

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 8 February 2018

Public Authority: Ceredigion County Council
Address: Penmorfa
Aberaeron
SA46 0PA

Decision (including any steps ordered)

1. The complainant has requested information about the costs of Aberystwyth bandstand. The Council withheld the information requested under sections 41 and 43(2) of the FOIA. During the course of the Commissioner's investigation, the Council withdrew reliance on section 41 but maintained the information was exempt under section 43(2) of the FOIA. The Commissioner's decision is that the Council has incorrectly applied section 43(2) to some of the withheld information. However, the Commissioner considers that some information relating to one part of the request has been appropriately withheld under section 43(2) of the FOIA.
2. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the information that falls within the scope of parts 1 and 3 of the request.
3. 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

4. On 2 February 2017 the complainant wrote to the Council and requested information in the following terms:
 1. *Has the cost of the bandstand gone above the original anticipated price?*
 2. *If so, by how much and why?*
 3. *If there's been additional costs to pay where will the money come? Is it something that the council can receive assistance from the Welsh Government for or will it be coming from the council's budget?"*
5. The Council responded on 17 March 2017 and stated that the information requested was exempt under sections 41 and 43(2) of the FOIA.
6. On 20 March 2017 the complainant requested an internal review of the Council's application of sections 41 and 43.
7. The Council provided the outcome of its internal review on 12 April 2017. The Council upheld its position that sections 41 and 43 applied to the withheld information.

Scope of the case

8. The complainant contacted the Commissioner on 13 April 2017 to complain about the way his request for information had been handled.
9. During the course of the Commissioner's investigation, the Council withdrew reliance on section 41 of the FOIA, but maintained that the information requested was exempt under section 43(2) of the FOIA.
10. The Commissioner considers that the scope of this complaint is to consider whether the Council has correctly applied section 43(2) of the FOIA to the withheld information.

Reasons for decision

Background

11. The request in this case is for information about the costs associated with the re-development of Aberystwyth bandstand. The Council advised that the project was supported by the Welsh Government funded Aberystwyth Regeneration Area Initiative. Following a public consultation exercise in December 2011, the Council commissioned Capita Symonds to consider how to obtain maximum regeneration effect from various options available and to recommend a preferred option to take forward. The consultancy team determined that a new building provided the greatest contribution to achieving the objectives of the Promenade Regeneration Strategy.
12. Originally a scheme was proposed to build a two storey building but later amended to a single storey building which aligned itself more with the results of the consultation process and the funding available via Welsh Government grants and the Council's finance arrangements. The old bandstand building within the original perimeter wall was subsequently demolished and, with financial help from the Welsh Government, a new contemporary, purpose-designed bandstand and seawall erected in its place.
13. The Council ran a competitive tender exercise for the scheme and the successful tenderer was awarded an industry standard JCT (Joint Contracts Tribunal) Intermediate form of contract. Work started on site in January 2015 and was completed in April 2016.

Section 43 – commercial interests

14. Section 43(2) of the 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).
15. Broadly speaking, section 43(2) protects the ability of a party to participate competitively in a commercial activity, for example the purchase and sale of goods or services. The successful application of section 43(2) is dependent on a public authority being able to demonstrate that the following conditions are satisfied –
 - Disclosure of the requested information would, or would be likely to, prejudice the commercial interests of any party (including the public authority holding it).

- In all the circumstances, the weight of the public interest in maintaining the exemption outweighs the public interest in disclosure.

16. The Council considers that disclosure of the information requested in this case would be likely to prejudice its own commercial interests and those of the contractor. The Council confirmed that it had entered into a confidential commercial settlement agreement with the contractor in this case regarding the Aberystwyth bandstand project.

The Council's own interests

17. The Council considers that disclosure would be likely to prejudice its own commercial interests. The Council contends that if it disclosed details of the settlement amount, the reasoning why adjudication came about and why that settlement amount was reached, contractors would be less likely to consider tendering for contracts in the future because *"they would be aware that if matters escalated to Adjudication then any settlement terms would potentially not be confidential"*.

18. The Council pointed out that the pool of contractors in its area is limited and as such knowledge that *"settlement agreements may be breached by the Council would be known amongst contractors which would make the Council's bargaining position for future contracts weaker"*. If the Council's bargaining position is weakened, it would then be forced to look further afield for contractors in the future. This would prejudice the Council's own commercial interests as contract costs would likely increase due to contractors having to bring in equipment and workers from further afield.

The contractor's commercial interests

19. In respect of the contractor's own commercial interests, the Council provided the Commissioner with evidence that it had consulted with the contractor at the time of the request. The Council also provided the Commissioner with a copy of the detailed representations submitted by the contractor, along with a copy of the settlement agreement between parties.

20. The contractor considers that disclosure of the information requested in this case could impact on its ability to be listed as potential tenderers if it became known that it was put in a position to bring action to recover monies from a client *"without the full facts been [sic] disclosed"* as to why it was put in such a position. This would in turn affect its commercial interests and business reputation.

21. The contractor clearly stated that it neither consented to nor agreed to the setting aside of the confidentiality provisions to enable the Council to

disclose any information relating to the settlement agreement. The contractor also asserted that it would hold the Council accountable for any loss of business, loss of opportunity and damage to their reputation which may result should information be disclosed in breach of the provisions of the settlement agreement.

22. The contractor referred to the confidentiality provisions within the settlement agreement and pointed out that they were included within the agreement to protect the commercial and business interests of both the Council and itself. The contractor also indicated that if the Council disclosed matters relating to the settlement agreement in breach of the provisions with it, it would be entitled to reserve its rights, including its rights to "provide an appropriate response" in respect of any information disclosed.

The Commissioner's position

23. In order for a prejudice based exemption such as section 43(2) 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 – ie disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold the Commissioner considers 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 to discharge.
24. The Commissioner is satisfied that the nature of prejudice envisaged to the Council and the contractors interests are ones that fall within the scope of the exemption provided by section 43(2).
25. The Commissioner notes that the Council entered into a settlement agreement with the contractor in question in relation to the contract that

was agreed for the redevelopment of Aberystwyth bandstand. She also notes that the settlement agreement includes a confidentiality clause to keep the terms of the settlement between the parties confidential. However, having had sight of the withheld information provided by the Council, the Commissioner is not satisfied that all of the information request in this case falls within the scope or provisions of the settlement agreement. The only part of the withheld information which is contained within the settlement agreement relates to part 2 of the request.

26. The Council's submission to the Commissioner makes no reference to any specific elements of the withheld information in relation to the prejudice it envisages. Further, it is not clear to the Commissioner whether the Council provided the contractor with the actual withheld information relevant to the request at the time it consulted with them. The arguments advanced by both the Council and the contractor appear to relate specifically to the settlement agreement. Despite asking the Council for further information to justify its position as to how disclosure of the withheld information, particularly the information relating to parts 1 and 3 of the request would be likely to prejudice any party's commercial interests, the Council failed to advance any further arguments.
27. In light of the above, the Commissioner does not consider that the explanations given by the Council sufficiently demonstrate a causal link between disclosure of information held relevant to parts 1 and 3 of the request and the stated prejudice to commercial interests. The Commissioner therefore finds that section 43 is not engaged in respect of this information.
28. The Commissioner has gone on to consider whether the Council's representations in terms of the nature of the prejudice envisaged in relation to information held relevant to part 2 of the request.
29. The Commissioner is prepared to accept that disclosure of the withheld information is likely to cause harm to both the Council's and the contractor's commercial interests. She agrees that it is logical to argue that settlement agreements are a mechanism by which parties can settle disputes or disagreements relating to contracts in private. The Commissioner accepts the Council's view that disclosure of confidential information contained within the settlement agreement may result in companies being less likely to enter such agreements with the Council in the future. This could in turn limit the pool of contractors available to the Council and/or increase the costs of such projects in the future.
30. The thrust of the contractors arguments appear to be that disclosure of the specific information requested in this case, without the full background and facts of the matter in question could impact on its

ability to tender for such contracts in the future. The Commissioner understands that the settlement agreement was made following negotiations between the Council and the contractor over a period of time. The Commissioner is not aware of the full background to the negotiations in question but she is prepared to accept the contractor's view that disclosure of the withheld information relating to part 2 of the request has the potential to adversely impact on the contractor's commercial interests.

31. In reaching a view as to whether there is some causal link between disclosure of the withheld information relevant to part 2 of the request and any harm occurring to the Council and/or the contractor's commercial interests the Commissioner has taken into account the fact that the request was made fairly soon after the settlement agreement was made in December 2016 and that it contained specific provisions to keep the terms of it confidential. The Commissioner is therefore satisfied that section 43(2) is engaged in relation to the information in question.

Public interest test

32. The exemption under section 43(2) of the FOIA is qualified which means that the information in question should only be withheld where the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosure

33. The Council acknowledges the general public interest in promoting transparency and accountability in the use of public funds.
34. The Council also accepts that there is a need for *"proper scrutiny of local government actions in carrying out its functions and the effective and efficient use of public money."*
35. The Commissioner considers that there is clear interest in knowing how public funds are spent. In addition, the Commissioner believes that there is a public interest in knowing that the oversight process in monitoring contracts and disputes is effective, which should in turn build public confidence in the handling of such issues.
36. On receipt of the Council's refusal notice, the complaint submitted some counter arguments in response to the Council's representations in favour of maintaining the exemption which are covered in paragraph 38 below.

