

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 13 June 2011

Public Authority: Neath Port Talbot County Borough Council
Address: Civic Centre
Port Talbot
SA13 1PJ

Summary

The complainant requested the annual rental rates for all business units on the Crynant Industrial Estate. The Council refused to provide the information citing section 43(2) of the Act. The Commissioner has investigated and finds that the Council correctly applied section 43(2) of the Act. The Commissioner also finds that the Council breached sections 17(1) and 17(3)(b) of the Act.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. On 1 March 2010 the complainant requested the following information from the Neath Port Talbot County Borough Council ('the Council') in respect of Crynant Industrial Estate:

"...details of the annual rental and business rates payable on each unit."

3. On 30 April 2010 the Council responded to the request. It refused to provide the information requested and cited section 43(2) of the Act for information in respect of the annual rents payable on each unit. It also informed the complainant that it had forwarded his request for details of business rates to its Finance and Corporate Services Directorate for a

direct response. The Council duly responded to this part of the request on 7 May 2010.

4. On 11 May 2010 the complainant requested an internal review of the Council's decision in respect of the annual rates and the Council forwarded the outcome of its review to the complainant on 26 July 2010.

The Investigation

Scope of the case

5. On 10 August 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled.
6. The complainant was satisfied with the response he had received regarding the business rates payable therefore this part of the request does not fall within the scope of this notice and it focuses solely on the annual rents payable for each business unit.

Chronology

7. The Commissioner contacted the Council on 10 August 2010 to notify it that he had received a complaint regarding its handling of this request for information and requesting copies of the withheld information.
8. The Council responded on 25 August 2010 and enclosed copies of the withheld information.
9. On 12 October 2010 the Commissioner contacted the Council to request further information in respect of its application of section 43(2) of the Act and details of its public interest test and the Council responded on 8 November 2010.
10. The Commissioner requested further information on 21 April 2011 to which the Council responded on 6 May 2011.
11. The Commissioner attempted an informal resolution to this complaint, however, on 17 May 2011 the complainant requested a formal decision notice.

Analysis

12. The full text of all sections of the Act referred to in this notice can be found in the Legal Annex at the end of this notice.

Exemptions

Section 43(2) – Commercial interests

13. Section 43(2) of the Act provides an exemption for information where disclosure of the information would or would be likely to prejudice the commercial interests of the public authority or a third party.
14. In order for section 43(2) to be engaged, the public authority must demonstrate that disclosure of the requested information would, or would be likely to prejudice either its commercial interests or those of a third party. In this case the Council has argued that disclosure would prejudice its own commercial interests.
15. In his assessment of prejudice, the Commissioner is guided by the case of [Hogan v The Information Commissioner and Oxford City Council \(EA/2005/0030\)](#) in which the former Information Tribunal stated that:

“The application of the ‘prejudice test’ should be considered as involving a number of steps. First, there is a need to identify the applicable interest(s) within the relevant exemption... Second, the nature of ‘prejudice’ being claimed must be considered... A third step for the decision-maker concerns the likelihood of occurrence of prejudice.”
16. In this case the applicable interest is that of the Council as it has argued that disclosure would prejudice its commercial interests.
17. The term prejudice implies not just that disclosure of information must have an effect on the application of the interest, but that this must be detrimental and/or damaging in some way. The Council has argued that disclosure would be detrimental or damaging to its commercial interests.
18. Whilst the term ‘commercial interests’ is not defined in the Act, the ICO guidance on the application of section 43 states:

“...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.”
19. The Commissioner has considered the arguments of both the Council and the complainant in his assessment of the nature of the prejudice.
20. The Council has explained that it is operating its leasing of business units as a commercial property landlord in a highly competitive market place. It has added that it is not the sole provider of business units within the County Borough and is therefore forced to compete on both

facilities and pricing with other landlords based both inside and outside of the County Borough with similar premises to rent.

21. The Council has further argued that the current economic climate in the UK has given rise to a plethora of units (of the type subject to this request) available for leasing to prospective and existing tenants of the Authority. Accordingly, to secure tenants for their units, landlords are in competition to persuade prospective tenants to rent their premises instead of a competitor's premises. Knowledge of a competitor's pricing is therefore invaluable in inducing prospective tenants to choose to rent their premises as it is easier to set your pricing lower than your competitor's if you have prior knowledge of its pricing.
22. The Council therefore considers that to make its annual rental rates available to the public puts it at an unfair disadvantage with its competitors, especially those which are not public bodies and therefore not subject to the Act.
23. However, the complainant has argued that in the case of limited companies, the rental costs would be accessible (albeit for a fee) from each company's annual accounts registered at Companies House. However, even if this is correct, this information is not in the public domain, and a cost would be incurred for each individual company. The Commissioner is not therefore persuaded by this argument.
24. Having considered the arguments of both the Council and the complainant, the Commissioner is satisfied that the information does relate to a commercial activity of the Council, namely obtaining a competitive rental income and that the nature of the prejudice would be detrimental and/or damaging.
25. The Commissioner has therefore gone on to consider the likelihood of the prejudice occurring. The prejudice test itself has two limbs; either 'would prejudice' or 'would be likely to prejudice'.
26. In this case the Council has confirmed that it believes disclosure 'would prejudice' its commercial interests.
27. This second limb of the prejudice test, 'would prejudice', places a much stronger evidential burden on the public authority to discharge. Whilst it would not be possible to prove that prejudice would occur beyond any doubt whatsoever, prejudice must be at least more probable than not.
28. The Commissioner has considered the Council's arguments and accepts that the market for renting business units both within the County Borough and its surrounding areas is highly competitive. The Commissioner is also mindful of the current challenging economic climate and accepts the Council's arguments that there is an abundance

of similar business units for rental. The Commissioner also accepts that knowledge of a competitors pricing would be invaluable in inducing prospective tenants to rent their premises and in so doing placing the Council at a commercial disadvantage with its competitors, especially those not subject to the Act.

29. The Commissioner therefore considers that if the information regarding annual rental rates payable on each unit was disclosed, it is more probable than not that the Council's commercial interests would be prejudiced. He has therefore concluded that section 43(2) of the Act is engaged. As section 43 is a qualified exemption, he has gone on to consider the public interest test.

Public interest arguments in favour of disclosing the requested information

30. The Council has considered the following arguments in favour of disclosure of the requested information.
31. The Council accepts that there is a general public interest in disclosure of such information as openness and transparency in its dealings serves to promote accountability in the way it utilises the assets it holds. On a more specific level, this would promote transparency in its commercial dealings.
32. There is also a public interest in disclosure of the information as it would promote accountability in the Council's general decision making.
33. Although not considered by the Council, the Commissioner believes that if knowledge of the rents payable on each business unit was in the public domain, this may also promote fair pricing of Council owned property.
34. The Commissioner also considers that disclosure of this information may facilitate a level playing field within the local economy as the Council's competitive advantage may be reduced.
35. The Commissioner is also mindful that disclosure may facilitate the widespread recognition that the Council is taking positive steps to stimulate SME's (Small and Medium Enterprises) by providing accessible unit space.

Public interest arguments in favour of maintaining the exemption

36. The Council has put forward the following arguments in favour of maintaining the exemption:

37. Disclosure of the information would place the Council at a disadvantage with its competitors, as knowledge of its rents would be invaluable since it is easier to set your pricing lower than your competitors if you have prior knowledge of its pricing.
38. By putting it at a competitive disadvantage, the Council also believes that this would prevent it from stimulating SME growth and would inhibit its achievement of its economic and social objectives of helping not for profit organisations or companies set up to benefit the local community.
39. The Council has further argued that as a consequence of placing it at a commercial disadvantage with its competitors, this would undermine its ability to generate revenue, which in turn has a significant impact on its finances and its ability to fund and sustain the services it provides to its residents.
40. The Council also considers that disclosure is unnecessary in terms of financial accountability and transparency as it believes that accountability is achieved by virtue of the fact that its Estates Section is subject to external scrutiny of the way in which it carries out its functions by the Wales Audit Office ('the WAO'). It has argued that the role of the WAO is to ensure that public authorities properly utilise the resources available to them not only to facilitate the aims and objectives of the public body but also in a prudent, cost-effective way. The results of the external audit by the WAO culminate in the Annual Audit Report which is presented to the Council at a meeting open to the general public and the report itself is available for inspection by any member of the public on request.

Balance of the public interest arguments

41. The Commissioner accepts that there is a general public interest in openness and transparency to promote accountability in the ways the Council utilises its assets and the spending of public money. He also accepts that disclosure would promote transparency in its commercial dealings. He further accepts that such openness is necessary to promote accountability in the Council's decision making. The Commissioner also acknowledges that there is a public interest in widespread recognition that the Council is taking positive steps to stimulate SME's by providing accessible unit space. However, the Commissioner is not persuaded that disclosure would promote either fair pricing or a level playing field within the local economy as not all competitors pricing would be disclosed. Neither has he placed much weight on the Council's arguments regarding the annual audits conducted by the WAO.

42. However, the Commissioner considers that the arguments regarding placing the Council at a disadvantage with its competitors are both strong and compelling. He is also mindful that preventing it from stimulating SME's and inhibiting achievement of its economic and social objectives of helping not for profit organisations and companies set up to benefit the local community are equally strong and compelling and taken together outweigh the countervailing arguments. He has therefore concluded that the balance of public interest favours maintaining the exemption and accordingly that the Council's application of the section 43(2) exemption was correct.

Procedural Requirements

Section 17(1)

43. Section 17(1) of the Act requires a public authority to inform the complainant in writing that it is refusing to provide the requested information '*within the time for complying with section 1(1)*' of the Act, (20 working days). The Council's failure to issue a refusal notice within the required timescale represents a breach of section 17(1) of the Act.

Section 17(3)(b)

44. Section 17(3)(b) of the Act states that a public authority must provide details of its public interest test within its refusal notice when it is relying on a claim that:

"...in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information"

45. The Council's failure to provide details of its public interest test in its refusal notice therefore represents a breach of section 17(3)(b) of the Act.

The Decision

46. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:
- The Council correctly withheld the information under section 43(2) of the Act.
47. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

- The Council's failure to issue its refusal notice within the required timescales represents a breach of section 17(1) of the Act.
- The Council's failure to provide details of its public interest test represents a breach of section 17(3)(b) of the Act.

Steps Required

48. The Commissioner requires no steps to be taken.

Other matters

49. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:

The internal review

50. Whilst there are no timescales specified in the Act for the communication of the internal review, the Section 45 Code of Practice recommends that the internal review should be considered promptly.
51. The Commissioner has also produced guidance in relation to this matter and considers 20 working days from the date of the request for a review to be a reasonable time in most cases. He does nevertheless recognise that there may be a small number of cases where it may be reasonable to take longer. The Commissioner's view is that no review should exceed 40 working days and, as a matter of good practice, the Commissioner expects the public authorities to notify the applicants in cases where more time is needed and to provide an explanation of why that is the case.
52. The Commissioner notes that the complainant requested an internal review of the original decision on 11 May 2010. However, the Council did not communicate the outcome of its internal review until 26 July 2010, which is in excess of the maximum 40 days and with no apparent reason for the exceptional circumstances that may have resulted in such a delay. Additionally, the complainant was not informed by the Council why any more time was needed.
53. The Commissioner considers that this is an unacceptable response to the request for an internal review and does not take account of the section 45 Code of Practice or his own guidance on the matter. The Commissioner therefore expects the Council to ensure that all future requests for internal reviews are dealt with in accordance with both the section 45 Code of Practice and his guidance.

Right of Appeal

54. 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,
Arnhem House,
31, Waterloo Way,
LEICESTER, LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

55. 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.
56. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Dated the 13th day of June 2011

Signed

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

Legal Annex

General Right of Access

Section 1(1) provides that -

"Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him."

Section 17(1) provides that -

"A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies."

Section 17(3) provides that -

"A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -

- (d) that, in all the circumstances of the case , the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or
- (e) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information."

Commercial interests.

Section 43(1) provides that –

“Information is exempt information if it constitutes a trade secret.”

Section 43(2) provides 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).”