

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 May 2024

Public Authority: Mid Devon District Council
Address: Phoenix House
Phoenix Lane
Tiverton
Devon
EX16 6PP

Decision (including any steps ordered)

1. The complainant requested information about a draft business plan relating to the creation of a property development company by Mid Devon District Council (the Council). The Council provided a copy of the main body of the report but withheld the appendix, citing section 43(2) (prejudice to commercial interests) of FOIA.
2. The Commissioner's decision is that section 43(2) is not engaged regarding the withheld information.
3. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation.
 - disclose the withheld information.
4. The Council must take these steps within 30 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 20 September 2023, the complainant wrote to the Council and requested information in the following terms:

"I have found a Decision Notice on the Information Commissioners Website that shows MDDC was ordered to release a Draft Business Plan and appendix

I have attached the Information Commissioner's Decision Notice on this.

In the Decision Notice, at para 3, it says MDDC must "Disclose the information withheld under section 43(2)"

At para 19, it says the Council was withholding (under section 43(2)) the "Draft Business Plan Cabinet item 30/03/2017 Minute 182 and appendix".

I went to the Cabinet meeting on 30/03/2017 Agenda/Minutes on the MDDC website to find Minute 182 refers to a report called Special Purpose Vehicle (Property) which is still marked restricted.

Since this Document/Report/Plan should now be placed in the public domain and should now be published. Will you please send me a copy of this "Draft Business Plan Cabinet item 30/03/2017 Minute 182 and appendix"."

6. The Council responded on 6 October 2023, providing a copy of the report but withholding the appendix citing section 43(2), commercial interests, of FOIA.
7. Following an internal review, the Council upheld its original response.

Background

8. The decision notice referenced by the complainant ([FS50694803](#)) in their request was issued by the Commissioner on 13 April 2018. It considered whether the Council was correct to withhold various information under section 43(2) of FOIA, including the report requested by the complainant in their request of 20 September 2023.
9. The decision notice stated that section 43(2) did not apply, and the Council was ordered to disclose the information.

10. The Council appealed the decision to the First Tier Tribunal, reference [EA/2018/0102](#). During the proceedings, most of the information was disclosed. However a single page of financial information, the appendix to the report, was still in dispute.
11. Ultimately the Tribunal was satisfied that the public interest at that time favoured withholding the appendix and did not order its disclosure.

Scope of the case

12. The complainant contacted the Commissioner on 12 December 2023, to complain about the way their request for information had been handled. In particular, the complainant is unhappy with the Council's application of section 43(2) of FOIA to withhold the appendix to the report.
13. The complainant considers that, given the passage of time since the report was originally created and other factors relating to the subject of the report, the public interest now favours disclosure of the appendix.
14. The scope of the following analysis is to determine if the Council was correct to apply section 43(2) of FOIA to withhold the appendix.

Reasons for decision

15. The report in question was created to look at options available to the Council for creating income by building a portfolio of properties to sell or rent at market rates through the establishment of a property development company (3 Rivers Developments Ltd).
16. Within the report, at paragraph 7.1, the appendix is described as showing "the initial scheme's revenues and cost projections for the site to the rear of the Town Hall building." Paragraph 7.2 of the report confirms that the figures in the appendix are approximate.

Section 43(2) – prejudice to commercial interests

17. Section 43(2) provides 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)."

18. The Commissioner has defined the meaning of the term "commercial interests" in [his guidance](#) on the application of section 43 as follows:

"A commercial interest relates to a legal person's ability to participate competitively in a commercial activity. The underlying aim will usually be to make a profit. However, it could also be to cover costs or to simply remain solvent."

19. Most commercial activity relates to the purchase and sale of goods but it also extends to other fields such as services. The Commissioner's guidance says that there are many circumstances in which a public authority might hold information with the potential to prejudice commercial interests.

20. The public authority needs to demonstrate a clear link between disclosure and the commercial interests of either itself, a third party or both. There must also be a significant risk of the prejudice to commercial interests occurring and the prejudice must be real and of significance for section 43(2) to be successfully engaged.

21. The actual harm that the public authority alleges would or would be likely to occur if the withheld information was disclosed has to relate to commercial interests.

Does the information relate to commercial interests?

22. In this case the report, including the withheld information, relates to the formation of a private limited company, 3 Rivers Developments Ltd, which was set up by the Council as a means to generate income.

