

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 5 December 2012

Public Authority: London Borough of Merton
Address: Merton Civic Centre
London Road
Morden
Surrey
SM4 5DX

Decision (including any steps ordered)

1. The complainant has requested information relating to car parking at Wimbledon Park and Morden Park during Wimbledon tennis fortnight in June 2011. London Borough of Merton (the "council") provided some of the requested information but refused to provide details of income received for parking at Morden Park citing the exemption for commercial interests.
2. The Commissioner's decision is that the council has correctly applied the commercial interests exemption to the withheld information and that the public interest favours maintaining the exemption.
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. On 26 April 2012, the complainant wrote to the council and requested information in the following terms:

*"During June 2011 (Wimbledon tennis fortnight) how many vehicles were allowed to park at Morden Park and Wimbledon Park?
How much income did Merton receive for each site for the loss of residents amenities?
Were any other benefits in kind received by any Merton employee or councillor?"*

*Who overall manages the parking arrangements?
In the event of inclement weather what arrangements were/are in place to repair the ground and how would it be funded?
Which other organisations/companies are involved in the park and ride scheme and are you aware of their income?
Will you please provide the above details for June 2012 and arrangements made during the London Olympics.”*

5. The council responded on 4 May 2012. It provided the complainant with some of the requested information but refused to provide details of the income it received for car parking at Morden Park, citing the exemption for commercial interests.
6. Following an internal review the council wrote to the complainant on 29 May 2012. It stated that, in relation to its application of the commercial interests exemption it was maintaining its position. The council also confirmed that some information was also being withheld under the exemption for personal data.

Scope of the case

7. On 2 July 2012 the complainant contacted the Commissioner to complain about the way his request for information had been handled.
8. The Commissioner confirmed with the complainant that his investigation would look at whether the council correctly applied the commercial interests exemption to the withheld information.

Reasons for decision

Section 43(2) – prejudice to commercial interests

9. Section 43(2) of the FOIA provides an exemption from disclosure of 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.
10. The term 'commercial interests' is not defined in the FOIA, however, the Commissioner has considered his awareness guidance on the application of section 43. This comments that:

"...a commercial interest relates to a person's ability to participate competitively in a commercial activity, i.e. the purchase and sale of goods or services."¹

11. The withheld information consists of the income the council has received from the All England Tennis Club (AELTC) for hiring the car park during Wimbledon Tennis fortnight. The Commissioner is satisfied that the withheld information falls within the definition of a commercial activity and that it, therefore, falls within the scope of the exemption. He has gone on to consider the nature of the prejudice and its link with disclosure.

Nature of the prejudice

12. The council has confirmed that it considers that its own commercial interests would be likely to be prejudiced by disclosure of the information. The Commissioner considers that for prejudice to be "likely" to occur and for this limb of the exemption to be relied upon, the possibility of prejudice should be real and significant, and certainly more than hypothetical or remote.
13. The council has argued that disclosure of the information could prevent it from getting the highest income for the hire of the site in future negotiations with parties other than AELTC. It has stated that public knowledge of the price of hire would set a "yard stick". According to the argument proposed, every event fee is subject to negotiation and a yard stick could disadvantage the council and inhibit its ability to obtain a higher income in future negotiations.
14. The council has further argued that disclosure would also be likely to prejudice its commercial interests in obtaining a similar contract with AELTC in future negotiations. Should information about the cost of hire enter the public domain, other potential suppliers of car parking land would be able to undercut the council's bid for the contract. The council pointed to the fact that a comparable park and ride service could be provided by a number of other sites not owned by the council but of equivalent distance from AELTC to Morden Park.

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http://www.ico.gov.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/AWARENESS_GUIDANCE_5_V3_07_03_08.aspx

15. The council has argued that the risk of prejudice is real and significant as other sites were considered by AELTC before Morden Park was chosen. Disclosure of the hire cost would provide competitors with an advantage not available to the council during its own negotiations and would, therefore, prejudice its ability to progress its own commercial interests.
16. Having considered these arguments, the Commissioner accepts that disclosure of the information would be likely to inhibit the council's ability to negotiate a best value deal for hire of Morden Park. He is, therefore, satisfied that disclosure of the information would be likely to prejudice the council's commercial interests.
17. Having found that the commercial interests exemption is engaged in relation to the withheld information, the Commissioner must next consider the application of the public interest test. In weighing the balance of the public interest arguments the Commissioner has considered submissions from the complainant and the council.

Public interest arguments in favour of disclosing the withheld information

18. The complainant has argued that there are no competitors to undercut the council's ventures in respect of Morden Park. He has stated that he considers that an examination of a local map will not highlight any alternative sites that have comparable facilities or attributes.
19. The complainant has also questioned the relevance of a decision notice referred to by the council in support of its position. This decision notice, issued by the Commissioner in relation to a request made to Neath Port Talbot County Borough Council, found that the authority had correctly withheld information relating to the rents of business units on an industrial estate.² The complainant has argued that the council's arrangement in respect of Morden Park, being effectively ad-hoc for a fortnight each year, is not a comparable venture and the decision notice conclusion cannot be transposed.
20. The complainant has also argued that Morden Park is a public open space and, given that residents face the inconvenience of this facility being unavailable during the Wimbledon fortnight, it is reasonable for

² Issued 13 June 2011, ICO reference: FS50317737; published here: http://www.ico.gov.uk/~media/documents/decisionnotices/2011/fs_50317737.ashx

them to be told what financial benefit the council is accruing on their behalf. The council has also acknowledged the relevance of this public interest argument in the current case.

21. The complainant has further argued that disclosure of the information would assuage concerns that the hire amount collected by the council is not sufficient enough to warrant the inconvenience to local residents. In effect, it would demonstrate that the council is obtaining best value for local resources.
22. The council has advanced the argument that there is a presumption that all information held by the council should be in the public domain unless there are good reasons why it should not be disclosed. This is essentially a generic public interest argument in favour of transparency and accountability where public funds are involved.

Public interest in maintaining the exemption

23. The council has identified the potential loss of income which would result from disclosure as an argument in favour of maintaining the exemption. The loss of income from rental of Morden Park to AELTC each year would affect the council's ability to generate revenue, something which would have a clear impact on council tax payers. The council maintains that such an effect cannot be in the public interest.
24. Contrary to the complainant's view, the council maintains that there are a number of other rival sites which would be able to compete for the AELTC contract and it has confirmed that there are other site owners who have offered to fulfil this contract in the past. The council has also pointed to the potential loss of funds from other event contracts for hire of the site. It has argued that it relies on this income to maintain its parks and green spaces for the use of all residents within the borough and visitors to the borough. Any loss of income could result in services being reduced or cut and this would also not be in the public interest.

Balance of the public interest

25. The Commissioner accepts that there is a general public interest in openness and transparency to promote accountability in the ways the council utilises its assets and the spending of public money. He also accepts that disclosure would promote transparency in its commercial dealings. He further accepts that such openness is necessary to promote accountability in the council's decision making. These factors are strengthened in this particular instance because of the disquiet voiced by the complainant about the inconvenience caused by the council's utilisation of Morden Park.

26. However, in this instance, the Commissioner considers that the countervailing arguments provided by the council in this instance, which identify a specific and real prejudice (rival sites undercutting the council's position and the ensuing loss of public revenue) which would likely result from disclosure carry significant weight.
27. The Commissioner considers that the arguments regarding the disadvantage to the council's ability to negotiate favourable rental conditions that disclosure is likely to bring are both strong and compelling. The Commissioner has weighed this against concerns voiced by the complainant that the council might not have obtained best value in its contract with AELTC and that the revenue generated does not justify the inconvenience incurred by residents. Whilst he accepts this point has merit the Commissioner has not been provided with any evidence which suggests the council has not acted appropriately in its attempts at maximising the income brought in by its assets. He considers that it is of greater public interest and benefit that the council should be able to conduct its commercial affairs in a way that ensures council tax payers receive the most benefit from publicly owned property.
28. The Commissioner notes that the complainant disagrees that the decision notice referred to by the council provides a comparable scenario to that identified in their own request. Having viewed the notice in question, the Commissioner accepts that this relates to an authority's annual rental charges for units. However, he notes that, aside from the scope of the time period involved, the general principle of a rate for rental of a property which is unknown to competitors is transposable to the current case. The Commissioner, therefore, accepts that the council's identification of an approach taken in a previous decision is relevant to this case.
29. Having considered the facts of this case and the decision reached in the previously cited case³, the Commissioner has concluded that the balance of public interest favours maintaining the exemption and accordingly that the council's application of the section 43(2) exemption was correct.

³ Ibid.

Right of appeal

30. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

31. 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.
32. 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
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