

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 23 February 2015

Public Authority: Suffolk Coastal District Council
Address: Council Offices
Melton Hill
Woodbridge
Suffolk
IP12 1AU

Decision (including any steps ordered)

1. The complainant has requested diverse information about historical and contemporary land development within Suffolk Coastal District Council's locality. Suffolk Coastal District Council, where it holds the requested information, relied on section 43 to withhold it from the complainant.
2. The Commissioner's decision is that Suffolk Coastal District Council correctly relied on section 43, as aforesaid, and also accepts its position where it said it did not hold requested information.

Request and response

3. On 12 November 2013 and in early December 2013 the complainant wrote to Suffolk Coastal District Council ("the Council") requesting information. The requests and the Council's replies, as per FOIA, are as laid out below. (Any first person references appear in the originals.)

Request 1

Removing beach huts from Felixstowe South land about 25 years ago: in particular lost rental and Council Tax income to Councils (Felixstowe and later SCDC).

Reply

It does not hold the requested information.

Request 2

Cost of purchase of Herman de Stern in 1970s, maintenance costs during ownership, including insurances.

Reply

It does not hold the requested information.

Request 3

Cost of plan to convert Herman de Stern into a theatre facility.

Reply

It does not hold the requested information.

Request 4

Cost of demolition and reclamation of the land parcel upon which the Herman de Stern stood. Within that request I'd also like to be directed towards any documents that explain the reasoning for SCDC refusal to use insurances to rebuild.

Reply

It does not hold the requested information.

Request 5

Contract details with Bloor Homes Ltd for use of 17.6 acres of land surrounding the Martello Tower. I am interested in relationship between Bloor Homes and SCDC as this is a shared development. Information required should include details of present land ownership, who now owns that land.

Also development contracts, do the new occupants hold freehold title - and if that is the case; what title and how much has been paid for that title, and to whom? How much money will Bloor Homes pay SCDC for use of this public land, and when will any payments be made?

Reply

Under section 43(2) of the FOIA, the Council considers the information in the Development Agreement ("DA") to be exempt information and to disclose it would prejudice the commercial interests of any person, including the Council; also that, in all of the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

4. The requests made in early December 2013, now follow. To ease reference in this decision notice they have been re-numbered from the original.

Request 6

How long are Council records, Minutes etc. kept? I presume there is a variable time scale but that must be set out, in details, by the Council.

Reply

Council minutes are kept in perpetuity. For how long other records are kept will depend upon which documents you are referring to, and what the Council's retention policy in relation to them is.

Request 7

I'm told Herman de Stern cost £54,000 when purchased, not £50,000. Do you have records to confirm your cost?

Reply

The Herman de Stern building was purchased for £50,000.00 from the Secretary of State for Social Services in 1979. We have a copy of the Conveyance dated 2 April 1979 as evidence of this.

Request 8

I was informed, in answer to a request I sent at the time to the Auditor, that the Herman de Stern was insured for £1 million. A block quote would still contain the costs of the individual units; otherwise no-one would know the allocation in the event of a claim. If you cannot give individual quotes then the overall cost must be available and that should include a list of which properties are included. Please supply that.

Reply

The Council does not hold this information.

Request 9

Demolition of Herman de Stern was a single project, as far as I was aware. In any case the cost of demolishing the additional buildings included on that plot can be assessed if the total cost of that combined project is known. Please supply that information.

Reply

I can advise you that we have records which show that the total cost of demolition of Herman de Stern and Coastguard Cottages, was £140,006.00. For the purposes of section 1(a) of the FOIA we do not hold any information showing the split between the various component parts of the demolition contract.

Request 10

You touch upon land ownership. Ownership rests with Suffolk Coastal DC, you say. Yet the new owners of property will have freehold possession. In which case there can be no commercial confidentiality upon sale. I presume transfer of land ownership will take place between SCDC and each new owner? As the representatives of the people, the residents of the town, disposing of such valuable parcels of land should attract a premium. Are you saying that no money will be given to SCDC by the new owners or by Bloor Homes for freehold possession of this land?

Reply

The DA sets out the financial arrangements regarding land acquisition but these terms are confidential for the reasons set out, above. So far as the individual residential plots are concerned, transfers are affected by SCDC to individual purchasers, with the consideration being paid to Bloor. Payments to SCDC under the terms of the DA have already been made and further amounts will become payable when triggered in accordance with the DA.

Request 11

If there is to be payment to SCDC for the sale of this land - how much will be paid, by whom, and when will it be paid?

Reply

See the response to [10] above. Payments are made on completion of the sale of each plot, how much being dependant on valuations and what is agreed between the parties.

Request 12

Finally can you explain, in detail, how section 43 of the Act can now apply to this project? And what commercial interests would be at risk if that information was made public?

Reply

Please see the explanation, above

5. On 17 December 2013, after internally reviewing its decision in relation to the complainant's first request (made on 12 November 2013), the Council informed him that it upheld its reliance on section 43. It further informed him that it also relied on section 36(2)(c) to withhold the same information.
6. Notwithstanding that the complainant failed to seek an internal review of the Council's decision regarding his second information request (of early December 2013), the Commissioner used his discretion to expeditiously consider the complaint herein.

Scope of the case

7. The complainant contacted the Commissioner on 13 March 2014 to complain about the way his requests for information had been handled.

Reasons for decision

8. Section 1 of FOIA provides two distinct but related rights of access to information that impose corresponding duties on public authorities. These are:
 - the duty to inform the applicant whether or not requested information is held and, if so,
 - the duty to communicate that information to the applicant.

Requests 1, 2, 3, 4 and 8

9. The Council avers that it does not hold this information. In order to assess this assertion the Commissioner put a number of queries to the Council during his investigation. A summary of the Council's replies thereto are set out below.
10. The Council confirmed that its officers had looked in paper files held by the Council in its service areas and in its strong room, but concluded that paper records going back 25 years had not been retained.

11. Therefore the Council cannot say whether it actually had such records and in what form such information might have been held, whether on ledgers or on paper files. Nor could it say when or by whom they might have been destroyed, assuming that they existed in the first place, as staff in post in 2013 could not confirm what might have been held and when such information might have been removed. It was unable to say whether or not the Council had a retention policy in 1988 when any such records may have been created. There was no statutory requirement to keep them, so far as it was aware, even if they had been in existence in 1988.
12. As to request 2 the Commissioner notes that information regarding the "cost of purchase of Herman de Stern in 1970s" was held, as recognised by events recorded in paragraph 36 below.
13. As to request 3, in particular, such information was not held in hard copy, and it cannot say if it existed, and if so, when it might have been removed. One of its officers looked to see if it existed, but could find nothing. The officer has since retired and the Council feels that it cannot ask him about the extent of his search, beyond what has been said, here.
14. In scenarios where there is some dispute between the amount of information located by a public authority and the amount of information that a complainant believes may be held, the Commissioner, following the lead of a number of Information Tribunal decisions, applies the civil standard of on the balance of probabilities.
15. The Commissioner notes that the complainant is seeking written information which would have been generated over 25 years ago, which considerably reduces the likelihood of the information having been retained and is from a time in which records management did not have the significance within public authorities that it has since gained. The Commissioner further accepts that the Council has searched for the said information and that those searches have been fruitless. Having regard to these factors the Commissioner, on the balance of probabilities, accepts the assertion that at the time of the requests it did not hold the information sought.

Requests 5, 10 and 11

16. The Council holds this information but relies on section 43(2) to withhold it from the complainant.
17. Having considered the content of the requested information it is apparent to the Commissioner that it is not environmental information for the purposes of the Environmental Information Regulations 2004.

The requested information is concerned with the ownership, valuation and sale price of land. The Commissioner's view is that the mere title, valuation and the affixing of a sale price of land is not itself environmental information.

18. Section 43(2) states that information is exempt information if its disclosure under FOIA would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).
19. The withheld information (i.e. the DA) is a lengthy contractual document titled "Agreement for Development and Disposal" between the Council and two named limited companies ("the companies"). The Commissioner has been provided with (and viewed) a copy of the document.
20. The exemption is a prejudice-based exemption, which means that it will only be engaged if three criteria are met. First, the harm that is envisaged would, or would be likely to, occur relates to the applicable interests described in the exemption. Second, there is a causal relationship between the potential disclosure of the withheld information and the prejudice that the exemption is designed to protect against. Third, there is a real risk of prejudice arising through disclosure. Specifically, the public authority must be able to demonstrate that either disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice; 'would' imposing a stronger evidential burden than the lower threshold of 'would be likely'. The Commissioner addresses this below.
21. The Council's general position is that its commercial interests and that of the companies would or would be likely to be prejudiced by disclosing the withheld information.
22. In particular, the Council made the following points -
 - The DA itself is a live document which regulates the development of land at Martello Park, formerly known as the South Sea Front, Felixstowe.
 - It will continue as a live document for a currently indeterminate period, whilst the site is built out, which is anticipated to last for at least another two years, possibly longer.
 - It contains complex financial arrangements which relate to the value of land and payments between the parties for land.
 - To release that information might affect negotiations for the sale of land and the value of land sold.

- To release that information might affect the competitive advantage of contracting parties in developing the site.
 - To release that information might affect the Council's financial position.
 - The DA has not been released to any third parties.
 - Contracting parties have not consented to the release of the withheld information to any third parties.
 - For the Council to release it would adversely impact on the Council's reputation and the willingness of other commercial organisations to trade with the Council, and negotiate transactions of this nature, in future.
23. In addition to the above the Council also provided the Commissioner with written submissions from one of the other contracting parties confirming its belief that releasing the withheld information would likely harm its commercial interests.
24. On the balance of probabilities the Commissioner is of the view that releasing the withheld information would be likely to prejudice the commercial interests of the Council and/or the aforesaid companies. At the time of the request and refusal this phased property development was ongoing and releasing the information would likely have an adverse effect on the companies' commercial interests. The Commissioner is satisfied that it would be likely to hinder the companies' ability to secure the best commercial terms for property or plots of land to be marketed and sold in accordance with the DA. Specifically, a prospective buyer would be privy to the companies' own final obligations to the Council and be able to use the information as a lever or a helpful insight when negotiating its own terms with the companies.
25. On a wider note the Commissioner also accepts that releasing the information would be likely to hinder the Council's future commercial activity. This is because of the likely risk that the Council would be viewed as a contracting party unable to keep confidential matters as such when matters are still ongoing and/or commercially sensitive. Such a negative view of the Council may well result in fewer commercial parties being attracted to the Council for financial activity. For this, and the reasons in the preceding paragraph, the Commissioner finds the exemption afforded by section 43 engaged. Therefore he next considered the application of the public interest test.
26. Section 43 is a qualified exemption so the public interest test set out in section 2(2)(b) must be applied. That is, the information can only be withheld if the public interest in maintaining the exemption outweighs the public interest in disclosure.

27. The Council identified the following public interest factors favouring releasing the information:

- There is an inherent public interest in the Council being transparent in the arrangements which it has made in relation to the development of land, in the DA, in order to promote accountability. If the arrangements are made public, there is a strong argument that this should improve accountability and the public's confidence in those arrangements.
- There is public interest in an individual having access to the information in the DA, that helps them to understand what the arrangements are, and why the DA has been set up in that way.
- There is a public interest in disclosing information which will help to determine whether the Council acted appropriately and reasonably. It is in the public interest that as much information in relation to the development of land, using Council taxpayers' money, is available for public scrutiny as possible, so as not to undermine public confidence in the Council's processes, procedures, and decisions.

28. The Council identified the following public interest factors favouring maintaining the exemption:

- There is a strong public interest in protecting the established principles of confidentiality in commercial arrangements made between the Council and a developer about complex land transactions and public finances.
- There must be reasonable certainty relating to confidentiality and the financial and business affairs of the Council and others. Without this, the principle of confidentiality would be undermined, as would be the ability of the Council and its developer to negotiate in a full and frank manner as they would wish, if there were a risk that those negotiations would be disclosed in future.
- The parties to the DA need to be able to have a free and frank negotiation to protect their respective positions, in a confidential manner.

29. The Commissioner notes that the only valid public interest arguments in favour of maintaining an exemption are those that relate specifically to that exemption, (Christopher Martin Hogan and Oxford City Council v Information Commissioner EA/2005/0026 and 0030 ("Hogan"), paragraph 59).

30. Conversely, the Commissioner notes, the above restriction when applying the public interest test does not apply to those factors favouring the release of information. The Information Tribunal in Hogan made this point at paragraph 60 where it said:

"While the public interest considerations against disclosure are narrowly conceived, the public interest considerations in favour of disclosure are broad-ranging and operate at different levels of abstraction from the subject matter of the exemption."

31. The complainant avers that the Council under-valued the land it sold and thus the public interest requires that more specific details are known about the valuation and sale of the land.
32. The Commissioner recognises that there is a general public interest in promoting transparency, accountability and public understanding about and regarding public authorities. The FOIA is a means of helping to meet that public interest, so it must always be given some weight in the public interest test and it is accordingly relevant here.
33. In spite of the preceding paragraph the Commissioner's view is that the public interest factors for maintaining the exemption outweighs those for releasing the information. In a complicated and multi-layered land redevelopment the Council, and thus the people of its locality, rightly requires a degree of protection to ensure its commercial activities are not unnecessarily jeopardised by the releasing of information. Similarly those engaged in private enterprise are entitled to engage in commercial activity without fear of financial loss caused by releasing information it has considered commercially sensitive and confidential. Additionally the Commissioner also takes cognisance that, more widely, commercial activity does require a degree of confidentiality to facilitate it. This of course is more acute when matters are still ongoing, as is the case here.
34. As to the assertions of the complainant these are, of course, serious matters. However the Commissioner recognises that these concerns can be attended to by a member of the public making a complaint to other bodies such as the Local Government Ombudsman (or indeed the police) that can investigate such matters. This avenue of complaint and address ameliorates, to a degree, those public interest factors. Furthermore, the Commissioner has not been presented with specific and substantive evidence or arguments, specific to the circumstances of the matter, which are sufficiently strong as to outweigh those factors in favour of maintaining the exemption.
35. The Commissioner has taken into account all the circumstances of the case, and for the reasons detailed above he finds that the public interest in maintaining the exemption outweighs the public interest in disclosure. Therefore the Commissioner did not go on to consider the application of the exemption at section 36(2)(c).

Requests 6, 7 and 9

36. Regarding these requests, the Commissioner has viewed a copy of the correspondence from the Council to the complainant providing the requested information to him. The relevant correspondence is dated as follows; 2 February 2015 (request 6), 28 November 2014 (request 7) and 17 December 2013 (request 9). The information as per requests 6 and 7 was conveyed to the complainant by the Council during (and as a result of) the Commissioner's investigation.
37. The Commissioner is satisfied that the information provided by the Council sufficiently met the scope of those requests, albeit that some of it was supplied outside of the statutory timescale at section 10(1) of the Act.

Request 12

38. The Act covers all recorded information held by a public authority. The Act does not therefore cover unrecorded information. If a member of the public asks for information, a public authority only has to provide information it already has in recorded form. A public authority does not have to create new information or find the answer to a question from staff that may happen to know it. Request 12 is essentially a dialogue question from the complainant to the Council in which the complainant enquires about the Council's reliance on section 43 to withhold requested information. As such it is not a request for recorded information, rather a request that seeks information to be generated. It is therefore outside the scope of section one of FOIA.

Other Matters

39. As regards request 6, the Council ultimately provided the complainant with a copy of its retention policy, amongst other things. As per paragraph 37, the Commissioner is satisfied that the information provided met the scope of the request. However, the delay could have been prevented had the Council provided to the complainant (within the time for compliance at section 10) a web link to the appropriate pages on its website containing this information.

Right of appeal

40. 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 123 4504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

41. 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.
42. 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

Alexander Ganotis
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF