

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 15 July 2014

**Public Authority:** Pembrokeshire County Council

**Address:** County Hall  
Haverfordwest  
Pembrokeshire  
SA61 1TP

### Decision (including any steps ordered)

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1. The complainant has requested a copy of the tender report and information with regard to a grant application for two named properties 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.
2. The Commissioner's decision is that Pembrokeshire County Council correctly refused to disclose some of the information withheld by virtue of section 43 of the FOIA. However, it incorrectly withheld the information outlined in paragraphs 37 of this notice and should have relied on section 40(2) of the FOIA in respect of the names of some individuals within the Tender Report.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Disclose the template details in the final accounts (Bill of Quantities) as specified in paragraph 37 of this notice.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Request and response

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5. On 5 September 2013, the complainant wrote to the Council and requested the following information:  
  
*"1. A list of tenderers for [named property A], Pembroke Dock ... refers.  
  
2. A copy of the tender report for [name property A], Pembroke Dock.....refers.  
  
3. A copy of the successful tenderer's priced Bill of Quantities for [name property A] ...refers."*
6. The complainant submitted a further request on the same day for the same information in respect of named property B.
7. The Council responded on 3 October 2013. It provided a redacted copy of both the tender report and the Bill of Quantities but refused the rest of the request by virtue of section 43 of the FOIA on the basis that disclosure would prejudice the commercial interests of the Council and a number of third parties.
8. Following an internal review the Council wrote to the complainant on 30 October 2013. The review panel upheld its original decision.

## Scope of the case

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9. The complainant contacted the Commissioner on 4 November 2013 to complain about the way his request for information had been handled. Whilst he was dissatisfied with the Council's response as a whole, he was particularly concerned at the Council's decision to only provide summaries of the detailed final accounts (Bill of Quantities) whereas it had provided a full, (albeit redacted) copy in respect of previous requests.
10. 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.
11. The complainant was not satisfied with the information only being provided on a confidential basis, 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

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### Section 43 – Commercial interests

12. 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.
13. The term 'commercial interests' is not defined in the FOIA. However, the Commissioner's guidance on the application of section 43 states that:
14. *"...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."*
15. 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.
16. 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.
17. 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.
18. 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*

19. The tender report highlights how much contractors would charge to carry out the works for the properties under tender and includes the names of the tenderers. Disclosure of an unredacted copy of these documents would therefore provide the information in respect of questions one and two of the complainant's request.
20. These particular properties were 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.
21. 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*

22. 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, yet 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.
23. 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 be likely to prejudice their commercial interests.

*The commercial interests of the agent of the property owner*

24. 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.

25. 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*

26. 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.
27. 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 match 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.
28. 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.
29. 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.
30. 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.

31. 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.
32. 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 30 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 58 to 75 of this notice for a full discussion.

*Item two – the detailed final accounts (Bill of Quantities)*

33. The Council has provided a redacted one page summary of the detailed final accounts for each of the two properties, arguing that the full detailed breakdowns contain a lot of design (in terms of materials used) and costing information. It has further argued that the materials used are a significant element in the design solution and that the solution was created due to the innovation and vision of the agent. It considers that this is what gives him his competitive advantage.
34. The Council considers that disclosure of the disputed information would prejudice the commercial interests of the owner of the three properties, the agent, the contractors and the Council.
35. The complainant however has pointed out that all pages (albeit with redactions) were disclosed to him regarding his previous request and he does not accept that withholding all but the final (summary) page of the documents engages section 43. The Commissioner acknowledges that this request was also subject to a complaint and was considered under case reference FS50513588.
36. The Council has confirmed that:  
  
*"The original tender document was a template that each company tendering for the works would have completed; the Final Account detail is unique to the contractor submitting the account."*
37. The Commissioner therefore notes that with the exception of the individual figures populating the final account documents by the individual tenders, that they are template documents produced by the Agent of the property owner for each of these properties. He is not

therefore persuaded that disclosure of the template information would prejudice the commercial interests of either the contractor, owner of the properties or even the Council. He does however accept that as it is unique to the agent that it may prejudice his commercial interests, therefore he has considered this below.

*The template final account documents and the commercial interests of the Agent.*

38. The Council considers that the template part of the document is key to the design solution of the individual projects. It has further argued that the design is created using the innovation and expertise of the agent and the materials used and their quantities are a significant element of that design. It considers that this expertise and vision is what gives the agent his competitive advantage.
39. The Council has also pointed out that the scheme remains on-going and the agent will be completing for further work from both the property owner of these properties and other property owners. The Council therefore considers that revealing the agent's design will allow others to 'steal' ideas and gain competitive advantage over the agent.
40. However, whilst the Commissioner accepts that the templates have been designed by the agent and that the scheme remains on-going, he notes that template differs for each property. It is likely therefore that the agent will need to produce a different template for any future properties. The Commissioner is not satisfied that disclosing the template part of the final account documents would reveal information which would prejudice the commercial interest of the agent and therefore considers that the Council incorrectly withheld the template information on the Final Account documents. He has therefore gone on to consider the individual data in the final account documents populated by the successful contractor, the disclosure of which the Council has argued would prejudice the commercial interests of the owner of the property, his agent, the contractor and the Council .

*The unique information in the final account documents (Bill of Quantities) - the commercial interests of the owner of the properties*

41. 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 Agent*

42. 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 Contractor*

43. 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 Council*

44. The Council considers that disclosure of the disputed information would damage its commercial interests and potentially its financial interests. It has reproduced the arguments relied on in respect of item one outlined in paragraphs 27 to 30 of this notice.
45. In respect of the unique information in the final account documents for the respective properties, the Commissioner is satisfied that the commercial prejudice outlined in paragraphs 41 to 44 of this notice is real, actual and of substance and therefore considers the Council was correct to rely on section 43 of the FOIA in respect of this information.

**Public interest arguments in favour of disclosing the requested information.**

46. 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.
47. 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.



48. 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 these particular commercial properties.
49. 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**

50. The Council has also argued that at least half of the expenditure in respect of these properties comes from private investment and has not identified a public interest in relation to the disclosure of information in relation to private funding.
51. 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.
52. 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**

53. 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.
54. 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.

55. 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.
56. 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.
57. The Commissioner also acknowledges that at least half of the funding comes from the private sector and is mindful that the commercial interests of the agent of the property owner have already been prejudice 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**

58. 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.
59. 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?**

60. 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."*

61. When considering whether the information is personal data, the Commissioner has taken into consideration his published guidance: *"Determining what is personal data"*.<sup>1</sup>
62. 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?"*
63. The Commissioner notes that the information withheld under this exemption is the name of the contract administrator, the structural engineer and the quantity surveyor in the tender reports for the two properties. The Commissioner is satisfied that the names of these individuals do constitute personal data.
64. As the Commissioner is satisfied that the information outlined in paragraph 28 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?**

65. 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.

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

66. 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.

*Would disclosure be fair?*

67. 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*

68. 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.<sup>2</sup> 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."*

69. 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).

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<sup>2</sup>[http://www.ico.gov.uk/~//media/documents/library/Freedom\\_of\\_Information/Detailed\\_speci alist\\_guides/PERSONAL\\_INFORMATION.ashx](http://www.ico.gov.uk/~//media/documents/library/Freedom_of_Information/Detailed_speci alist_guides/PERSONAL_INFORMATION.ashx)

70. However, whilst the requested information relates to the data subject's professional life, not all information relating to an individual's professional or public role is automatically suitable for disclosure.
71. In this case, the personal information is the names of the contract administrator, structural engineer and quantity surveyor included in the Tender Reports for named properties A and B. The Commissioner notes that as the individuals represent neither of the parties in the delivery of the contract, they would expect the normal corporate channels to be used to file enquiries and would therefore have little expectation that their names would be disclosed.

#### *Consequences of disclosure*

72. The Commissioner has considered the consequences of disclosure of the information and is mindful that they could be seen as a 'lightning 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 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*

73. 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.
74. 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.
75. 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. He therefore considers that this information should be withheld by virtue of section 40(2) of the FOIA.



**Right of appeal**

76. 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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

77. 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.

78. 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 .....**

**Andrew Smith**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**