

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 April 2017

Public Authority: Welsh Government
Address: Cathays Park
Cardiff
CF10 3NQ

Decision (including any steps ordered)

1. The complainant requested details of financial support that the Welsh Government agreed with a particular company. The Welsh Government withheld the information under section 43(2) of the FOIA. During the Commissioner's investigation the Welsh Government withdrew reliance on section 43 and stated that it considered sections 29(1)(b) and 36(2)(c) to apply to the requested information.
2. The Commissioner's decision is that the Welsh Government has incorrectly withheld the requested information under sections 29(1)(b) and 36(2)(c).
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - To disclose to the complainant the information that it withheld under sections 29(1)(b) and 36(2)(c).
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

5. On 24 February 2016 the complainant wrote to the Welsh Government and requested information in the following terms:

"Please provide details of the financial support agreed with Aston Martin to create 750 jobs at St Athan".
6. The Welsh Government responded on 23 March 2016 and stated that the information requested was exempt under section 43 of the FOIA.
7. On 24 March 2016 the complainant requested an internal review of the Welsh Government's handling of the request.
8. The Welsh Government provided the outcome of its internal review on 26 April 2016 and upheld its decision that the information requested was exempt under section 43 of the FOIA.

Scope of the case

9. The complainant contacted the Commissioner on 5 July 2016 to complain about the way his request for information had been handled.
10. During the course of the Commissioner's investigation the Welsh Government withdrew reliance on section 43(2) and introduced its reliance on sections 29(1)(b) and 36(2)(c). It wrote to the complainant to confirm its revised position relating to the request.
11. In view of the above, the Commissioner has considered whether the Welsh Government has correctly applied sections 29(1)(b) and 36(2)(c) to the requested information.

Reasons for decision

Background information

12. The request in this case relates to Welsh Government financial support to Aston Martin Lagonda Limited's (AML) investment to build its new luxury car at a super hangar situated in the Vale of Glamorgan¹.
13. In considering the information that falls within the scope of the request, the Welsh Government explained that it considers the term 'financial support' to mean grants or other aid awarded to a company. This would not include transactions with companies on commercial terms such as property transactions. The Welsh Government considers the term 'agreed' to mean support offered and accepted by a company.
14. The Welsh Government advised that, in this particular case, AML made an announcement about bringing its project to Wales before any formal offers of support were made and agreed. However in considering the request, the Welsh Government took into account "anything that resembled a firm proposal". As such, it considers that the information held that falls within the scope of the request in this case relates to the Repayable Business Finance grant (RBF). Although the RBF in question had not been formally offered at the time of the request, it had been referred to in discussions with the company and referenced in some documents. The Welsh Government also confirmed that at the time of the request and at the time of the Commissioner's investigation no payments have made to AML.

Section 29 – the economy

15. Section 29(1)(b) is engaged if disclosure would, or would be likely to, prejudice the financial interests of any administration in the United Kingdom, as defined by section 28(2).

The Welsh Government's position

16. The Welsh Government considers that it is in the interest of good government that there is a secure and confidential environment in which discussions and negotiations about potential packages of support for companies interested in bringing projects to Wales that create jobs.
17. The Welsh Government explained that grants to businesses are awarded on the basis of value for money relative to the benefit to the economy. The project with AML was considered to be "a very high quality project which attracted more investment".

¹ <http://www.bbc.co.uk/news/uk-wales-35640339>

18. The Welsh Government argues that section 29(1)(b) is engaged for the following reasons:

- “The prospect of disclosure....would be likely to have a prejudicial impact on the Welsh Government’s ability to achieve value for money when entering into future negotiations with companies seeking to do business in Wales, as they would have access to information that would give them an unfair advantage in discussions”.
- Individual companies always believe their company to be of a very high quality and value. Disclosure of information relating to the financial support awarded to one company would undermine the Welsh Government’s ability to secure projects at lower costs. This is because companies would “use the information released....and feel that they could demand the same level of investment in negotiations with the Welsh Government about bringing a project to Wales; in effect they would be able to hold the Welsh Government to ransom”.
- Disclosure “would be likely to have an adverse effect on the Welsh Government’s ability to negotiate the best possible commercial and grant packages on future projects. It would limit the Welsh Government’s ability to enter into genuine negotiations with companies, seriously impacting on our ability to secure value for money and when we should be seeking to leverage in as much private investment as possible. This in turn would have a negative and prejudicial impact on the Welsh Government’s ability to ensure value for money in agreeing potential support for companies for future projects and thereby prejudice the Welsh Government’s financial interests”.

19. The Welsh Government asserts that, in the past, where information about such support has been shared between companies it has “experienced difficulties in negotiations and reaching an agreement on appropriate levels of support”. However, it did not provide the Commissioner with any specific examples or evidence to demonstrate/support this point.

The complainant's view

20. The complainant does not accept that disclosure of the financial support provided to one company could be used by another to try to force the Welsh Government to provide similar levels of funding in the future.

Whilst the complainant did not provide any additional reasoning for this view, he pointed out that the Welsh Government has previously, over a long period of time, released information about the level of support provided to companies. The complainant provided the Commissioner with a number of links to news releases on the Welsh Government's website to demonstrate this point, which are below:

[Clothcat received £225k of Welsh Government funding](#) (5 December 2016)

[Amplifyfi receives £400k of Welsh Government funding](#) (24 November 2016)

[ElectoImpact receives £282k of Welsh Government funding](#) (16 November 2016)

[Ford receives £14.67m of Welsh Government funding](#) (25 September 2015)

21. The complainant accepts that the support provided to AML is likely to be on a larger scale than all of the examples provided, with the exception of the last one relating to Ford. However, he believes the circumstances in this case are no different to the examples referred to. The complainant considers that a key part of the political system is that the public are able to judge politicians on results. The complainant considers that there is an overriding public interest in knowing how large amounts of taxpayers' money is spent so that citizens and taxpayers can decide if it was a good deal or not.
22. Whilst the complainant is sympathetic to the financial interests of the Welsh Government he pointed out that it had chosen to publicise the success of bringing AML to Wales². In addition, the complainant referred to a post on the Welsh Labour Party Facebook page on 13 September 2016 taking credit for the jobs created by the project. This post is below:

"Car maker Aston Martin who are basing production of their new car in Wales thanks to the Welsh Labour Government have today announced that the first of an estimated 750 employees have been hired.

² <http://gov.wales/newsroom/firstminister/2016/160224-astonmartin/?lang=en>

Full story here:

<https://www.astonmartin.com/en/live/news/2016/09/13/aston-martin-hires-first-employees-for-welsh-factory> "

The Commissioner's position

23. In order for a prejudice based exemption, such as section 29(1), to be engaged the Commissioner considers that three criteria must be met:
- Firstly, the actual harm which the public authority alleges would, or would be likely, to occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
 - Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and
 - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – i.e., disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold the Commissioner takes the view that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority.
24. As covered in the Commissioner's guidance on section 29³, the financial interests of any UK administration may cover:
- Market trends including interest rates and the framework of monetary policy and government borrowing forecasts.
 - Information held by the regulatory bodies – for example, regulation of financial services, energy companies.
 - Government cash dealing and banking arrangements.

³ <https://ico.org.uk/media/for-organisations/documents/1177/theeconomy.pdf>

- UK reserves and foreign currency liabilities management and foreign exchange dealings.
 - Intended investment strategies.
 - Finances of public corporations.
25. With regard to the first criterion of the three limb test described above, the Commissioner accepts that the potential harm envisaged by the Welsh Government as a result of disclosure of the withheld information fits within the scope of section 29(1)(b). This is because the withheld information relates to its investment strategies.
26. The Commissioner must therefore consider whether disclosure of the information requested would, or would be likely to, prejudice the financial interests of any administration in the United Kingdom. The Welsh Government has applied the 'would be likely' threshold of prejudice to the information, and the Commissioner has proceeded with her considerations on this basis.
27. Broadly speaking, the Welsh Government's arguments are that disclosure of the requested information would be likely to prejudice its ability to enter into and negotiate future financial support with other companies on an even playing field. This is because companies would use the information and demand the same level of investment/financial support for future projects.
28. The Commissioner understands from information on the Welsh Government website that RBF represents its major programme to help fund projects delivering job creation. According to the Welsh Government's "A Guide to Welsh Government Repayable Business Finance"⁴, ('the Guide') "The level of support we offer is discretionary but will always be within state aid ceilings and no more than is necessary to enable the project to go ahead". The Guide states that application forms are only issued when an assessment has been made on its eligibility. Page 22 of the Guide explains the application process and the information that an organisation seeking to apply for an RBF grant needs to provide. This includes completing an application form

⁴ <https://businesswales.gov.wales/sites/business-wales/files/documents/Business.Wales%20Web%20-%20PDF%20-%20A%20guide%20to%20Welsh%20Government%20repayable%20finance%20-%20ENG%20-%202012-09-27.pdf>

and, in most cases it needs to be accompanied with a full business case. Additional information also needs to be provided if the amount of assistance requested is £2 million or above.

29. Pages 17-20 of the Guide explains in some detail the appraisal criteria used to assess a project's eligibility for an RBF grant. Upon submission of an application, it is assigned a case officer whose role is to appraise three key areas of information, including the project itself, the level of funding being applied for and the potential impact of the funding on the project. A variety of factors under each of these three key areas are considered when appraising an application.
30. In view of the above, it appears to the Commissioner that the process for applying for, appraising and agreeing the level of RBF grant offered by the Welsh Government is very detailed and comprehensive. The process takes into account a wide range of issues and considerations which are pertinent to each individual project/proposal. In light of the RBF grant process, the Commissioner does not accept that disclosure of the amount of RBF grant funding provided to one company would be likely to lead to other companies expecting (or demanding) the same level of investment in future negotiations with the Welsh Government. Even if a company were to demand a similar level of funding, the Commissioner considers that the comprehensive appraisal process in place would be likely to reject such a proposal.
31. In addition, the Commissioner notes the complainant's point that the Welsh Government has a history of publicising the financial support it has provided to other organisations wishing to invest in Wales. As well as the examples provided by the complainant in paragraph 21 of this notice, the Commissioner has undertaken her own research and has identified a significant number of other press releases confirming the financial support package offered to companies. The complainant raised this point in his internal review request and, to date, the Welsh Government has not explained why the circumstances in this particular case may be different.
32. The Commissioner also notes that, in relation to a similar information request in 2015, for "beneficiaries of the repayable Business Finance Scheme", the Welsh Government disclosed a list of offers accepted under £25,000 and confirmed that it publishes a monthly list of all payments made over £25,000 and provided a link to the relevant section of its website⁵. The Commissioner raised this point with the

⁵ <http://gov.wales/about/foi/responses/2015/sep15/atish9731/?lang=en>

Welsh Government who confirmed that the default position was that details of all payments over £25,000 would be published, unless there was a reason not to. As an example, if any payment over £25,000 was considered exempt under the FOIA because it was commercially sensitive then it may not be published, or it may be published in an anonymised way. The Commissioner notes that the relevant section of the website where payments over £25,000 are published includes the statement below:

“A limited number of transactions have been withheld from publication based on exemptions under the Freedom of Information Act 2000. Following a European Court ruling, agriculture subsidies paid to individuals are also not published”.

33. The Welsh Government re-confirmed that no payments had yet been made to AML. Any decision as to whether any payment to AML would be published would be made when any such payment is made.
 34. The Commissioner accepts that there is a significant public interest in disclosure of sufficient information to enable the public to assess the integrity and cost-effectiveness of government administrations. She accepts that this needs to be balanced against any damage that could arise if too much information is disclosed or after too short a time period. However in this case, the Commissioner does not accept that there is sufficient detail in the withheld document for any potential prejudice to the UK's economy to occur.
 35. The Commissioner does not consider that the Welsh Government has provided sufficient evidence to demonstrate that disclosure of the information requested in this case would be likely to adversely affect its ability to negotiate the best possible commercial deal on future projects. The Commissioner does not therefore consider that the Welsh Government has provided a sufficient link with the consequences of disclosure and the prejudice claimed. The Commissioner does not, therefore, consider that this would be likely to prejudice the economic interests of the UK by undermining a scheme designed to provide financial support to organisations wishing to invest in Wales. As she can find no causal link she concludes that the exemption is not engaged and will not consider it further.
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Section 36 – prejudice to the effective conduct of public affairs

36. Section 36 of the FOIA states that information is exempt where, in the reasonable opinion of a qualified person, disclosure would or would be likely to prejudice the effective conduct of public affairs. Section 36 operates in a slightly different way to the other prejudice based exemptions in the FOIA. Section 36 is engaged only if, in the reasonable opinion of a qualified person, disclosure of the information in question would, or would be likely to, prejudice any of the activities set out in the sub-sections of 36(2).
37. In this case the Commissioner is considering the application of section 36(2)(c) which provides an exemption where disclosure would, or would be likely to, otherwise prejudice the effective conduct of public affairs.

Is the exemption engaged?

38. In order to establish whether the exemption has been applied correctly the Commissioner has:
- Ascertained who is the qualified person or persons for the public authority in question;
 - Established that an opinion was given;
 - Ascertained when the opinion was given; and
 - Considered whether the opinion given was reasonable.
39. With regard to the first two criteria, the Commissioner has established that the opinion was given by the First Minister. The Commissioner is satisfied that, under section 36(5) of the FOIA, the First Minister is the qualified person for the Welsh Government.
40. In relation to the third criterion, as stated earlier in this notice, the Welsh Government introduced its reliance on section 36 during the course of the Commissioner's investigation. It is therefore clear that the opinion of the qualified person was not sought when the Welsh Government initially responded to the request or at the internal review stage. The Welsh Government provided the Commissioner with a copy of the submission put to the qualified person and confirmation that he agreed the engagement of section 36 on 16 November 2016. Therefore the Commissioner has taken this to be the date on which the exemption was first applied.
41. With regard to the fourth criterion, in deciding whether an opinion is reasonable the Commissioner will consider the plain meaning of that word; namely in accordance with reason, not irrational or absurd. If it is

an opinion that a reasonable person could hold, then it is reasonable for these purposes. This is not the same as saying that it is the *only* reasonable opinion that could be held on the matter. The qualified person's opinion is not rendered unreasonable simply because other people may have come to a different (and equally reasonable) conclusion. It is only not reasonable for these purposes if it is an opinion that *no* reasonable person in the qualified person's position could hold. The qualified person's opinion does not even have to be the *most* reasonable opinion that could be held; it only has to be *a* reasonable opinion.

42. The Commissioner notes that the qualified person signed his agreement to the submission which indicated that the level of prejudice claimed was the lower threshold of "would be likely" prejudice. The Commissioner also notes that the qualified person was provided with all the information within the scope of the request, was informed which specific limb of the exemptions his opinion was being sought on and he was provided with reasons for the exemption being engaged.
43. The submission to the qualified person explained that the information was initially considered to be exempt under section 43 of the FOIA, and this position was upheld at the internal review stage. It confirmed that, following the complaint to the Commissioner, it was considered that section 43 had been applied inappropriately. The submission explained that the information was, instead, considered to be exempt under section 29(1)(b) and section 36(2)(c).
44. The submission explained the reasons why section 36(2)(c) was considered to apply. Having considered the wording in the submission the Commissioner notes that it contains almost identical wording/phrases as the Welsh Government's representations in respect of its application of section 29(1)(b) of the FOIA. In correspondence with the Commissioner, the Welsh Government did provide additional representations relating to the application of section 36(2)(c) over and above what was contained in the submission to the qualified person. However, broadly speaking, these additional representations, again, are almost identical to the representations provided in relation to the application of section 29(1)(b).
45. The Commissioner's approach to section 36(2)(c) is that it should only be cited where none of the other exemptions in part II of the FOIA are relevant. In *McIntyre v Information Commissioner and the Ministry of*

Defence (EA/2007/0068, 4 February 2008)⁶, the Information Tribunal supported the view that section 36(2)(c) is intended to apply to cases not covered by another specific exemption. As such, if section 36(2)(c) is used in conjunction with any other exemption, the prejudice envisaged must be different to that covered by the other exemption.

46. In this case, the Welsh Government has failed to provide sufficient detail and explanation as to why it considers disclosure in this case would be likely to otherwise prejudice the conduct of public affairs. This is because its representations regarding the engagement of section 36(2)(c) are almost identical to its representations regarding the engagement of section 29(1)(b). They refer to the same prejudicial effects ie that disclosure would be likely to prejudice the Welsh Government's ability to negotiate the best possible commercial deal on future projects. In light of this the Commissioner has no option but to conclude that the qualified person's opinion is not reasonable. It follows that the Commissioner does not find section 36(2)(c) engaged.

⁶ <http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i99/McIntyre.pdf>

Right of appeal

47. 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

48. 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.
49. 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

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