

My Ref: IGO/10-7476
Your Ref:
Contact: S Pearson
Email: information.governance@nottinghamcity.gov.uk



Nottingham
City Council

Information Governance
Resources
Loxley House
Nottingham
NG2 3HX

Tel: 0115 876 3168
www.nottinghamcity.gov.uk

Mr A Platt

Sent by email to:
request-41830-30a79a06@whatdotheyknow.com

20th April 2011

Dear Mr Platt

Re: Your appeal against the lack of response to your original request for information, IGO ref 10-7439

Thank you for your email dated 18th August 2010.

Initially please accept my sincere apologies for the substantial delay in the issuing of my reply.

I have now had the opportunity to review your original request and our response and note you appear to be dissatisfied with our application of the section 44 exemption to continue to withhold these decisions.

Originally you requested;

"I am writing to you to request copies of portfolio holders' decisions 727, 729, 730, 731 and 737 under the Freedom of Information Act. There seems to be a recent trend of announcing portfolio holders' decisions on the NCC website without publishing the decisions themselves. In the case of #727 it is claimed that the decision is exempt from publication but there is no explanation why. No such claim is made for the other unpublished decisions. Please could you therefore provide a specific explanation for the claimed exemption for publication of #727? In addition, if it is in fact claimed that the other decisions are exempt from publication please also provide specific explanations for those also. Can I add that I have emailed committee services a number of times asking for explanations on all but #737 (it has only gone up today) but for reasons known only to themselves they have not bothered to reply. There have been cases in the past where decisions have been left off the website in error".

And we responded as follows:

"The copies you have requested are exempt from disclosure under section 44(1)(a) of this act as we feel releasing the information would contravene Local Government Act 1972. However, I can provide the following answers in relation to your

specific question around what exemptions if any were applied previously and accidentally left off the website.

The decisions referred to in this enquiry are all exempt from publication. It is appropriate to include a statement of the reason for exemption from publication and this has, unfortunately, not been done in all of these cases. Arrangements have been made to include the reason for this on the website as below:

- **Portfolio Holder Decision 727 – Provision of hospitality at the Royal Centre until 31 March 2021** - This is exempt under paragraph 3 of Schedule 12A to the Local Government Act 1972 because it contains information relating to the financial or business affairs of any particular person, including the City Council and, having regard to all the circumstances, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
- **Portfolio Holder Decision 729 – Purchase of Property** - This is exempt under paragraph 3 of Schedule 12A to the Local Government Act 1972 because it contains information relating to the financial or business affairs of any particular person, including the City Council and, having regard to all the circumstances, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
- **Portfolio Holder Decision 730 – Purchase of Property** - This is exempt under paragraph 3 of Schedule 12A to the Local Government Act 1972 because it contains information relating to the financial or business affairs of any particular person, including the City Council and, having regard to all the circumstances, the public interest in maintaining the exemption outweighs the public interest in disclosing the information. It supersedes Portfolio Holder Decision 729 above.
- **Portfolio Holder Decision 731 – Sporting Activities in Nottingham** - This is exempt under paragraph 3 of Schedule 12A to the Local Government Act 1972 because it contains information relating to the financial or business affairs of any particular person, including the City Council and, having regard to all the circumstances, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
- **Portfolio Holder Decision 737 – Waste Project and Carbon Management Plan Review** - This is exempt under paragraph 4 of Schedule 12A to the Local Government Act 1972 because it contains information relating to consultations or negotiations or contemplated negotiations or contemplated negotiations in connection with a labour relations matter arising between the Council and employees of the Council and, having regard to all the circumstances, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Owing to the fact that this authority is applying an exemption to part of the information requested, please accept this as a refusal notice issued in accordance with section 17 of this Act”.

You subsequently appealed this response on 1st September 2010 stating:

“I am writing to request an internal review of Nottingham City Council's handling of my FOI request 'Portfolio Holder Decisions'. The decision states that the information is

exempt under s.44 and I understand that this is an absolute exemption. However the exemption relies in turn on sch 12A LGA 1972 and this includes an inbuilt public interest consideration. I therefore argue that a review of this decision does in effect require an assessment of the public interest in disclosure, if not under s.44 then under sch 12A. In the case of Portfolio holders decisions 727, 729, 730 and 731 I note that the following reason for non publication is given under sch 12A "...it contains information relating to the financial or business affairs of any particular person, including the City Council and, having regard to all the circumstances, the public interest in maintaining the exemption outweighs the public interest in disclosing the information." I would argue that the threshold for the public interest being with non disclosure would be extremely high.

Firstly, without the public interest qualification this exemption would potentially cover all NCC decisions which cannot be the purpose of the legislation. This implies that the use of such an exemption should very much be the exception. Secondly, there is always a public interest in the public being able to observe the business of the council, after all they pay for it, they base their votes on how well the council spends their money and secrecy is simply not consistent with these requirements of a democracy. Again, this sets the threshold extremely high for non-disclosure. NCC could consider publishing a redacted version of the decision if there are certain commercial details contained. However, information concerning the total cost and what council taxpayers get in return would, I suggest be subject to the same very high threshold of justification for non disclosure. One of the difficulties of arguing public interest is that it is difficult to do without knowing what the decisions are about. However, it is difficult to see what public interest there could be in non disclosure of a simple property transaction or a decision on sporting activities in Nottingham. In addition the decision for hospitality at the Royal Centre is a very long term contract which presumably will lock the council in for the entire length of the contract, potentially beyond the current administration remaining in power.

