

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 February 2022

Public Authority: The Vale of Glamorgan Council
Address: Civic Offices
Holton Road
Barry
Glamorgan
CF63 4RU

Decision (including any steps ordered)

1. The complainant has requested a copy of the winning tender submission for the Weltag Appraisal: Barry Docks Transport Interchange (Ref AUG342470). The council applied section 43(2) (prejudice to commercial interests) and refused the request. The complainant accepted that some types of information would be commercially sensitive and therefore narrowed the scope of his request. The council, however, upheld its decision for the remaining information after its review.
2. The Commissioner's decision is that the council was not correct to apply section 43(2) to withhold the information.
3. The Commissioner requires the council to take the following steps to ensure compliance with the legislation.
 - To disclose a copy of the withheld information to the complainant, without information on commercial rates, staff names, survey costs and client contacts.
4. The council 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 19 August 2020, the complainant wrote to the council and requested information in the following terms:

"a copy of the Winning Tender submission for Weltag Appraisal: Barry Docks Transport Interchange (Ref AUG342470)"
6. 'WelTAG' refers to the Welsh transport appraisal guidance¹.
7. The council responded on 16 September 2020. It said that the information was exempt from disclosure under section 43(2) of the FOI Act (commercial interests).
8. On the same day, the complainant asked the council to carry out an internal review of its decision. In his request for review he narrowed the scope of his request. He said that he understood that some information, such as commercial rates, staff names, survey costs and client contacts, were genuinely sensitive and could be redacted. But he argued that the remaining areas of the tender, namely information relating to methodology, programme, appreciation of key issues and company experience should be disclosed. He argued that it was the normal standard for information such as this to be disclosed where commercial tenders of this nature are concerned.
9. The council wrote to the complainant on 13 October 2020 informing him that as the issues involved were complex it was still considering its position.
10. Following its review, the council wrote to the complainant on 2 December 2020. It upheld its initial decision that all of the information was exempt under section 43(2).

¹ <https://gov.wales/welsh-transport-appraisal-guidance-weltag>

Scope of the case

11. The complainant contacted the Commissioner on 3 December 2020 to complain about the way his request for information had been handled.
12. He considers that the council was not correct to withhold all of the data under section 43(2).
13. As noted in paragraph 8, the complainant narrowed the scope of his request for information by accepting that some types of information could be redacted. The council therefore did not submit any arguments to the Commissioner for withholding these types of information from disclosure.
14. The Commissioner therefore considers that these types of information fall outside the narrowed scope of the request. He has not, therefore, considered these further within this decision notice. The following analysis therefore excludes consideration as to whether the following types of information should be disclosed: commercial rates, staff names, survey costs and client contacts.
15. The complainant also asked the Commissioner to consider the time which the council took to provide its response to his request for review.

Reasons for decision

Background information

16. The council's website² confirms that the aim of the proposed Barry Docks Transport Interchange is to provide a bus and taxi interchange, enhance station access and facilities to accommodate increasing numbers of people using an increased number of trains, each with increased seating capacity, which will stop at Barry Docks Station from 2023 onwards.

² <https://www.valeofglamorgan.gov.uk/en/living/transportation/Barry-Docks-Transport-Interchange.aspx>

Section 43(2) – Commercial interests

17. Section 43(2) states that:

"Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it)."

18. The term 'commercial interests' is not defined in the FOIA; however, the Commissioner has considered her guidance on the application of section 43, which clarifies that:

"A commercial interest relates to a legal person's ability to participate competitively in a commercial activity. The underlying aim will usually be to make a profit. However, it could also be to cover costs or to simply remain solvent."

19. In order for a prejudice-based exemption, such as section 43, to be engaged the Commissioner believes 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 considers that the chance of prejudice occurring 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. The anticipated prejudice must be more likely than not.

³ <https://ico.org.uk/for-organisations/foi-guidance/section-43-commercial-interests/>

Does the information relate to a person's commercial interests?

20. The information withheld in this case is a copy of the winning tender submission for the council's Weltag Appraisal: Barry Docks Transport Interchange.
21. Tenders are part of a commercial procurement process; a competitive process to provide services to another party. The council has said that a disclosure of the information would be likely to impact upon Amey's competitiveness in future tenders if the information were to be disclosed.
22. The Commissioner accepts that the interests in question are therefore the commercial interests of the successful tendering company, Amey.

The likelihood of the prejudice occurring

23. In order for the exemption to be engaged it is necessary for it to be demonstrated that a disclosure of the information would result in some identifiable commercial prejudice which would, or would be likely to, affect one or more parties.
24. The Commissioner has been guided on the interpretation of the phrase "would, or would be likely to" by a number of First-tier Tribunal (Information Rights) ("the Tribunal") decisions. The Tribunal has been clear that this phrase means that there are two possible limbs upon which a prejudice-based exemption can be engaged; i.e., either prejudice 'would' occur, or prejudice 'would be likely to' occur.
25. With regard to 'would be likely to' prejudice, the Tribunal in *John Connor Press Associates Limited v The Information Commissioner (EA/2005/0005)* confirmed that "the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk" (Tribunal at paragraph 15).
26. With regard to the alternative limb of 'would prejudice', the Tribunal in *Hogan v Oxford City Council & The Information Commissioner (EA/2005/0026 & 0030)* commented that "clearly this second limb of the test places a stronger evidential burden on the public authority to discharge" (Tribunal at paragraph 36).
27. The Council argues that a disclosure of the information 'would be likely to' prejudice the commercial interests of Amey Consulting (Amey).