23. The Commissioner is satisfied that the whole of the report, including the appendix, relates to a commercial activity and hence to commercial interests.

Causal relationship

24. The Council explained that a decision has been made to wind up 3 Rivers Developments Ltd, but that this process is not complete. It went on to argue that the winding up process involves the movement of assets from the limited company to the Council or other third parties, and that disclosure of the appendix could impact on the sale of said assets.

25. It stated that if specific financial details were placed in the public domain, this could have a negative impact on the sales of the assets potentially in a number of ways.

- By creating a hostile environment for the sale of assets, potentially reducing their sales value.
- It could give buyers an unfair advantage in negotiating the sale of those assets.
- It could lead third parties to withdraw from the sale of said assets entirely.

26. While the Council has stated that disclosure of the withheld information would cause prejudice, no information other than the statements above have been provided. Nor has the Council provided any further reasoning or explanations on any potential causal relationship between the disclosure of the appendix and the prejudice described.

The likelihood of the prejudice occurring

27. In order to apply section 43(2), a public authority must be able to show that the disclosure of the information **would**, or **would be likely to**, prejudice commercial interests.

“would prejudice” means that if the information is disclosed, it is more probable than not that the harm identified would occur (ie there is a more than 50% chance of disclosure causing the prejudice, although it is not absolutely certain that it would do so).

“would be likely to prejudice” is a lower threshold. It means that if the information is disclosed, the probability of the harm occurring is less than 50%. However, the risk of prejudice occurring must be real and significant, and it must be more than hypothetical or remote.

28. The Council considers that disclosure of the information **would** cause the prejudice specified. The Commissioner has therefore considered whether the chance of prejudice occurring meets the threshold of being more probable than not.

29. The Commissioner is of the opinion that the Council has not provided evidence that disclosure of the information **would** cause prejudice. This is because, the Council has not provided evidence of a direct causal relationship between the disclosure of the information and any prejudice. Instead it has relied on the outcome of its appeal to the First Tier Tribunal ([EA/2018/0102](#)) of decision notice [FS50694803](#), which allowed the Council to withhold the requested information.

30. The Commissioner has therefore considered if disclosure of the information **would be likely to** cause the prejudice specified.

31. In his guidance on section 43(2), the Commissioner notes that commercial sensitivity may diminish over time. The extent to which this occurs may depend on the nature of that information.
32. In assessing the nature of the information in question here, the Commissioner notes that the report produced by the Council confirms that the withheld information consists of approximate figures.
33. While the report recommends the setting up of a property development company, it pre-dates that action being taken. It is reasonable to suppose that, once the recommendations of the report were accepted and the development company set up, a more in depth and specific costing of the project would have been undertaken. This would have made the approximate figures obsolete and would reduce the likelihood of any prejudice occurring.
34. In considering if disclosure of the information would be likely to cause prejudice, the Commissioner has also considered the timing of the request.
35. In the original case the request was made on 25 May 2017, three months after the report was created and a month after the development company was incorporated on 28 April 2017. It is therefore reasonable to assume that full costings for the project may not have been carried out at that point and this would likely make the figures in the appendix more sensitive at that time.
36. However, at the date of the request being considered here, the information was over six years old and it is likely that later more specific costings for the project have superseded the approximate figures in the report.
37. The Commissioner is therefore not convinced that the withheld information would retain the same sensitivity more than six years after its creation, meaning that the likelihood of any prejudice occurring is reduced further.

The Commissioner's conclusions

38. The view of the Commissioner is that given the time that has elapsed since the report was created and the significant change in the circumstances relating to this information between its creation and the date of the request, limited, if any, harm would come from its disclosure.
39. The Commissioner finds that section 43(2) of the FOIA is not engaged and so the Council was not entitled to apply section 43(2) to withhold the requested information.

40. As he has found that section 43(2) is not engaged, he has not gone on to consider the public interest test.
41. As at paragraph 3 above, the Council is now required to disclose the withheld information.

Other matters

42. The Commissioner acknowledges the decision of the Tribunal in appeal [EA/2018/0102](#) which allowed the information to be withheld. However, he would remind the Council that while previous cases or appeals can be taken into consideration when considering disclosure of the same, or similar, information in response to a different request, the fact that a previous decision has allowed the information to be withheld cannot be taken to mean that the information should never be disclosed.

Right of appeal

43. 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

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

44. 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.
45. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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