

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 February 2020

Public Authority: The University Council
University of Bath

Address: Claverton Down
Bath
BA2 7AY

Decision (including any steps ordered)

1. The complainant requested information from the University of Bath (the University) regarding communications between the University and Bath Rugby Club about Bath Rugby's temporary stadium plans. The University refused the request under section 43(2) (commercial interests) of the FOIA.
2. The Commissioner's decision is that the University correctly applied section 43(2) of the FOIA. Therefore, the Commissioner does not require the University to take any steps as a result of this decision.

Request and response

3. On 22 December 2018 the complainant wrote to the University and requested information in the following terms:

"I would like copies of all communications between the University of Bath and Bath Rugby Club on the subject of using University land as temporary use for Bath Rugby during any development of the Rec".
4. On 23 January 2019 the University responded. It withheld the requested information under section 43(2) of the FOIA as the University considered that disclosure would be likely to prejudice its commercial interests.

5. On 24 January 2019 the complainant asked for an internal review. He said to the University that it could have supplied all of the information requested but redacted the cost figures from the documents. The complainant appealed for the issue to be reviewed and asked the University for the full details of the information requested to be made public.
6. On 20 February 2019 the University provided the complainant with its internal review outcome and maintained its original position. It stated that its decision was taken in consideration of all the factors covered by section 43 of the FOIA and of the public interest test in transparency and accountability. The University added "*especially for an organisation in receipt of public funding.*"

Scope of the case

7. The complainant contacted the Commissioner on 29 April 2019 to complain about the way his request for information had been handled. Specifically, the complainant disputed the University's finding on the public interest test.
8. The following analysis focuses on whether the exemption at section 43(2) of the FOIA was cited correctly.

Reasons for decision

Section 43(2) – prejudice to commercial interests

9. Section 43(2) of the FOIA states 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. This is a qualified exemption and is, therefore, subject to the public interest test.
10. The exemption can be engaged on the basis that disclosing the information either "would" prejudice commercial interests, or the lower threshold that disclosure "would be likely" to prejudice those interests. The term "likely" is taken to mean that there has to be a real and significant risk of the prejudice arising, even if it cannot be said that the occurrence of prejudice is more probable than not.
11. For the Commissioner to accept that prejudice *would* result, she must be satisfied that this outcome would be more likely than not.

12. The withheld information consists of correspondence between the University and Bath Rugby Club. It relates to an ongoing project concerning options for a proposed temporary stadium. Negotiations for the lease of the land is a commercial activity between the parties involved. The argument made by the University is that a disclosure of information which detrimentally affects a party's interests in this sort of activity, will fall within the scope of the exemption.
13. The Commissioner accepts on the basis of this reasoning that the information in question is commercial in nature. The next step is for the Commissioner to consider the prejudice which disclosure would or would be likely to cause and the relevant party or parties that would be affected.
14. For Section 43(2) to be engaged 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 commercial interests;
 - Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the withheld information and the prejudice to those commercial interests; and
 - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met, meaning whether there is at least a real and significant risk of the prejudice occurring.
15. With regards to the first criterion, the Commissioner accepts that the prejudice envisaged would be to the commercial interests of the parties concerned. Therefore, the Commissioner is satisfied that the first criterion is met. This is not to say that she agrees it will happen; simply that the criterion is met.
16. The University argued that disclosure of the withheld information would be likely to harm the University's business and local reputation. It argued that confidential communications from a third party about its local business development and planning issues, which have not yet been resolved and are a matter of discussion and contention in Bath, should not be disclosed. The University explained that this would associate it with ideas that it did not initiate or propose, but informally discussed with a third party whilst considering options.

17. The University believes that other external organisations would be deterred from approaching the University with possible commercial ventures, if this information were to be disclosed. This, it said, would adversely affect commercial and business possibilities, if they thought even exploratory or initial ideas and emails would be disclosed under the FOIA. If fewer organisations approached the University with initial proposals, it argued that this would prejudice its commercial interests.
18. Regarding the second criterion, the Commissioner is satisfied that the University demonstrated that some causal relationship exists between the potential disclosure of the information being withheld, and the prejudice to its commercial interests. Therefore, the Commissioner considers that the second criterion has also been met.
19. Turning to the third criterion, the University said if organisations and third parties thought differently about collaborating with, or suggesting commercial ventures to the University, that this would be likely to commercially prejudice the University. It also argued that disclosing the withheld information would be likely to damage the University's reputation and threaten the ability for it to continue to diversify its income streams, during a period which has seen a reduction of public funding to the higher education sector.
20. The University's argument is that a disclosure will affect its reputation and may dissuade other organisations from approaching it with ideas for future projects. The Commissioner therefore asked how many proposals of a similar nature it receives. It was also asked if this particular request was unique and to clarify the other kind of proposals the University receives which it considers may be affected by the disclosure of this information. In its response, the University provided details of regular approaches of a similar nature, other proposals it receives and details of the level of income the University receives from such proposals coming to fruition.
21. The Commissioner has considered these details and she accepts that the University has clearly demonstrated that the disclosure of the information, would be likely to have a detrimental impact on its commercial activities; specifically, that loss of revenue would occur through a wider loss of confidence in its ability to discuss such projects confidentially at an early stage. The Commissioner accepts that this would be likely to prejudice the University's commercial activities in this area.

22. The University informed the Commissioner that the public has access to information regarding a consultation about concept designs for the new stadium for Bath, and it referred the Commissioner to a website link¹. This consists of Bath Rugby's proposals about a temporary stadium at the University, and it said that this has been documented and is under public consultation by Bath Rugby.
23. The University understands that the public has concerns about the use of the University's land, specifically environmental matters, local resident issues, noise pollution, transport matters etc. The University explained that it publishes in advance its Masterplan, it consults the public on further development and that it holds regular Local Residents' Forums – where residents are briefed in full on its capital plans and its programme of events for campus. The University referred the Commissioner to its website link² which includes details of its masterplan and events programme.
24. The Commissioner has considered the withheld information and the existing relationship the University has with Bath Rugby. She also notes that the University has been transparent about its own development plans by consulting the public in advance and publishing its Campus Masterplan.
25. In light of the University's submissions, the Commissioner agrees that Bath Rugby would not look favourably upon the University if it released the withheld information. Specifically, due to the confidentiality Bath Rugby expected would be in place to protect its discussions with the University. There is a risk that this could affect the University's ability to maintain and form partnerships with other external organisations, in its provision of future commercial and business possibilities, if information of this sort is disclosed at an early stage in the process.
26. In this case, disclosure of the withheld information would be likely to compromise what the University considers to be an "*important*" relationship with Bath Rugby. The Commissioner understands the University's argument that it would be likely to damage the University's reputation should the withheld information be disclosed.

¹ https://www.stadiumforbath.com/wp-content/uploads/2018/12/SFB_exhibition_panels-round2_FINAL-HighRes.pdf

² <https://www.bath.ac.uk/publications/university-of-bath-masterplan-consultation-materials/attachments/university-of-bath-masterplan-consultation-event-exhibition-materials.pdf>

27. However, she also draws its attention to the fact that it has obligations under the FOIA and the Environmental Information Regulations 2004. Therefore, the University is not in a position that it can say with any degree of surety, that all such information will always be exempt.
28. The University cannot provide categorical assurances to third parties that all information provided to it in such circumstance will be held in confidence. There will be a degree of expectation that information provided to public authorities, might have to be disclosed in part or in full in response to a valid information access request on some occasions.
29. However, having viewed the withheld information and considered the arguments made, the Commissioner accepts that prejudice to the commercial interests of the University would be more likely than not to result through disclosure of the information in question. She therefore finds that disclosure of the information would result in prejudice to the commercial interests of the University and, on this basis, section 43(2) of the FOIA is engaged.

Public interest test

30. Having found that the exemption is engaged, the Commissioner has gone on to consider the public interest factors in favour of disclosing the withheld information and of maintaining the exemption. Although the Commissioner has found the section 43(2) exemption is engaged, the information may still be released if the public interest in disclosing it outweighs the public interest in maintaining the exemption.

Public interest arguments in favour of disclosing the withheld Information

31. Whilst there is a general public interest about Bath Rugby's stadium plans, the University declared that it has not received any queries or correspondence relating to this matter from other local residents or interested parties. Therefore, the University considers the public interest lies with Bath Rugby and not with the University. The Commissioner however, considers this to be a weak argument. There is a strong public interest in being transparent about a matter which will have a significant impact upon the surrounding area, regardless of the University not receiving numerous enquiries or complaints relating to the project.
32. The University argued that if no plan or proposal was made to host Bath Rugby's temporary stadium on the University's land, there can be no public interest in the requested information. The Commissioner is of the view that there is still a public interest in knowing that the plan is under discussion. This creates greater transparency over an issue which could impact residents and the local community in a significant way.

33. The University understands that the public has concerns about the use of the University's land, specifically environmental matters, local resident issues, noise pollution and transport matters. The University explained that it publishes in advance its Masterplan, it consults the public on further development and that it holds regular Local Residents' Forums – where residents are briefed in full on its capital plans and its programme of events for campus. The University referred the Commissioner to its website link³ which includes details of its masterplan and events programme.
34. The Commissioner recognises that there is a significant public interest in disclosure of information concerning any plans or formal proposals made by the University to host Bath Rugby's temporary stadium. This is a valid factor in favour of disclosure of the requested information of significant weight.

Public interest arguments in favour of maintaining the exemption

35. The University said that disclosure of confidential commercial ideas from third parties may deter other organisations from proposing future ventures, and that this would weaken the University's position and affect its future commercial relationships and ventures. Therefore, the University argued, it would be effecting a valuable and necessary income stream and the University's position in an increasingly competitive market.
36. The Commissioner recognises that there is a public interest in preventing prejudice to the commercial interests of the University. She understands that disclosure of the information could compromise the existing relationship which the University has with Bath Rugby. There is also a presumption that initial discussions might be kept confidential until plans begin to formalise, and that potentially the plans may be taken forward.
37. There is a public interest in protecting the safe space in which projects such as this are initially developed. A failure to protect that safe space risks damaging the party's commercial interests, and as the University argues in this case, any lack of safe space may deter other parties from approaching the University with their own ideas. This would damage the University's ability to gain revenue from outside projects such as this.

³ <https://www.bath.ac.uk/publications/university-of-bath-masterplan-consultation-materials/attachments/university-of-bath-masterplan-consultation-event-exhibition-materials.pdf>

Balance of the public interest arguments

38. The Commissioner accepts that there is a strong and legitimate public interest in the openness and transparency of public authorities with regard to their decision-making processes. This is because it promotes the aims of transparency and accountability, which in turn promotes greater public engagement and understanding of the decisions taken by public authorities.
39. The University has already demonstrated its openness and accountability in this case. From viewing the links which the University provided, the content shows development news and Bath Rugby's proposals about a temporary stadium at the University. Also, the Commissioner acknowledges the Local Residents' Forums which the University states it regularly holds, and its publication of its Masterplan – residents are briefed on its plans and programme of events for campus.
40. However, there is a public interest in protecting the commercial interests of the University; specifically, in protecting its income stream in an increasingly competitive market. There is also a public interest in protecting the ability of third parties to provide early, or initial ideas to the University with a degree of surety that these discussions will not be disclosed by the University whilst they retain their commercial sensitivity.
41. Given the level of likelihood that commercial harm would occur should the information be disclosed, the Commissioner has decided that the balance of public interests favours maintaining the exemption.

Conclusion

42. The Commissioner's conclusion is that the public interest in disclosure of the withheld information is outweighed by the public interest in maintaining the section 43(2) exemption. Therefore, the University was not obliged to disclose the requested information.

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: 0300 1234504

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.

Signed

Ben Tomes
Team Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF