her request for an internal review. In one of these emails, the Commissioner notes that a councillor advised:

*'At present, the market is the activity which generates the most income. This is used for important maintenance and improvement work in the whole park. The park team is small and covers parks around the whole borough. I am content with the approach that the park team took – which was to look for an established park market business. The team does not have the capacity to support a smaller operator and our main aim must remain to deliver a high-quality park. Park events are not an area where we tender for provision and there is not the capacity to take this approach'.*

15. The Council provided the complainant with their internal review on 12 April 2021. The Commissioner notes that the review was of a significantly better standard and quality than the Council's previous responses to the request.

16. The Council advised that there is no 'contract' in place with the market provider and no formal tender process was followed since the nature of these arrangements did not require a tendering process. The Council explained that:

*'The space used for the market in Lloyd Park is hired on a week by week basis like any other park hire, just as the Service would for fun fairs, ice cream vans and other events. The Service have baseline fees and charges for non-commercial events/hires but these are subject to a negotiated rate based on the type of event taking into consideration any comparative rates. In relation to the Lloyd park market the Service had negotiated a rate that was beneficial to the parks department. However, this remains a hire on a week by week basis like any other park hire. The Service can cancel the hire at any time with no contractual obligations or penalties if the event or market did not work for the park or there were other events planned that meant the Service could not cater for both at the same time'.*

17. The review confirmed that the information which the complainant was seeking relating to fees and charges was exempt under section 43(2) of the FOIA as the Council were of the view that '*placing the information you have requested into the public domain would prejudice the Council as publication of the fees negotiated could result in the LBWF Council*

*being undercut by another Council. The loss of the rental income would in turn impact upon the community in that the funds derived from the rental are used for the upkeep of the park and other public spaces'. The Council therefore confirmed that it was their commercial interests that had been considered when engaging the exemption.*

18. The Council advised that since no consultation had been carried out with those using the park space it was not possible to confirm whether or not their commercial interests could also be affected. The Council noted that in the event of a complaint to the ICO, they might be required to carry out such a consultation as part of any investigation by the Commissioner.

19. The Council provided details of how the disclosure of the withheld information would prejudice their commercial interests, stating that:

*'Publicly disclosing the negotiated rate applicable to the Lloyd park market could result in the LBWF Council losing the revenue currently obtained from the rental if we were undercut by another Council offering the vendor a cheaper rate. This loss would in turn harm the community who utilise the open spaces that are maintained from the revenue we derive. The Council is entitled to enter into commercial activities such as the hire of park space'.*

20. With regard to the public interest test, the Council acknowledged that there *'is a clear public interest for the taxpayer for the decisions made regarding the use of public spaces and public funds'*. However, when considering the balancing of factors such as the Council's ability to generate income and the preservation of negotiating positions, the Council concluded that the public interest balance weighed in favour of maintaining the exemption to the information requested.

21. The Council advised the complainant that whilst it seemed clear that Council officers, when responding to her emails, had tried to provide advice and assistance in explaining the position with the market, they considered that misunderstandings had occurred and that more clarification ought to have been sought from the complainant regarding precisely what information held by the Council she wished to have access to.

22. Finally, the Council advised the complainant that whilst *'there is no 'contract' governing these arrangements which have been tendered, there is documentation held regarding the operation of the licensing of park spaces for the purposes of events'*. The Council confirmed that whilst they were not willing to provide any financial information contained in this documentation, if the complainant wished the Council to provide her with copies of such licensing arrangements, this could be arranged.

## Scope of the case

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23. The complainant contacted the Commissioner on 11 June 2021 to complain about the way her request for information had been handled.

24. The complainant stated that:

*'Given the decision of the Council and the continued public interest in this matter, I wish to request a review of this decision by Waltham Forest Council not to place in the public domain, information on the cost of the contract for use of this public space. I do not believe it can argue this is a commercially sensitive matter and use this exemption to avoid providing information, whilst showing no evidence of any commercial process to underpin this claim. Local residents have the right to know whether the Council has secured value for money for the use of this public space in their management of it and this is impossible to assess without understanding the sums generated by its use.'*

25. During the course of his investigation, the Commissioner obtained detailed submissions from the Council in support of their position and sight of the withheld information.

26. The Commissioner considers that the scope of his investigation is to determine whether the fees/rental information requested by the complainant was correctly withheld by the Council under section 43(2) of the FOIA.

## Reasons for decision

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27. Section 43(2) of the FOIA states:

*'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).'*

28. In order for a prejudice based exemption such as section 43 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, i.e. 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 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.
29. In submissions to the Commissioner, the Council explained that their fixed fees and charges for the hire of parks for non-commercial or charitable events are based on audience numbers and are published online. These rates, their rates for sport-based activity/amateur club activity and rates for funfairs and circuses are all benchmarked with London Boroughs or similar venues.
30. The Council advised that the market at Lloyd Park was *'to explore a new commercial venture and has enabled us to trial options for additional income generation'*. In launching the market the Council explained that they had tried to generate interest from local traders but were unfortunately unsuccessful. The Council advised that as they were keen to test a new concept they worked with the current trader. They informed the Commissioner that, *'through this venture we have shown that there are commercial opportunities for both the Council and traders. We will continue to encourage local traders to apply to rent a pitch in the park'*.
31. The Council confirmed that no contract was drafted for the Lloyd Park market and so that part of the requested information was not held. The withheld information consisted of fees/rental information. The Council confirmed that the venue hire arrangement in question was not subject to any formal tender process. The Council advised that they have an event and sports hire agreement which is their standard application process for any event, including free and commercial. Any organisation or group can apply for events or hire space in any park. In this particular case, the market provider had approached the Council with an expression of interest. Following that initial contact the Council consulted with stakeholders, including other local markets and the boroughs market management team before processing the weekly hire.

32. Explaining that the Council followed their hire agreement and a process<sup>1</sup> in establishing the hire which is the subject of the complainant's request, the Council confirmed that the only element which they had chosen not to disclose is the financial hire agreement. The Council stated that the Lloyd Park Management Group was consulted on the market, and all were in approval of the agreement, including Friends of Lloyd Park and ward councillors.

33. In submissions to the Commissioner the Council explained:

*'The rental is on a week by week basis through our weekly hire agreement for parks events and sporting activities. The hire can be terminated or withdrawn by either party with no prior notice. This practice in parks is a pre-emptive position to prevent harm and a process chosen for that reason only. No examples exist of this happening before and the type of service is a new venture for parks which are generally non retail venues'.*

34. Addressing the complainant's concern that less than a third of the market is provided by local traders on a consistent basis, the Council noted that they had explained that this is a farmer's market and there are no producers of many of the goods sold at the market within the borough (examples being cheese, vegetables and meat etc). Therefore, there is a need to open the market up to sellers and producers from outside the borough.

35. The Council stated:

*'Attracting local traders is one of many outcomes we would like to see from the market. Others include, quality of offer, variety of offer, sustainability of offer, environmental sustainability, ability to meet hire process requirements, behaviour on site, cultural offer, Covid resiliency/compliancy and income. Due to the number and relative importance of the different outcomes required, we consider current progress on local traders successful. From beginning 2021-22 average percentage local traders is 19% (almost one fifth). Average percentage social enterprise traders is 6%. As far as we are aware, no other market operates using a policy to promote or prioritise local traders'.*

36. As part of their submissions to the Commissioner, the Council provided a copy of an email from the provider to the Council, in which the provider

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<sup>1</sup> <https://www.walthamforest.gov.uk/libraries-arts-parks-and-leisure/our-parks/events-parks-and-open-spaces>



objected to their commercial terms being made public because the fees information is commercially sensitive. The provider noted that *'this is also the policy followed by every other borough we work with, who do not share fees publicly'*.

37. The Council confirmed that the parties whose commercial interests were being protected by the application of section 43(2) were the market provider, Good Market, and the Council (specifically the parks service).
38. The Council explained that the fees generated are a negotiated rate which is agreed between the Council and the provider. The information is being withheld to enable the Council and the provider to negotiate rates in a competitive way without disclosure to others. If the rate of hire were disclosed it could create a bidding war with alternative providers, which could force hire prices up. This in turn would be passed on to the consumer, or other venues could undercut the Council's rates to coax a relocation of the market.
39. The Council have advised that the rental is on a week by week basis through their weekly hire agreement for parks events and sporting activities. The hire can be terminated or withdrawn by either party with no prior notice. The Council have advised that this practice in parks is a pre-emptive position to prevent harm and a process chosen for that reason only. *'No examples exist of this happening before and this type of service is a new venture for parks, which are generally non retail venues'*.
40. The Commissioner is satisfied that the prejudice contended by the Council relates to both the commercial interests of Good Market and those of the Council. As the Council noted in their internal review, they are entitled to enter into commercial activities such as the hire of park space. The Commissioner therefore considers that the first criterion set out in paragraph 28 above is met.
41. With regard to the second criterion, having had sight of the withheld information, the Commissioner accepts that it is commercially sensitive as it comprises the fees negotiated between the Council and the provider. Were this information to be put into the public domain, it is, as the Council have contended, probable that they would be undercut by another council offering the provider a cheaper rate. Disclosure of the fees information would also allow another party to undercut the market and secure a more favourable fees arrangement themselves. Consequently, the Commissioner accepts that the causal relationship between the release of the fees information and prejudice to the commercial interests of the Council and the market is real and of substance.

42. The Commissioner considers that the Council has demonstrated the application of the higher threshold level of 'would' prejudice the commercial interests of the Council and the market. He is satisfied that competitors (both other councils and other market providers) would commercially benefit from access to the fees information, which in turn would result in prejudice to the commercial interests of the Council and the market. The Commissioner considers that the anticipated prejudice is more likely than not.
43. The Commissioner therefore finds that the exemption at section 43(2) was correctly engaged by the Council. This exemption is subject to the public interest test as set out in section 2(2)(b) of the FOIA. The Commissioner must decide whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the withheld information.

### **The public interest**

44. In her request to the Council for an internal review on 10 March 2021, the complainant contended that *'as the local authority is a public body there is a clear public interest for the taxpayer for the decisions made regarding the use of public spaces and public funds'*. Similarly, in her subsequent complaint to the Commissioner, the complainant contended that, *'local residents have the right to know whether the Council has secured value for money for the use of this public space in their management of it, and this is impossible to assess without understanding the sums generated by its use'*.
45. In their internal review of 12 April 2021, the Council acknowledged that there was *'a clear public interest for the taxpayer for the decisions made regarding the use of public spaces and public funds'*. However, when considering the balancing of factors such as the Council's ability to generate income and the preservation of negotiating positions, the Council concluded that the public interest balance weighed in favour of maintaining the exemption to the withheld information.

### **Balance of the public interest**

46. The Commissioner considers that the complainant has advanced legitimate and reasonable arguments for the disclosure of the withheld information (as the Council have themselves acknowledged). There is clearly a case for proportionate transparency and accountability in respect of the management of hire of the Lloyd Park market.
47. The Commissioner considers that such proportionate transparency and accountability has been appropriately met by the Council in this matter. As the Council have noted in their submissions to the Commissioner, the market was required to follow the Council's usual hire processes, which are in the public domain. In addition, the Lloyd Park Management

Group consulted on the market, obtaining approval from Friends of Lloyd Park and ward councillors. The Council have advised that any organisation or group can apply for events or hire space in any park, and in this particular case the market approached the Council with an expression of interest. Following that initial contact the parks service consulted with stakeholders, including other local markets and the borough's market management team before processing the weekly hire.

48. Whilst further transparency and accountability would be provided by the disclosure of the negotiated rate applicable to the Lloyd Park market (the withheld information), the Commissioner accepts that there is a real risk that this would mean that the Council could be undercut by another council offering the provider a cheaper rate. Were this to happen then the Council would lose the revenue currently generated by the rental and as the funds derived from the rental are used for the upkeep of the park and other public spaces, this would adversely impact the community who utilise the same. Such an outcome would clearly not be in the public interest. The Commissioner is mindful, as the provider has noted, that other councils do not publicly disclose such sensitive fees information.
49. Therefore, the Commissioner considers that any public interest benefit which would be served by the disclosure of the withheld information, would be outweighed by the harm which would be caused by the provision of such information allowing other councils to offer the provider cheaper rental rates, and thus deprive the Council of essential income for the maintenance and upkeep of Lloyd Park. Consequently, the Commissioner is satisfied that the public interest balance supports maintaining the exemption to the withheld information.

## Right of appeal

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50. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

51. 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.
52. 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 .....**

**Gerrard Tracey**  
**Principal Adviser FOI**  
**Information Commissioner's Office**  
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