

Downs for People public forum statement no.1: information on court case

Summary

1. This is the last chance for the Committee to provide information about the *Downs for People (DfP)* court case. Otherwise, we will refer our requests for information to the Information Commissioner's Office. More generally, the financial information that the Downs Committee publishes is inadequate and compares unfavourably with the past. This should be remedied.

Background

2. Our statement to the last Downs Committee meeting explained that *DfP* had made formal requests under the Environment Information Regulations 2004 on 27 September and 8 November last year. The Lord Mayor wrote on 14 December refusing information for the second time. We had asked the City Council to conduct an internal review, a necessary step before referral to the Information Commissioner.

3. We received the results of the review on 2 March (annex 1). The City Council's Data Protection Manager upheld the decisions not to disclose information. (She has, however, agreed to pursue an answer to our question about the licences supposedly issued in 2009 and 2013).

Next steps

4. We do not accept the Data Protection Manager's reasoning. Squandering so much money on a hopeless court case has had an obvious impact on how the Downs will be managed in future. What has been spent and why seems very clearly within the definition of environmental information under the Environmental Information Regulations 2004.

5. ***We would remind the Committee that the regulations anyway specify the minimum that must be disclosed, not the maximum the Committee can reveal if they wish.*** We would at the least expect the Committee to make clear:

- **the costs of the court case.** Our estimate of the total costs of the case is £420k, £360k of which fell on the Downs Committee. This has not been disputed, so that we suspect the costs may have been even higher. There is a reference to the costs of the case in the notes of the January Events and Finance Subgroup:

“ Make the following amendments on the minutes of 22 November 2021:

- On item 2 'Finance Update' the first bullet should read 'total overspend £273k' change Judicial Review costs to £140k.”

We can, however, see no reference to Judicial Review costs in the November minutes presented to the last meeting, nor have we seen them separately identified anywhere else. The financial report for this meeting states that the Committee is likely to spend £590k this year, compared with an initial forecast of £350k. It attributes most of the excess to the costs of defending the court case. There will have been significant expenditure in 2020/21 too.

The Committee almost certainly spent more than its usual total annual budget on the case: in accordance with the Nolan principles there should be a proper account of this expenditure.

- **its legal advice.** The Data Protection Manager decided the Committee need not reveal its legal advice because: “the issues around the Downs land are still live and ongoing” and “disclosure of the information would adversely affect the Downs Committee’s ability to defend itself in any future legal action or inquiry”. This is odd reasoning. Our court case is not live: it was discontinued in May last year on the basis of a settlement which makes resumption unlikely. There have been suggestions of a challenge by others if the Committee decides to licence further rock concerts. We assume that the Committee would not take such a decision if it were contrary to its legal advice. It must be in everyone’s interest – except lawyers looking for more hefty fees – to share the advice for which council tax payers have paid dearly.

7. If this information is not provided, we will refer the case to the Information Commissioner.

Financial information

8. As far as we can tell, the Committee is currently given almost no information on income and expenditure, just the overall totals. This contrasts with the years until 2018/19 (see Annex 2). Much more detail needs to be provided to achieve accountability.

Peter Weeks, Downs for People

17 March 2022

Annex 1: results of internal review, email of 2 March 2022

Dear Ms Carter,

Our ref 17211066

Internal Review – Environmental Information Regulations 2004 (EIR)

I am writing in response to your concerns about the Downs Committee’s handling of your request for information (our reference: 17211066) which was responded to by Cllr Steve Smith of the Downs Committee on 14th December.

I have been asked to carry out an independent review of the Downs Committee’s response to you. It should be noted that BCC provides administrative services to the Down’s Committee and are not the data controller of the requested information.

In your request to the Downs Committee, you asked for the following information:

“Downs for People seeks disclosure of any documents relating to:

- 1) *Downs for People’s* public forum statements from 2017 onwards warning that zoo parking on the Downs could be challenged in the Courts;
- 2) the five year licences for zoo parking purportedly granted in 2009 and 2013. (The licences have never been produced, nor were they referred to in answer to a subsequent Freedom of Information Act request);
- 3) publicity for the July 2019 decision to grant a twenty year licence for zoo parking;
- 4) the then Lord Mayor’s statement on 24 July 2020 that the grant of the licence to the Zoo was lawful;
- 5) Bristol City Council’s statement in July 2020 that they were not involved in the issue of the licence;
- 6) the terms under which two QCs were engaged to deal with the High Court challenge;
- 7) the legal advice given to Bristol City Council and the Downs Committee at various stages;
- 8) the possibility of an out of court settlement once the Zoo announced it would close;