I do not accept that there is any public interest in keeping the details of suppliers secret, these are normally routinely published. Decision 737 has been kept from disclosure for the following reason "...it contains information relating to consultations or negotiations or contemplated negotiations or contemplated negotiations in connection with a labour relations matter arising between the Council and employees of the Council and, having regard to all the circumstances, the public interest in maintaining the exemption outweighs the public interest in disclosing the information."

Again a review should consider the public interest in non disclosure v disclosure. In this case the Carbon and Waste Management Plan has been announced with great fanfare to the press and on the council's website. There is therefore legitimate public interest as to why it is to be reviewed so soon. In addition, being a citywide initiative it is questionable as to whether it is constitutional for a portfolio holder to make such a decision and disclosure would aid an interested observer in making that judgment. Again, the council could have considered publishing a redacted decision with personnel matters removed for example. To conclude, in all these cases there is no evidence of the public interest in disclosure having been made properly. I would also remind you that the public interest is not served by saving the council or particular councillors from embarrassment, quite the opposite".

Having taken all of the above into account and in consulting with the relevant parties, my findings on reviewing this matter are as follows;

Portfolio Holder Decision 727

Having consulted with Mr R Sanderson, Managing Director of Nottingham Theatre Royal and Concert Hall, I can advise you that:

The general circulation and public availability of detailed information relating to the negotiations and outcomes of Contract Offer & Award Procedures, particularly those subject to OJEU regulation, is very strictly controlled, usually by statute or case law precedent. In the case of a Contract for the provision of Bars & Catering Services, the detailed information regarding the final outcome of negotiations is extremely commercially sensitive and therefore strictly confidential.

This is for two reasons; Firstly, if the value of the contract and therefore the actual financial return to the City Council was made public, it would significantly compromise Nottingham City Council (NCC) in any future negotiations and/or awards of this or similar contracts. NCC's likely negotiating position would be public knowledge to all and any bidders for any contracts awarded anywhere across the authority. This is obviously an untenable position that would work against NCC delivering Best Value services to and for their citizens. Secondly, if the value of the contract and therefore the actual deal offered by the successful bidder was made public, then the successful winner of this contract would be significantly compromised in all future negotiations for any catering contract across the UK if their competitors knew what terms and deals they were offering. Information therefore cannot be disclosed in this manner during the bidding process.

As a result of the above considerations I believe section 43(2) commercial interests and section 44(1)(a) prohibited by another enactment, namely Schedule 12A of the Local Government Act 1972 still apply in this case. I am satisfied that on balance and using the considerations I have outlined above, that the public interest in withholding this information is greater than in disclosure.

Portfolio Holder decision 729 and 730

Please find attached the relevant portfolio holder decision on this issue. I have not however included the annex to this report or any appendices as you do not ask for any supporting documentation within your request, therefore this information has not been considered in this review.

Please also note that decision 729 was never signed off and the final decision that eventually achieved sign off was 730. Both reports were on the same topic and therefore only report 730 has been attached.

Portfolio Holder decision 731

Please find attached the relevant Portfolio Holder Decision.

Portfolio Holder decision 737

Consideration has been given by the qualified person to this portfolio holder decision and to the potential use of the section 36 exemption – prejudice to the effective conduct of public affairs. Having looked at the material which forms the portfolio decision it is the view of the Qualified Person that they do not see any public interest argument supporting refusing access to this decision, at this point in time, and would

now support its release in response to this request. They have however asked me to point out that your request only asked for access to the Portfolio decision and not to any material generated as a consequence of this decision, therefore any materials that may have resulted as a consequence of this decision have again not been considered as part of this request.

They have also asked me to point out that the release of this information to you may lead you on to raise a query as to the completeness of the information supplied. As far as the Qualified Person understands it, the attached is the totality of the decision. The draft variation agreement makes reference to other documents – see Recitals (“WHEREAS”) (A) and (b), conditions 1.3 and 2 – these were not attached to the decision form. These documents were, presumably, not seen by the portfolio holder and have not been seen or reviewed by the Qualified Person. If you therefore subsequently require access to these documents, this request would have to be approached as a new request and any relevant exemptions to disclosure be considered in the usual manner.

As the Authority is applying exemptions to the information requested in this instance, please accept this letter as a refusal notice issued in accordance with section 17 of the Act.

On the basis of the above, I uphold your complaint in relation to the three out of four Portfolio Holder Decisions that are now being released. Further I accept that there has been an unacceptable delay in this instance and that the Council are in breach of our obligations under section 10(1) of the Act to respond to your request within a 20 working day period, for this delay I sincerely apologise.

If you remain dissatisfied after receiving this response to your initial complaint you can request an independent review from the Information Commissioner's Office at **FOI/EIR Complaints Resolution, Information Commissioner's Office, Wycliffe House, Water Lane, Wilmslow, Cheshire SK9 5AF**. You may also contact the Information Commissioner's Office by telephone on 01625 545745 or by email at mail@ico.gsi.gov.uk.

Yours sincerely

A handwritten signature in black ink, appearing to read 'S. Pearson', followed by a period.

Mrs S Pearson
Information Governance Manager
Resources