The causal relationship

28. The council argued that a disclosure of the information would be likely to prejudice Amey's position in respect of any future tenders. It considers that it would divulge Amey's way of working, their methodology and their approach to the project.
29. It argues that these are individual to the tenderer. It said that: *"a winning tender document may be considered to have commercial value on the basis that it has been successful and would show a methodology and information/programme and an appreciation of the key issues. All of which would have been compiled by and at the cost of a third party commercial organisation. If placed in the public domain others may be able to utilise this methodology and knowledge of what needs to be included without such costs or substantially diminished costs."*
30. The council therefore argued that a disclosure would disadvantage Amey by allowing its competitors to copy its strategies and/or amend their own future tenders to counter any areas where Amey currently provides a more competitive element. This would make Amey's tenders less likely to win future tendering exercises as its stand out features would have been copied and used by its competitors, whereas otherwise, they would not have been able to do this.
31. It explained that it was highly likely that Amey would submit future tenders for similar contracts, and disclosing its tendering strategies would put it at a competitive disadvantage compared to other companies because of this.
32. It noted from its refusal arguments that:

"I have also had regard to the Public Contract Regulations 2015. This provides a section on publication and transparency. It provides for certain information to unsuccessful tenders however it makes no provision for the release of a successful tender. Even with this however, like the Freedom of Information Act it provides an exemption if the information would prejudice commercial interests. Given this legislation is relatively recent and specifically governs information provision in relation to tenders I consider it appropriate."
33. The council further argued that the council's difficulty is that, as a public authority, it is subject to statutory regimes which govern the release of data. It considers that there is nothing in the statutory schemes which governs it which provides for release of information on 'common practice' grounds which it could rely upon to override the statutory schemes. It argued that organisations may provide such information on a voluntary basis, but they could not be compelled to do

so, and accordingly that it would be at the discretion of those organisations.

34. The Commissioner disagrees with this argument, and will elaborate further in her analysis below.

The complainant's arguments

35. The complainant argues that the council has applied a blanket use of section 43(2) to information which would generally be disclosed. He considers that it is standard practice for the information he has outlined to be disclosed in response to FOI requests, subject to the redaction of the areas which he has also highlighted, such as specific costs information and personal data.
36. He considers that each tender, would require tailoring to fit the role being tendered for, and, therefore it is not the case that competitors could simply copy the methodology from the requested information if it were disclosed.
37. The complainant also argues that:

"...it is a requirement in the WelTAG guidance document (which this study is based upon) to set out in the Study Report the methods followed, key issues examined, programme, etc to demonstrate the options considered and how the preferred scheme was identified. Furthermore, WelTAG also recommends open dialogue and public engagement/consultation throughout the study process, including a description of the approach followed and tools used. Therefore, your assertions actually contravene the principles of WelTAG, the very process you are following for this study! In addition, we understand the tools the contractor is using (WelTAG, business case analysis, asset management reviews, demand forecasting, engineering design standards, etc) are all standard tools freely available and readily published in the public domain – including several references on the contractors own website!"

38. He also pointed out that the Weltag guidance document (which the study is based on) requires the study report to set out the programme, methods followed, key issues examined etc to demonstrate options considers and how the preferred scheme was identified.
39. Whilst the council noted this argument, and accepted that some information is provided in this way, it argued Amey does not disclose details of its tenders, and that this is the information which has been requested.

The Commissioner's analysis

40. The Commissioner has reviewed the withheld information, in conjunction with the council's arguments. He notes that the council has applied section 43(2) to a significant volume of information.
41. He notes the council's initial argument that it has no statutory basis for disclosing the information. The council has seemingly applied section 43(2) to the information simply on the basis that it relates to a successful commercial tender, and there is no direct statutory requirement for it to make that information public. Given this, it appears to be seeking to argue that it is not able to do so.
42. It appears that, in part, the basis of its argument refers to a proactive publication of the information concerned, as per public procurement legislation. However, the FOI Act provides a statutory regime for information to be disclosed upon request. The FOIA requires that all information held by a public authority should be disclosed upon request unless an appropriate exemption is applicable. In any event, this is not an argument which relates to the prejudice of the commercial interests of any party and so it is not relevant to the application of section 43(2).
43. The Commissioner also notes that the 2008 WelTAG guidance specifically highlighted that public authorities should be aware of their obligations under the FOI Act, although this does not appear in the later 2017 guidance version.
44. The Commissioner explored the basis of the council's concerns further with it. He asked the council to provide copies of any correspondence it has had with Amey in relation to this request which led the council to conclude that a disclosure of the information would be likely to prejudice Amey's commercial interests. The council did not provide any correspondence of this nature. It does not therefore appear to have sought any degree of substantiation from Amey that the information it has withheld is sensitive commercial information to it.
45. In its appeal response to the complainant, the council said:

"The difficulty is that it is not easy to distinguish which information is sensitive in the commercial context, I can appreciate your comments and assistance but what is not necessarily sensitive to one tender may be sensitive to another dependant on the individual circumstances and context of the project in question. I am however satisfied that a winning tender document may be considered to have commercial value on the basis that it has been successful and would show a methodology and information/programme and an

appreciation of the key issues. All of which would be compiled by and at the cost of a third party commercial organisation. If placed in the public domain others may be able to utilise this methodology and knowledge of what needs to be included without such costs or substantially diminished costs."

46. The Commissioner's guidance on section 43 highlights the case of *Derry City Council v Information Commissioner EA/2006/0014*, (11 December 2006), in which the Tribunal considered that in order to justify applying section 43 where a third party's commercial interests are concerned, it is not enough to speculate on the potential prejudice.

47. The Commissioner's guidance on this issue, on the Commissioner's website at <https://ico.org.uk/for-organisations/section-43-commercial-interests/> provides that:

"Furthermore, if you propose to withhold information because the disclosure would, or would be likely to, prejudice a third party's commercial interests, you must have evidence that this accurately reflects the third party's concerns. It is not sufficient for you to simply speculate about the prejudice which might be caused to the third party's commercial interests. You need to consult them for their exact views in all but the most exceptional circumstances."

48. When claiming that disclosure would prejudice the commercial interests of a third party, the Commissioner therefore expects a public authority to obtain arguments from the third parties themselves. Whilst it may not be necessary to explicitly consult the relevant third party, arguments which are advanced by a public authority should be based on its prior knowledge of the third party's concerns.

49. The Commissioner is not aware of any exceptional circumstances in this case for the council not to have consulted with Amey, and doing so would have alleviated the speculation which the council's response suggests it had to undertake in carrying out its assessment of the information, as evidenced in paragraph 45 above.

50. As the council did not provide evidence from Amey regarding the prejudice it perceives if the information were to be disclosed, this significantly weakens its arguments in respect of the application of section 43(2). This is particularly the case given its admission that it was difficult for it to '*distinguish which information is sensitive in the commercial context*'. At this point the council should have recognised the need to consult with Amey over the withheld information and took its advice as to how a disclosure of the requested information might affect it.

51. The Commissioner also considers that the council has not taken into account arguments considering the other factors which might affect the likelihood of prejudice to Amey's commercial interests. These include the different approach it would be likely to need to take in respect of other tenders, how other weighting systems might affect which tenders are successful, and other factors or circumstances which might effect the likelihood of success of submitting similar tenders in future tendering exercises. As the complainant outlined to the council, it would be unlikely to be enough to simply copy and paste the tender approach taken by Amey in this case to another tendering competition with the myriad of other different factors which might come into play.
52. The Commissioner considers that the council's arguments are largely speculative and relatively weak in addressing many of the concerns outlined by the complainant in his request for review; concerns which do have substance and directly relate to the commercial sensitivity of the information requested.
53. The Commissioner must take into account the insufficient arguments provided the council, coupled with the lack of further information from Amey demonstrating if, or why, it considers that a disclosure would be prejudicial to its commercial interests.
54. In conclusion, the Commissioner has not been persuaded by the council's arguments in respect of the application of section 43(2) to the information.
55. For the above reasons, the Commissioner finds that prejudice to commercial interests would not be likely to occur through disclosure of the information in question. As this test is not met, there is no requirement for the Commissioner to proceed to carry out the public interest test required by section 2 of the Act.

Other matters

Internal review

56. The Commissioner cannot consider the amount of time it took a public authority to complete an internal review in a decision notice because such matters are not a formal requirement of the FOIA. Rather they are matters of good practice which are addressed in the code of practice issued under section 45 of the FOIA.

57. Part VI of the section 45 Code of Practice states that it is desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. The Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the FOIA, the Commissioner considers that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may take longer but in no case should the time taken exceed 40 working days; it is expected that this will only be required in complex and voluminous cases.
58. As a responsible regulator, the Commissioner has taken into account the difficulties faced by all public authorities as a result of the COVID 19 pandemic.
59. Whilst the Commissioner accepts that the council faced unprecedented demands upon its resources during this period, he would like to take this opportunity to remind the council of the expected standards in this regard moving forward, and he expects it to ensure that it aims to complete its future reviews within his recommended timescale of 20 working days, and in exceptional circumstances, within 40 working days.

Right of appeal

60. 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: 0203 936 8963
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

61. 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.
62. 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

Ian Walley
Senior Case Office
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF