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31 May 2023

### **INTERNAL REVIEW - REFERENCE 23-012IR**

We refer to your email of 6 April 2023 where you requested an internal review under the Freedom of Information Act 2000 (FOIA) with regard to the response you received from the London Legacy Development Corporation (Legacy Corporation) in relation to your information request reference as above.

The internal review has been completed and the findings and recommendations of the internal review are as follows:

#### 1 Background

- 1.1 The original request (Ref 23-012) was received on 16 March 2023 and requested that the Legacy Corporation provide information under the Freedom of Information Act 2000 in response to a series of questions as set out below:

*“Under freedom of information legislation can you provide me the actual attendances for West Ham United for the 2022/2023 season and the previous season 2021/2022 at the London Stadium.*

*For the avoidance of doubt I am looking for the actual figures of those coming through the turnstiles and not the official published match day figure which just relates to tickets sold.”*

- 1.2 A response was sent on 6 April 2023 refusing to provide the information under FOIA section 43(2) – commercial interests as releasing the information would prejudice the commercial interests of West Ham United (WHU). The response is attached for reference in **Annex A**.
- 1.3 Your subsequent email request for an internal review was received on 6 April 2023 setting out the grounds for appeal as follows:

*"I request an internal review of 23-012.*

*I dispute that the real attendances figures are protected by commercial interests.*

*Section 43(1) provides an exemption from disclosure for information which is a trade secret.*

*Section 43(2) exempts information whose disclosure would, or would be likely to, prejudice the commercial interests of any legal person (an individual, a company, the public authority itself or any other legal entity).*

*Section 43(3) provides an exemption from the duty to confirm or deny whether you hold information, if doing so would, or would be likely to, prejudice the interests protected by section 43(2).*

*As this is not a trade secret I would like an explanation how the publication of these figures will prejudice your commercial interests*

*Do your exemptions pass the ICO prejudice test? [the\\_prejudice\\_test.pdf \(ico.org.uk\)](#)"*

## 2 Review findings:

- 2.1 The internal review has now been concluded and the findings and recommendations of the review are set out below.
- 2.2 The internal review request includes all of the subsections in relation to the FOIA s43 exemption and suggests that the information is not a trade secret (s43(1)) and also references s43(3) and the duty to confirm or deny whether the information is held.
- 2.3 The internal review panel (Panel) reviewed the initial response, and they are of the opinion that the original response clearly states that the Legacy Corporation holds the information requested, therefore s43(3) is not relevant.
- 2.4 The response also clearly states that s43(2) is the relevant section of the FOIA legislation being applied, therefore the references in the internal review request in relation to s43(1) are also considered to be not relevant.
- 2.5 It is unclear to the Panel as to why these subsections were included in the internal review request as they are not referenced in the original response. The Panel do not consider them relevant to the original response or this review and therefore the Panel will not address the s43(1) and s43(3) subsections, and references to trade secrets further in this response.
- 2.6 As mentioned above in 1.4, the original response is clear that the exemption being applied is FOIA section 43(2) – commercial interests.

*Section 43(2) - Commercial interests.*

*(2) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).*

- 2.7 The application of the s43(2) exemption is supported if releasing the information would prejudice the commercial interest of any person, not just the organisation holding it.
- 2.8 To clarify the internal review request point “I would like an explanation how the publication of these figures will prejudice your commercial interests”: releasing the information would not impact on the commercial interests of the Legacy Corporation, however, it would impact on the commercial interest of WHU and this is clearly stated in the original response.
- 2.9 The prejudice test involves a number of steps:
- One of the law enforcement interests protected by section 31 must be harmed by the disclosure.
  - The prejudice claimed must be real, actual or of substance. Therefore, if the harm was only trivial, the exemption would not be engaged.
  - The public authority must be able to demonstrate a causal link between the disclosure and the harm claimed.
  - The public authority must then decide what the likelihood of the harm actually occurring is, i.e., would it occur, or is it only likely to occur?
- 2.10 Deciding whether the prejudice would occur or is only likely to occur is important. The more certain the prejudice, the greater weight it will carry when considering the public interest. In this context the term “would prejudice” means that it has to be more probable than not that the prejudice would occur. “Would be likely to prejudice” is a lower test; there must be a real and significant risk, even if risk of prejudice occurring is less than 50 per cent. If a public authority’s handling of a request results in a complaint to the Information Commissioner, the onus will be on the public authority to demonstrate that the specified prejudice test is met.
- 2.11 As WHU are the party whose commercial interests would be harmed if the information in relation to West Ham game attendance is released, they were contacted and asked to re-consider the assessment provided for the original response and to confirm if, in their opinion, the prejudice to commercial interests was still valid. If their original assessment was still accurate, they were asked to provide further detail to support the use of this exemption and the prejudice releasing the information would have to their commercial interests.
- 2.12 The key points made by WHU in relation to why the release of the attendance figures would be likely to prejudice their commercial interests are as follows:
- 2.13 WHU are of the firm view that disclosure would prejudice their commercial interests. WHU has a commercial interest in selling tickets for matches and attracting sponsors, both of which could be prejudiced by the information on actual match attendance. The risk of prejudice occurring is real and significant and is far more than hypothetical or remote. This interest is likely to be prejudiced for the reasons summarised below:

- 2.14 WHU, along with all other Premier League (PL) clubs, are not obliged to publish attendance figures, therefore releasing this information solely for WHU would put WHU at a commercial disadvantage. It would not be in line with other comparable PL clubs and would give the other PL clubs access to WHU data without reciprocal or comparative information from these other PL clubs.
- 2.15 The specific disclosure of attendance data for individual matches distorts the comparisons made with other PL clubs who either do not publish stats for actual attendance or publish stats on a different basis. The extrapolation of data is likely to be misleading and would potentially undermine commercial efforts to attract sponsors and could also influence the secondary market for tickets i.e., touts.
- 2.16 WHU assert/contend that only they should control how they reveal their sales messaging (such as ticket sales, capacity, etc) to represent their commercial position in the market. Attendance figures also do not take into consideration the commercial success of the WHU, therefore undermining the commercial success of the Club to an external audience who would not typically have this data from other comparable Clubs.

### 3 Panel Recommendations:

- 3.1 The Panel have reviewed the original response and recognise the prejudice to WHU's commercial interests and consider the application of the FOI 43(2) – commercial interests to be valid and justifiable.

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If you are not content with the outcome of the internal review, you may appeal directly to the Information Commissioner at the address given below. You should do this within two months of our final decision. There is no charge for making an appeal.

Further information on the Freedom of Information Act 2000 is available from the Information Commissioner's Office:

Wycliffe House  
Water Lane  
Wilmslow  
SK9 5AF

Telephone 08456 30 60 60 or 01625 54 57 45

Website [www.ico.gov.uk](http://www.ico.gov.uk)

Yours sincerely

Deputy Chief Executive  
London Legacy Development Corporation

