

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 2 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 various items of information in respect of commercial property grants for three named properties in Pembroke Dock. Pembrokeshire County Council provided some information but refused to provide full details of the documents requested citing section 43 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. However, it incorrectly withheld the agent's details and the final account template details.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Disclose the agent's details in the three final certificates, as specified in paragraph 18 of this notice, and the final account template details as specified in paragraph 31 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 14 August 2013, the complainant wrote to Pembrokeshire County Council ('the Council') and requested the following information:  
  
*"...copies of the final accounts, including the detailed breakdowns, re commercial grants at Nos 25, 27 and 29 Dimond Street Pembroke Dock."*
6. The Council responded on 11 September 2013. It provided the Final Certificates for the three named properties and redacted summary sheets from the detailed final accounts which support the Final Certificates. It informed the complainant that the redacted information and the detailed final accounts were exempt from disclosure by virtue of section 43 of the FOIA. It also informed the complainant that personal information had been redacted from the documents in accordance with section 40(2) of the FOIA.
7. The complainant was not satisfied with this response and in particular the fact that the Council only provided summaries of the final accounts (Bill of Quantities). He added that he requires the full final accounts that go to support the figures in the summaries provided.
8. Following an internal review the Council wrote to the complainant on 10 October 2013. It informed him that it had overturned parts of the original decision but upheld others. It upheld its original decision to withhold information by virtue of section 40(2) of the FOIA which was essentially the signatures on the documents requested. However, it informed the complainant that it was no longer withholding the name of the contractor on the Final Certificates but would continue to withhold the name of the agent on the basis of section 43 of the FOIA.

## **Scope of the case**

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9. The complainant contacted the Commissioner on 12 October 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 confirmed that he was particularly concerned at the Council's decision to only provide summaries of the detailed final accounts whereas it had provided a full, (albeit redacted) copy in respect of previous requests.
10. The complainant has subsequently confirmed to the Commissioner that he does not require him to consider the small amount of information refused on the basis of section 40(2). The Commissioner's investigation

is therefore solely concerned with the Council's reliance on section 43 of the FOIA.

## **Reasons for decision**

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### **Section 43 – Commercial interests**

11. 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). It is a qualified exemption, and is therefore subject to the public interest test.
12. The term 'commercial interests' is not defined in the FOIA. However, the Commissioner's guidance on the application of section 43 states that:
13. *"...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."*
14. The withheld information relates to the tendering process for the development of three properties 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.
15. 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.
16. 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.
17. The Council is relying on 'would prejudice' on the basis that representations from some of the third parties illustrate that their interests have already been prejudiced and further release of information may exacerbate the damage.

*Item one – the Final Certificates*

18. The Council has provided redacted copies of the three Final Certificates falling within the scope of the request. Following its internal review, the only information redacted from the Final Certificates by virtue of section 43 is the agent's details. The Council considers that disclosure of this information would prejudice the commercial interests of the property owner, the agent and the Council.

*The commercial interests of the agent*

19. The Council has argued that the agent relies on contractors having confidence that their confidential information will be treated as such. It has further argued that this confidentiality is required for the successful conduct of future tender exercises of the owner and other clients of the agent, whether in the context of the Commercial Property Grant Scheme or not. However, the Council has not provided details of the nature of the prejudice it considers would result from the disclosure of the agent's details on the Final Certificate.
20. It has however, provided an email from the agent objecting to the disclosure of:

*"...confidential tender documents, drawings, specifications and associated information..."*

on the basis that it will have a negative effect on its commercial interests. The agent has further stated that the person making these requests appears to want to use the information either directly or indirectly in local blogs and magazine articles which he considers have already had a detrimental effect on his business.

21. However, the Commissioner would point out that that it has long been established that the FOIA is both applicant and purpose blind, therefore he can only consider whether the disputed information is appropriate for the public domain and he is not persuaded by the arguments put forward in paragraphs 19 and 20 of this notice.

*The commercial interests of the property owner*

22. The Council has stated that the owner of the three properties may wish to seek further funding from the Commercial Property Grant Scheme. It has added that the majority of funding for all three projects comes from the owner's private funds and considers the relationship between the owner and the agent is confidential.
23. However, the Commissioner notes that the Council has failed to demonstrate how disclosure of the agent's details would prejudice the owner's commercial interests.

*The commercial interests of the Council*

24. The Council considers that disclosure of the agent's details contained on the Final Certificates would prejudice its own commercial interests on the basis that it would have a detrimental impact on 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. It is concerned that such a failure may require the repayment of funds to the WEFO, including monies already spent and committed for completed work and work in progress and the fact that fulfilling these commitments can only be done with the engagement of the private sector to generate the necessary private sector match funding, without which the Council would be unable to finance other elements of the Regeneration project. This in turn may lead to the potential recovery of funds and reputational damage caused by failure to deliver an ERDF funded project. The Council considers that this would count against it under the project selection system for 2014-2020 ERDF projects.
25. However, whilst the Commissioner acknowledges that these are real commercial concerns, the Council has not indicated how disclosure of the agent's details would result in the commercial prejudice outlined in paragraph 24 of this notice.
26. The Commissioner is not therefore satisfied that any of the commercial interests identified by the Council and outlined in paragraphs 19 to 24 of this notice would be prejudiced by the disclosure of the agent's details and does not therefore consider that section 43 of the FOIA is engaged in respect of this information.

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

27. The Council has provided a redacted one page summary of the detailed final accounts for each of the three 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.
28. 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.
29. 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.

30. 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."*

31. 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.

*1) The template final account documents and the commercial interests of the agent.*

32. 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.

33. The Council has also pointed out that the scheme remains on-going and the agent will be competing for further work from both the 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.

34. However, whilst the Commissioner accepts that the templates have been designed by the agent and that the scheme remains on-going, he notes that the 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.

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

35. The Council has provided evidence from the owner of the property to support his 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*

36. 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 they provide 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*

37. 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*

38. 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 paragraph 24 of this notice.
39. 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 35 to 38 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.**

40. 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.
41. The Council 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.
42. The Council considers that disclosure of this information would show that the its tender process was followed in relation to the development of these particular commercial properties.
43. 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**

44. The Council has 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.
45. Additionally, the Council considers that the 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.
46. 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**



47. 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.
48. 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.
49. 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.
50. 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.
51. The Commissioner also acknowledges that at least half of the funding comes from private sector and is mindful that the commercial interests of the agent of the property owner have already been prejudiced as a result of disclosure of some of the information. The Commissioner also considers that there is a strong public interest in ensuring that the Commercial Property Grant Scheme is able to continue without the unnecessary or unjustified prejudice which would result from disclosure of the information. He has therefore concluded that the balance of public interest test is weighted in favour of maintaining the exemption and that the Council were correct to rely on section 43(1) of the FOIA in relation to this information.

## Right of appeal

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52. 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)

53. 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.
54. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Signed .....**

**Anne Jones**  
**Assistant Commissioner**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**