- 9) the decision of the Society of Merchant Venturers to be separately represented in court;
- 10) payments to the two QCs;
- 11) other costs incurred on this case;
- 12) financial contributions to the cost of the case from the Society of Merchant Venturers;
- 13) assessments of the financial cost of the court case on other activities on the Downs;
- 14) the costs of the input by Bristol City Council's legal officers;
- 15) the consequences of the court case for procedures for making future Downs Committee decisions.”

With regards to your questions 3, 6, 10, 11, 12, 13, 14, and 15 the Downs Committee stated the information requested was not environmental information.

Under the EIR 2004 Environmental information is **any information on: the state of the elements of the environment and the interaction among these elements; factors affecting or likely to affect those elements. Environmental information is any information on:**

the state of the elements of the environment and the interaction among these elements;

factors affecting or likely to affect those elements;

measures or activities affecting or likely to affect those factors or elements, or designed to protect those elements;

reports on the implementation of environmental legislation;

cost–benefit and other economic analyses and assumptions used within the framework of those measures and activities; and

the state of human health and safety, conditions of human life, cultural sites and built structures in as much as they are or may be affected by those elements.

Any information on measures such as policies, legislation, plans, programmes, environmental agreements and activities affecting or likely to affect the elements or factors of the environment listed in the regulation will be environmental information. One of the elements listed under 2(1)(a) is land. Whilst administrative measures such as policies, plans and environmental agreements are considered environmental information there is no indication in the regulations that the costs of financing a legal case is environmental information. Legal costs information does not of itself affect the state of the elements of the environment, nor can it be a factor affecting those elements. I therefore find the Downs Committee were correct to conclude that legal costs are not environmental information and are therefore not covered by the EIR.

With regards to your questions 1, 4, 5, 7, 8, above the Downs Committee applied the following exceptions:

12(5)(b) – a public authority may refuse to disclose information to the extent that its disclosure would adversely affect the course of justice....

Material covered by LLP maybe considered “in the course of justice”. For 12(5)(b) to apply to LPP it is necessary to demonstrate disclosure would adversely affect the course of justice.

Legal Professional Privilege

DCLG v Information Commissioner & WR: “Under this exception, a public authority can refuse to disclose information to the extent that disclosure would adversely affect “the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature”.

The Information Commissioner’s published guidance on legal professional privilege states the following: “Legal professional privilege is intended to provide confidentiality between professional legal advisors and clients to ensure openness between them and safeguard access to fully informed, realistic and frank legal argument, including potential weaknesses and counter arguments. This in turn ensures the administration of justice”.

Having viewed the withheld information and received assurances from the relevant lawyers involved I am satisfied it represents communications made for the dominant purpose of giving or seeking legal advice in the context of litigation. There is no evidence to indicate that the information has lost its confidential character and I find this exception has been engaged.

The public interest test must be applied to determine whether notwithstanding engagement of the exception the public interest lies with or against disclosure.

Factors for disclosure:

Disclosure would achieve accountability and transparency. This in turn can help to increase public understanding, trust and participation in the decisions taken by public bodies. It is recognised the information requested affects the environment and this adds to the public interest.

Factors against disclosure:

In the case of *Bellamy v Information Commissioner and Secretary of State for Trade and Industry (EA/2005/0023)*, the Information Tribunal described legal professional privilege as, “a fundamental condition on which the administration of justice as a whole rests”. Disclosure of the information would undermine the important common law principle of legal professional privilege. This would in turn undermine a lawyer’s capacity to give full and frank legal advice and would discourage people from seeking legal advice.

I understand the issues around the Downs land are still live and ongoing and that to disclose the information would be prejudicial to the course of justice.

Decision:

There will always be a strong argument in favour of maintaining legal professional privilege because of its very nature and the importance attached to it as a long-standing common law concept. The Information Tribunal recognised this in the *Bellamy* case when it stated that: “...there is a strong element of public interest inbuilt into privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt interest...It is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear case...”

Whilst this does not mean that the counter arguments favouring public disclosure need to be exceptional, they must be at least be as strong as the interest that privilege is designed to protect it. Disclosure of the information would adversely affect the Down’s Committees ability to defend itself in any future legal action or inquiry. It should be able to defend its position and any claim made against it without having to reveal its position in advance.

On balance I am satisfied that it is more probable than not that disclosure of the information would adversely affect the course of justice and the public interest in disclosure does not equal or outweigh the strong public interest in maintaining the Down’s committees right to consult its legal team in confidence.

I am therefore satisfied that regulation 12(5)(b) has been properly engaged in respect of the relevant information and that disclosure would not be in the public interest.

Internal Communications

With regards to your questions 1, 4, 5, 7, 8, above the Downs Committee also applied the following exceptions:

EIR Regulation 12(4)(e) Internal communications Regulation 12(4)(e) states:

“12.-(4) For the purposes of paragraph (1)(a), a public authority may refuse to disclose information to the extent that— (e) the request involves the disclosure of internal communications.”

The EIR do not provide a definition of what is meant by ‘internal’. The Information Commissioner’s guidance on this exception defines a communication as encompassing any information which someone intends to communicate to others, or even places on file (including saving it on an electronic filing system) where others may consult it. The communications have to have taken place solely within a public body.

The information that has been withheld from disclosure is contained in emails which have only been shared within the Downs Committee. Regulation 12(4)(e) is a class-based exception, meaning the exception is engaged as long as the information constitutes ‘internal communications’. The underlying rationale behind the exception is that public bodies should have the necessary space to think in private. The emails were for internal circulation in order to assist the Downs committee members with their discussions about the issues in hand.

Despite Regulation 12(4)(e) being engaged, I am required to consider the public interest test because the information may still be disclosed if there is sufficient public interest in doing so.

Factors for disclosure:

Disclosure would achieve accountability and transparency. This in turn can help to increase public understanding, trust and participation in the decisions taken by public bodies. It is recognised the information requested affects the environment and this adds to the public interest.

Factors against disclosures:

There is a public interest in protecting the 'safe space' for public authorities. Disclosure of the withheld information would inhibit the ability of members to debate the issues and prevent a free and frank exchange of views if the contributors felt that their input would be disclosed to a wider audience.

This in turn would have an adverse impact on the Committees ability to properly and fully consider all advice, including opinions without limitations. Discussions on the subject of the Downs are still considered 'live' and on-going and it is in the wider public interest that the committee is able to allow its members to reach decisions away from external interference and distraction.

The Regulations ensure that consideration is given to what is in the Public Interest and not what is purely interesting for the Public.

With regard to your question 2 – “the five year licences for zoo parking purportedly granted in 2009 and 2013”, the committee indicated they are giving that part of your request “further consideration”. I assume you have received their substantive response to that question by now but if not please advise and I will press for an answer.

Decision

We therefore uphold the decision not to disclose part of the information that falls within scope of this request because Regulations, 12(5)(b) and 12(4)(e) EIR applies and the wider public interest lies in favour of non-disclosure.

If you are not content with the outcome of this Internal Review you have the right to apply directly to the Information Commissioner's Office for a further decision. The Information Commissioner can be contacted at:

Information Commissioner's Office Wycliffe
House Water Lane
Wilmslow
Cheshire
SK9 5AF
www.ico.org.uk

Regards

Lynne Miller

Data Protection Manager

Annex 2: financial report from 2018

Actual Result 17/18, Budget and Forecast 2018/19

In the financial year 2016/17, Bristol City Council contributed £262,000 to the Downs in accordance with the Downs Act of 1861.

In response to the budget challenges which the Council faced in 2017/18 and thereafter, the Downs Committee agreed to support the delivery of the following savings as contribution to bridging the Council's Medium Term Financial Plan budget gap -

16/17	£(262)k	(baseline)
17/18	£(200)k	(representing £62k saving)
18/19	£(100)k	(representing an additional £100k saving)
19/20	-	(representing an additional £100k saving and cost neutrality thereafter).

This report now presents:

- 1) The actual result for the full year 2017/18 (Table 1)
- 2) The budget and forecast for the full year 2018/19 (Table 2)

1. The last reported full year Forecast indicated the delivery of £141,000 savings.

The Actual full year result now confirms delivery of £160,103 savings.

£62,090 of this was treated as having met Bristol City Council's saving target for 17/18.

The balance of £98,013 has been transferred to the Downs Committee's Reserve.

The balance on the Reserve brought forward in 18/19 is now £327,358.

Table 1: Shows last Forecast 2017/18 Income and Expenditure presented alongside Actual result 2017/18.

	2017/18 Last Full Year Forecast £	2017/18 Final Full Year Actual £	Commentary
Income			
Fees - Leisure Services	171,477	178,391	Football, Team Love, Funderworld, Foodies Festival
Fees - Licensing	70,433	103,827	Zoo parking and Ladies Mile parking and ice cream concession
Commercial Rents	18,000	18,000	Annual concession for Café Retreat.
Fees - Other	27,765	18,488	S106 monies for changing rooms and goal posts, filming, photo shoots and runs.
Total Income	287,675	318,706	
Expenditure			
Employees	(207,600)	(201,833)	Includes salaries costs and non-contractual overtime related to provision of football pitches.
Premises	(15,100)	(16,639)	Includes Sea Walls inspections, emergency security works and works to dressing rooms.
Transport	(200)	(291)	Depot equipment repairs and maintenance.
Supplies and Services	(86,300)	(69,801)	Includes Biodiversity Officer, grass seed, replacement of fences at Black Rock Quarry.
Third Party Payments	(22,500)	(10,614)	Early hay cut and Avon Gorge and Downs Wildlife Project
Support Services	(17,350)	(45,227)	Includes security patrols May-September.

Sub-Total Expenditure	(349,050)	(344,405)	
Other Direct Costs	(51,144)	(51,144)	Includes grounds maintenance incurred by Parks Services, changing room cleaning costs and fleet running costs (excludes allowance for fleet renewal charges).
Indirect Costs	(25,144)	(25,144)	Includes Parks Management, Finance and Democratic Services
Employee Adjustment	17,000	-	Less: the cost of Employee time spent at Blaise and Kingsweston Estate
Total Expenditure	(408,338)	(420,693)	
Income Less Expenditure	(120,663)	(101,987)	
Plus:			
Council Contribution	200,000	200,000	
Net Position	79,337	98,013	Downs generated surplus <u>over and above</u> the £62,090 saving

2. The full year Budget for 2018/19 and first Forecast for 2018/19 is confirmed below.

Table 2: Shows proposed Budget 2018/19 Income and Expenditure presented alongside Forecast 2018/19.

	2018/19 Full Year Budget (as confirmed 22/1/18) £	2018/19 Latest Full Year Forecast £	Commentary
Income			
Fees - Leisure Services	170,126	205,126	Football, Russian Circus, Team Love, Funderworld, Let's Rock, Foodies Festival
Fees – Licensing	70,433	100,433	Zoo parking and Ladies Mile parking and ice cream concession
Commercial Rents	18,000	18,000	Annual concession for Café Retreat
Fees – Other	10,000	10,000	S106 monies, filming, photo shoots and runs
Total Income	268,559	333,559 (i)	
Expenditure			
Employees	(196,600)	(196,600)	Includes salaries costs and non-contractual overtime related to provision of football pitches
Premises	(14,100)	(37,100) (ii)	2018/19 includes contract cleaning
Transport	-	-	
Supplies and Services	(83,850)	(102,095) (iii)	
Third Party Payments	(8,500)	(8,500)	Includes early hay cut and Avon Gorge and Downs Wildlife Project
Support Services	(17,500)	(17,500)	Includes security patrols May-September
Sub-Total Expenditure	(320,550)	(361,795)	
Other Direct Costs	(39,144)	(39,144)	Includes grounds maintenance incurred by Parks Services and fleet running costs (excludes allowance for fleet renewal charges)
Indirect Costs	(25,144)	(25,144)	Includes Parks Management, Finance and Democratic Services
Total Expenditure	(384,838)	(426,083)	
Income Less Expenditure	(116,279)	(92,524)	
Plus:			
Council Contribution	100,000	100,000	
Net Position	(16,279)	7,476	Downs generated surplus/(shortfall) against relevant year's total saving (18/19 162k)

Notes:

- i) Representing incremental
£18,000 for Football
£17,000 for Team Love levy and

- £30,000 for ice-cream concessions.
- ii) Representing £23,000 for contract cleaning, servicing, opening and closing of loos.
- iii) Representing £10,000 for Sea Walls Café Planning and £8,245 for Downs Changing Rooms Feasibility Study (survey, design, structural assessment).
If the 2 investments go ahead in 18/19, £18,245 could subsequently be capitalised.