

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 3 September 2024

Public Authority: Liverpool City Council
Address: Cunard Building
Water Street
Liverpool
L3 1AHX

Decision (including any steps ordered)

1. The complainant requested information relating to the Isla Gladstone Conservatory in Stanley Park. Liverpool City Council (the "Council") disclosed some information and withheld other information under the exemption for commercial interests.
2. The Commissioner's decision is that the Council has failed to demonstrate that the exemption in section 43(2) is engaged.
3. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation.
 - Disclose the information in part 2 of the request to the complainant.
4. The public authority 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 25 January 2024 the complainant wrote to Liverpool City Council (the "Council") and asked for the following information:

"1) What lease / Contract with Liverpool City Council have with the owners of the Gladstone Conservatory Stanley Park, 1 Anfield Rd, L4 0TD

2) Since January 2014 how much has been paid to Liverpool City Council in rent / lease payments Could you provide these in a year by year break down"
6. The Council responded on 2 February 2024 and provided the information in part 1 of the request. It withheld the information in part 2 under the exemption for commercial interests (section 43(2)).
7. On 20 February 2024 the complainant asked the Council to carry out an internal review. At the time of writing the Council does not appear to have carried out a review.

Scope of the case

8. On 18 April 2024 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
9. The Commissioner has considered whether the Council correctly withheld the information in part 2 of the request.

Reasons for decision

Section 43 - commercial interests

10. Section 43(2) of the FOIA provides that information is exempt if its disclosure would, or would be likely to, prejudice the commercial interests of any person, including the public authority holding it.
11. Where a public authority considers that the information it holds comprises commercial information, the Commissioner's longstanding view is that, in order to engage section 43, the public authority must be able to show how, and why, its disclosure has the potential to prejudice someone's commercial interests.

12. Once an authority has shown that the exemption is engaged it must then go on to consider whether the public interest favours maintaining the exemption or disclosing the information.

13. The Council has confirmed that it is the owner of Gladstone Conservatory. The request relates to payments it has received from its leasing of the property to a specific party.

14. In explaining why it considered that the exemption was engaged the Council stated:

“The reason we have considered this exemption is on the basis that the requested information is commercially sensitive and relates to the financial and business affairs of the council and a third party in respect of commercial transactions – previous and current.”

15. In its consideration of the public interest test, the Council identified the following factors in favour of maintaining the exemption:

“If details of the information request were disclosed, then this would potentially identify detailed commercial information including expenditure profiles of a third party. This in turn would substantially impair and prejudice the ability of the council to conduct negotiations with third parties for similar arrangement and would therefore place the council at a substantial disadvantage when negotiating or entering into other similar commercial arrangements. The basis is that this information would identify the specific arrangements of the council and a third party and result in substantial commercial prejudice for future similar arrangements. The effect of such disclosure would be potentially damaging to the council as the third party affected may well look to the council for compensation as a result of disclosure which could place the council under the threat of legal action.”

16. The Commissioner considers that the factors identified by the Council are generic in nature and make no reference to the specific information that is being withheld or the reasons why disclosure would be likely to result in prejudice. Whilst he accepts that the factors identified might provide a valid basis for engaging the exemption, it would need to be shown how they apply to the specific circumstances of the request.

17. In general terms, the Commissioner understands that, where there are ongoing negotiations relating to the lease of a property, disclosure of prospective negotiating positions might be prejudicial to the effectiveness of this process. However, in this case, beyond general terms, the Council has not explained what specific form the commercial prejudice would take.

18. Given the specific context which the Council has identified to the Commissioner, it is unclear how disclosure would have a commercial impact on the negotiations in question. The Council has not explained, for example, what value the information might be to a rival prospective leaser, who such a party might be, how they might be able to involve themselves in the ongoing process and how their involvement might prejudice the process. The Commissioner is left with the impression that the Council has sought to apply the exemption on a general basis without specific consideration of the facts of the case.
19. The Commissioner also notes that the Council's submissions refer to other ongoing legal processes and that its arguments for applying section 43(2) are focused on the prejudice which disclosure would be likely to cause to these proceedings. However, the Commissioner does not consider that these factors directly relate to commercial prejudice or, at any rate, the Council has not explained how or why they are related. On the basis of the submissions provided the Commissioner does not consider that the impact of disclosure on these other proceedings are relevant to the scope of the exemption.
20. In the course of his investigation the Commissioner gave the Council opportunities to provide further submissions in support of its position, providing an indication of the level of detail required to engage the exemption.
21. The Commissioner considers that, in cases where adequate arguments are not provided, it is not his role to generate arguments on an authority's behalf. In this case, for the reasons set out above, the Commissioner considers that the Council's arguments fail to meet the evidential threshold required by the exemption.
22. The Commissioner has, therefore, concluded that the Council has failed to show that the exemption in section 43(2) is engaged in this case. He has not gone on to consider the public interest test.

Other matters

23. Although they do not form part of this notice the Commissioner would like to note the following matters of concern.

Section 45 code of practice – internal review

24. The code of practice issued under section 45 of the FOIA (the “Code”) recommends that public authorities should give requesters the opportunity to request an internal review of the handling of a request. The Code recommends that internal reviews should normally be completed within 20 working days¹.

25. In this case the Council’s response to the requester of 2 February 2024 confirmed that the option to request a review was available. The complainant wrote to request a review on 20 February 2024. The Council failed to respond to the complainant’s review request.

26. The Commissioner expects that, in future, the Council will carry out internal reviews in accordance with the recommendations of the Code.

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/744071/CoP_FOI_Code_of_Practice_-_Minor_Amendments_20180926_.pdf

Right of appeal

27. 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

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

Christopher Williams
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