

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 2 June 2014

Public Authority: Pembrokeshire County Council
Address: County Hall
Haverfordwest
Pembrokeshire
SA61 1TP

Decision (including any steps ordered)

1. The complainant has requested a copy of the tender report and information with regard to a grant application for a named property within the boundaries of Pembrokeshire County Council ('the Council'). The Council provided some information but refused to disclose the remainder by virtue of section 43(2) of the FOIA. The Commissioner's decision is that the Council has correctly relied on section 43(2) of the FOIA in respect of most of the information. However, it should have relied on section 40(2) of the FOIA in respect of the names of some individuals within the Tender Report. The Commissioner does not require the public authority to take any steps.

Request and response

2. On 29 April 2013, the complainant wrote to the Council and requested the following information:
*"1. A copy of the tender report with regard to grant application for [named property] (Agenda item 23 cabinet 3 September 2012 refers).
2. Copy of the tender submitted by [named builders] (Agenda item 23 cabinet 3 Sept 2012 refers).
3. Copy of minutes of the Historic Commercial Property Grant Scheme Panel meeting (date unknown) where this grant application was agreed."*
3. The Council responded on 24 May 2013. It provided a copy of the minutes requested in item three of the request but refused the information in items one and two, on the basis of section 43(2) of the

FOIA as it considered disclosure would prejudice the commercial interests of any person including the public authority holding it.

4. Following an internal review the Council wrote to the complainant on 8 July 2013. It stated that it had overturned its original decision to withhold the documents requested in respect of items one and two in their entirety and enclosed redacted copies of both documents. The Council confirmed that it was continuing to rely on section 43(2) in respect of the redacted information.

Scope of the case

5. The complainant contacted the Commissioner on 5 September 2013 to complain about the way his request for information had been handled. He was not satisfied with the redactions in items one and two of his request, particularly the identities of the other tenderers in the tender report. He also questioned the absence of Bill 1 (Preliminaries and general conditions) from the copy of the Bill of Quantities (item two of his request).
6. During the course of the Commissioner's investigation the Council provided the complainant with access to all information falling within the scope of the request under the provisions of section 100F of the Local Government Act 1972 on a confidential basis by virtue of him being a Councillor and outside of the provisions of the FOIA. This also included Bill 1 from the Bill of Quantities although it should be noted that the contractor did not submit a specific Bill 1 with the Bill of Quantities and what was provided to the complainant represented a standard template without specific figures.
7. The complainant was not satisfied with the information only being provided on a confidential basis or the fact that some information continued to be redacted if he wanted to take copies.
8. The Commissioner has therefore considered whether the Council was correct to rely on section 43(2) of the FOIA in respect of the information withheld at the time of its internal review.

Reasons for decision

Section 43 – Commercial interests

9. Section 43(2) FOIA provides an exemption from disclosure of information which 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 term 'commercial interests' is not defined in the FOIA. However, the Commissioner's guidance on the application of section 43 states that:
11. *"...a commercial interest relates to a person's ability to participate competitively in a commercial activity, i.e. the purchase and sale of goods and services."*
12. The withheld information relates to the tendering process for the development of a property under the Commercial Property Grant Scheme. The Commissioner considers that information in respect of a tendering process is a commercial activity of the companies involved and the Council. He is therefore satisfied that the requested information does fall within the remit of commercial interests.
13. Section 43 is a prejudice based exemption. As with all prejudice based exemptions, there are two limbs which clarify the probability of the prejudice occurring and the public authority must decide which one it considers applicable.
14. The Commissioner considers that "likely to prejudice" means that the possibility of prejudice should be real and significant and certainly more than hypothetical or remote. On the other hand, "would prejudice" places a much stronger evidential burden on the public authority and must be at least more probable than not.
15. The Council is relying on 'would prejudice' in relation to the withheld information. It considers that disclosure of the information would prejudice the commercial interests of the owner of the property, his agent, the contractors and the Council itself. Indeed, the Council has argued that the agent's commercial interests have already been prejudiced as a result of the disclosure of information in respect of information falling within the scope of this request.

Item one - the tender report

16. The tender report highlights how much contractors would charge to carry out the works for the property under tender. This particular property was eligible for funding under the Commercial Property Grant Scheme which the Council has explained relates to an on-going grant scheme that remains open to further applications and will close either when all funds are fully allocated or on 31 March 2015, whichever is earlier.

17. The Council has disclosed the tender figures for each of the companies who submitted tenders, but has withheld the names of the companies themselves on the basis that disclosure of these details would prejudice the commercial interests of the contractors, the agent of the property owner and the Council. The Commissioner has therefore considered each of these interests separately.

The commercial interests of the contractors

18. The Council has provided evidence from a sample of the individual contractors who have argued that as their individual tender figures have already been disclosed, the disclosure of their names would reveal their individual business rates and in so doing, would allow their competitors to undercut them. The Council has also pointed out that it is possible that at least some of these companies will be looking to submit tenders for similar developments under the Commercial Property Grant scheme, but their chances of success would be diminished if their competitors were able to undercut them. The contractors have therefore objected to disclosure as they consider it would prejudice their commercial interests.
19. The Commissioner acknowledges that the companies are competing against one another in a highly competitive market and considers that disclosure of their names linked to the actual builder rates would be used by their competitors to undercut them and would therefore prejudice their commercial interests.

The commercial interests of the agent of the property owner

20. The Council has provided evidence from the agent to confirm that he considers disclosure of the names of the contractors under the FOIA would prejudice his commercial interests. The Agent relies on contractors having confidence that the confidential information that they provided to him will be treated as such. Disclosure would prejudice his ability to successfully conduct future tender exercises from his clients whether in the context of the Commercial Property Grant Scheme or not.
21. Additionally, the agent has confirmed that disclosure of some of the information relating to this request, has already damaged his commercial interests.

The commercial interests of the council

22. In respect of the Council's own commercial interests, the prejudice relates to its contractual obligations to the Welsh European Funding Office (WEFO) to deliver the Pembroke and Pembroke Dock Regeneration project, including the Commercial Property Grant Scheme.

23. The Council has explained that fulfilling these commitments can only be done with the engagement of the private sector as the funding is conditional on the requirement to generate matched funding from the private sector. The Council has further argued that there is a significant risk of the investor, as well as other investors withdrawing from the scheme if they feel they cannot conduct their business in relation to these projects on a commercially confidential basis.
24. Such failure may require the repayment of funds to the Welsh European Funding Office, including monies already spent and committed for completed work and work in progress. Without such funding, the Council would be unable to draw down the full ERDF grant and would therefore be unable to finance other elements of the Pembroke and Pembroke Dock Regeneration Project, leading to potential recovery of funds and reputational damage caused by failure to deliver a European Regional Development Fund ('ERDF') funded project.
25. Without the private investment generated from the Commercial Property Grant Scheme, the Regeneration Project would be undeliverable and would compromise the Council's efforts to prevent the town centres of Pembroke and Pembroke Dock falling into further states of disrepair.
26. The Commissioner also notes that the Council has refused to provide the names of the contract administrator, the structural engineer and the quantity surveyor. The Council has argued that disclosure of these details would prejudice the commercial interests of the owner, his agent and the Council. The Commissioner has therefore considered whether the Council was correct to rely on section 43 of the FOIA in respect of this information.
27. The Council has alleged that the relationship between the owner and his agent is confidential. However, it has not provided details of how disclosure of this information would reveal this relationship, or what prejudice would or would be likely to occur if it was revealed. Additionally, it has not provided any evidence from the third parties whose commercial interests are alleged to be prejudiced, that they have objected to disclosure.
28. The Commissioner is not therefore persuaded that the commercial interests identified would in fact be prejudiced by the disclosure of this information and does not accept that section 43(1) of the FOIA is engaged in respect of the information outlined in paragraph 26 of this notice. The Commissioner does however consider that he has a duty to consider whether these details should be disclosed under section 40(2) of the FOIA. Please see paragraphs 49 to 66 of this notice for a full consideration.

Item 2 – The Bill of Quantities

29. Item two of the request is the Bill of Quantities (tender submitted by the successful contractor). The Council provided the complainant with a redacted copy of the document but withheld the actual figures in relation to the tender on the basis that they are unique to the company in question. The Council considers that disclosure of this information would prejudice the commercial interests of the contractor, his agent, the property owner and the Council. As with the tender report, the Commissioner has considered each of these commercial interests separately.

The commercial interests of the contractor

30. The Council has provided evidence to the Commissioner that the contractor considers that disclosure would prejudice his own commercial interests. The figures provided in the successful tender contain details of his charges for various types of building work. The building industry operates in a highly competitive market with the contractor's competitiveness based on his individual rates. Disclosure of this information would allow his competitors to undercut him by the slightest of margins.

The commercial interests of the agent

31. The Council has provided evidence from the agent to confirm that he considers disclosure of this information under the FOIA would prejudice his commercial interests. The Agent relies on contractors having confidence that the confidential information that they provided to him will be treated as such. Disclosure would prejudice his ability to successfully conduct future tender exercises from the successful contractor or his other clients whether in the context of the Commercial Property Grant Scheme or not.

The commercial interests of the property owner

32. The Council has also provided evidence from the owner of the property to support its claim that disclosure of the information would prejudice his commercial interests. The Council has explained that he owns further properties within its boundaries and may therefore seek further funding from the Commercial Property Grant Scheme. His ability to do so would be prejudiced if potential contractors lost faith in his agent's ability to keep information confidential.

The commercial interests of the Council

33. The Council has argued that the disclosure of this information would prejudice its commercial interests as it would alienate private sector

interests which would ultimately result in it being unable to fulfill its contractual obligations to the Welsh European Funding Office to deliver the Pembroke Dock Regeneration Project including the Commercial Property Grant Scheme as outlined in paragraphs 22 to 25 of this notice.

34. This would also count against the Council under the project selection system for 2014-2020 ERDF projects.
35. The Commercial Property Grant Scheme is on-going and other tendering opportunities presently exist with several property owners preparing applications and seeking tenders from potential contractors. The scheme could potentially remain open until 31 March 2015 and releasing the information at this time prejudices the opportunities of the investor, agent, contractor and the Council.

In this case, the Commissioner is satisfied that the commercial prejudice outlined in the above paragraphs is real, actual and of substance and therefore considers that the Council was correct to rely on section 43(2) of the FOIA in respect of all withheld information with the exception of that outlined in paragraph 26 of this notice.

Public interest arguments in favour of disclosing the requested information

36. The Council has confirmed that it is committed to transparency and accountability with regard to the expenditure of public money as it provides the public with the means to scrutinise the use to which these funds are put.
37. The Commissioner also acknowledges the public interest in the release of information which informs the public of activities carried out on its behalf promoting wider participation and collaboration in the decision making processes.
38. The Commissioner also considers that disclosure of this information would show that the Council's tender process was followed in relation to the development of this particular commercial property.
39. The complainant however, considers that there is an over-riding public interest in the disclosure of the information. He believes that the contractor, property owner and the agent are working together to circumvent the Council's tendering process.

Public interest arguments in favour of maintaining the information

40. The Council has argued that the tender report highlights how much contractors would charge to carry out the works and revealing this information under the FOIA would seriously compromise the ability of

the agent to deal with construction contractors and the contractors' ability to compete for other works.

41. The Council has also argued that at least half of the expenditure in this case comes from private investment and has not identified a public interest in relation to the disclosure of information in relation to private funding.
42. Additionally, the Council considers that the commercial prejudice that would occur to the whole Commercial Property Development Scheme as a result of the private sector withdrawing its funding or refusing to participate in future tenders of this nature represents a significant factor in favour of maintaining the exemption.
43. The Council has also argued that the scheme has been audited by WEFO, the Welsh Government's European Funds Audit Team, (EFAT), Wales Audit Office, the European Commission and the Council's internal audit Service. Copies of the reports prepared by WEFO and EFAT were provided to the complainant prior to his request and the grant scheme was further considered by the Council's Audit Committee in January 2014 when, (as stated in paragraph 6 of this notice), it was decided to grant the complainant access to the information under section 100F of the Local Government Act 1972 on a confidential basis by virtue of him being a councillor.

The balance of public interest test

44. The Commissioner has considered the arguments in favour of disclosure and maintaining the exemption to determine where the balance of the public interest test is weighted.
45. The Commissioner agrees that there is a strong public interest in public authorities being both transparent and accountable with regard to the expenditure of public money. He also acknowledges the public interest in informing the public of activities carried out on its behalf, thereby promoting wider participation and collaboration in the decision making processes.
46. The Commissioner has also considered the complainant's concerns regarding potential discrepancies in the tendering process on the part of the property owner, agent and contractor. However, although he notes that the police are currently investigating these allegations and at the time of writing, the funding has been suspended pending an investigation of possible fraud, this is not in relation to the property subject to this complaint and is only a recent development.

47. Further, the FOIA is not the appropriate avenue via which to pursue these concerns and it is not within the Commissioner's remit to comment further. It is the responsibility of the relevant investigating authorities to determine whether or not there is any case to answer.
48. The Commissioner also acknowledges that at least half of the funding comes from private sector and is mindful that the commercial interests of the agent of the property owner have already been prejudiced as a result of disclosure of some of the information. The Commissioner also considers that there is a strong public interest in ensuring that the Commercial Property Grant Scheme is able to continue without the unnecessary or unjustified prejudice which would result from disclosure of the information. He has therefore concluded that the balance of public interest test is weighted in favour of maintaining the exemption and that the Council were correct to rely on section 43(1) of the FOIA in relation to this information.

Section 40(2) - personal information

49. Section 40(2) of the FOIA states that information is exempt from disclosure if it constitutes the personal data of a third party and its disclosure would breach any of the data protection principles.
50. In order to reach a view regarding the application of this exemption, the Commissioner has firstly considered whether the requested information does in fact constitute personal data as defined by section 1(1) of the Data Protection Act 1998 ('the DPA').

Is the requested information personal data?

51. Personal data is defined at section 1(1) of the DPA as:

"personal data means data which relate to a living individual who can be identified-

- (a) from those data,*
- (b) from those data and other information which is in the possession of, or likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual."*

52. When considering whether the information is personal data, the Commissioner has taken into consideration his published guidance: "*Determining what is personal data*".¹
53. On the basis of this guidance, there are two questions that need to be considered when deciding whether disclosure of information into the public domain would constitute the disclosure of personal data:
- (i) "*Can a living individual be identified from the data, or, from the data and other information in the possession of, or likely to come into the possession of, the members of the public?*"
- (ii) "*Does the data 'relate to' the identifiable living individual, whether in personal or family life, business or profession?*"
54. The Commissioner notes that the information withheld under this exemption is the name of the contract administrator, the structural engineer and the quantity surveyor. The Commissioner is satisfied that the names of these individuals do constitute personal data.
55. As the Commissioner is satisfied that the information outlined in paragraph 26 of this notice constitutes personal information, he has therefore gone on to consider whether disclosure would breach any of the data protection principles.

Would disclosure contravene the first data protection principle?

56. The first data protection principle requires that the processing of personal data be fair and lawful and,
- a. at least one of the conditions in schedule 2 is met, and
- b. in the case of sensitive personal data, at least one of the conditions in schedule 3 is met.
57. In the case of personal data, both requirements (fair and lawful processing, and a schedule 2 condition) must be satisfied to ensure compliance with the first data protection principle. If even one requirement cannot be satisfied, processing will not be in accordance with the first data principle.

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http://www.ico.gov.uk/upload/documents/library/data_protection/detailed_specialist_guides/what_is_data_for_the_purposes_of_the_dpa.pdf

Would disclosure be fair?

58. In his consideration of whether disclosure of the withheld information would be fair, the Commissioner has taken the following factors into account:
- a. The reasonable expectations of the data subjects.
 - b. Consequences of disclosure.
 - c. The legitimate interests of the public

The reasonable expectations of the data subjects

59. The Commissioner's guidance regarding section 40 suggests that when considering what information third parties should expect to have disclosed about them, a distinction should be drawn as to whether the information relates to the third party's public or private life.² Although the guidance acknowledges that there are no hard and fast rules it states that:

"Information which is about the home or family life of an individual, his or her personal finances, or consists of personal references, is likely to deserve protection. By contrast, information which is about someone acting in an official or work capacity should normally be provided on request unless there is some risk to the individual concerned."

60. The Commissioner's guidance therefore makes it clear that where the information relates to the individual's private life (i.e. their home, family, social life or finances) it will deserve more protection than information about them acting in an official or work capacity (i.e. their public life).
61. However, whilst the requested information relates to the data subjects' professional lives, not all information relating to an individual's professional or public role is automatically suitable for disclosure.
62. In this case, the personal information is the names of the contract administrator, structural engineer and quantity surveyor included in the Tender Report for a named property. The Commissioner notes that as the individuals represent neither of the parties in the delivery of the

²http://www.ico.gov.uk/~media/documents/library/Freedom_of_Information/Detailed_speculist_guides/PERSONAL_INFORMATION.ashx

contract, they would expect the normal corporate channels to be used to filed enquiries and would therefore have little expectation that their names would be disclosed.

Consequences of disclosure

63. The Commissioner has considered the consequences of disclosure of the information and is mindful that they could be seen as a 'lightening rod' for opponents of the contract and be put in a position of having to justify decisions made by the Council. The Commissioner also notes that information was provided to the Council in confidence and that disclosure of the names of the individuals might cause distress to the individuals concerned.

The legitimate public interest in disclosure

64. Notwithstanding the data subjects' reasonable expectations, or any damage or distress caused to them by disclosure, it may still be fair to disclose the requested information if it can be argued that there is a more compelling public interest in disclosure.
65. Although the broad general principles of accountability and transparency of public sector organisations may be applicable in this case, it is not clear what public interest would be served from disclosure to the world at large of the names of the individuals, especially given that they are employed in the private sector.
66. In weighing up the balance between the reasonable expectations of the data subjects and the consequences of disclosure of their personal information, against a general legitimate public interest in disclosure, the Commissioner considers that the balance is weighted in favour of the data subjects and considers that disclosure of the names of the individuals would breach the first principle of the DPA.

Right of appeal

67. 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: 0116 249 4253

Email: GRC@hmcts.gsi.gov.uk

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

68. 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.
69. 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

Anne Jones
Assistant Commissioner
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