Public interest arguments in favour of maintaining the exemption

37. The Council submitted the following arguments in favour of maintaining the exemption at section 43:
- a. It is not in the public interest for local authorities to break contracts and agreements.
 - b. Disclosure of sums of money confidentially settled during arbitration proceedings would result in companies being less likely to provide confidential or commercially sensitive information in the future. This would in turn undermine the Council's ability to agree contracts in the future.
 - c. Disclosure would make litigation likely, with the resulting associated expenses involved in such litigation.
 - d. Disclosure would adversely affect the Council's bargaining position in the future because the pool of contractors in the area is limited. The Council would then be forced to look further afield for contractors, which would likely increase the costs of contractors and equipment being transported to the area.
 - e. If the Council does not utilise local businesses and has to look further afield for contractors there would be an adverse effect on the local economy. This would undermine the objective in its strategic plan to create *"Conditions and opportunities to allow the economy and local business to develop and prosper"*.
 - f. The Council pointed out that the request in this case has been submitted by a local newspaper rather than an individual requestor. The Council considers that there is a distinction between *"information which may be of interest to the public, as distinct from information which is in the public interest"*. It added that media coverage of an issue does not necessarily mean that there is a public interest at stake.
 - g. The Council does not consider that there are any procurement or policy issues involved in this case. Rather, it relates to the use of public funds to restore a bandstand which was damaged by storms. The Council stated that *"In this sense the work, purpose of spending and provisions is for an open, visible and accessible public benefit rather than some remote, indirect or opaque scheme."*

- h. The Council recognises that the public interest is not weakened or displaced by another means of scrutiny. However, it pointed out that in this case, scrutiny and accountability of the matter has been undertaken as the matter has been fully considered by its Audit Scrutiny Committee.
38. In response to the Council's arguments in favour of maintaining the exemption, the complainant raised the following points
- (i) The argument that disclosure would adversely affect the Council's bargaining position is *"utterly specious and taken to extremes could lead to the council refusing to make any details of the cost of a contract public, completely abandoning any transparency in how the council's budget is spent"*.
 - (ii) The Council's argument about having to go further afield to find contractors in the future which would lead to higher costs and an adverse effect on the local economy is misleading as the contractors for the scheme in this case are based in Pembrokeshire.
 - (iii) The Council's argument that there are no procurement or policy issues relevant to this case is incorrect. The Council has admitted that it has been in dispute with the contractors about the project. This in itself demonstrates at the least there is a procurement or policy issue. It is in the public interest that details concerning the dispute and the financial implications of such are made public to increase confidence in the handling of such large scale schemes.
 - (iv) There is a public interest in transparency and accountability given the scheme involved a considerable amount of public money.
39. The Council addressed the complainant's points in correspondence to the Commissioner. In terms of point (i) the Council pointed out that the information in this case does not merely relate to a public contract, but rather a confidential settlement agreement. A decision around disclosure of the information in this case does not affect cost details in any other Council contract. In respect of point (ii) the Council explained that whilst the contractor in question is based Pembrokeshire, local and distant labour was utilised during the project. With reference to point (iii) the Council reiterated that the settlement agreement did not relate to the process of procuring the contractor's services. Rather, the matter was essentially a contractual dispute which did not compromise the scheme which had already been completed satisfactorily. The Council also confirmed that it had taken into account the public interest in

transparency and accountability in respect of the effective and efficient use of public money.

The balance of the public interest test

40. The Commissioner considers that there is a public interest in openness and transparency, and in accountability for the efficient use of public funds.
41. She also accepts that disclosure of the information requested in this case would provide members of the public with information about the nature of the dispute which led to the settlement agreement. This would in turn increase public confidence in the handling of such large scale schemes.
42. The Commissioner considers that there is a public interest in not disclosing information which would be likely to disadvantage private companies in bidding for contracts with public authorities. She accepts that the settlement agreement was made following a period of negotiations between the Council and the contractor and is subject to an explicit clause to keep the terms of the agreement and the substance of negotiations leading to it confidential. The Commissioner has also taken into account the fact that the request in this case was made fairly soon after the settlement agreement was made.
43. Based on the evidence provided, the Commissioner accepts that it is likely that disclosure of the withheld information may result in companies being less likely to enter such agreements with the Council in the future. This in turn could limit the pool of contractors available to the Council and it is also likely to lead to increased litigation costs, which is not in the public interest.
44. Having taken into account all of the public interest arguments for and against disclosure of the withheld information, the Commissioner has concluded that the public interest in maintaining the exemption outweighs the public interest in disclosure in all the circumstances of this case.

Right of appeal

45. 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

46. 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.
47. 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

David Teague
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