

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 July 2014

Public Authority: City and County of Swansea
Address: Civic Centre
Oystermouth Road
Swansea
SA1 3SN

Decision (including any steps ordered)

1. The complainant requested the name of the tenant's financier in relation to a lease granted by the Council at Celtic Marine. The Council refused the request under section 43 of the FOIA. During the course of the Commissioner's investigation, the Council also sought to rely on section 41 of the FOIA to withhold the information requested. The Commissioner's decision is that the requested information is exempt by virtue of section 41 of the FOIA. The Commissioner does not require any steps to be taken.

Request and response

2. On 25 June 2013, the complainant wrote to Council referring to correspondence between the Council and another member of the public, and requested information in the following terms:

"I am asking supplementary questions to the correspondence [named member of public redacted] has had with [named Council employee redacted] about the development of the maritime quarter boatyards.

On 23rd April 2013 he [the named member of public] received an email from [Council employee name redacted] stating that, 'the project was led by a Chartered Development Surveyor' (so who was that?) and that the 'tenants financiers requested a long leasehold interest...' (so who were they?) and finally when was the agreement made to grant a 'long leasehold interest...' to the 'tenants financiers'?"

3. The Council responded on 31 July 2013 and provided the name of the Chartered Surveyor and the date the leasehold was agreed, however, the Council stated that it considered the name of the tenant's financiers was exempt under section 43(2) of the FOIA.
4. On 7 August 2013 the complainant requested an internal review of the Council's refusal to disclose the name of the tenant's financiers.
5. The Council provided the outcome of its internal review on 25 September 2013 and upheld its decision that the name of the tenant's financiers was exempt under section 43(2) of the FOIA.

Scope of the case

6. The complainant contacted the Commissioner on 24 September 2013 to complain about the way his request for information had been handled.
7. During the course of the Commissioner's investigation, the Council sought to rely on section 41 as well as section 43 as the basis on which to withhold the name of the tenant's financier.
8. The scope of the Commissioner's investigation into this case is to determine whether the Council should disclose the identity of the tenant's financier.

Reasons for decision

Section 41 – information provided in confidence

9. Section 41(1) provides that information is exempt if it was obtained by the public authority from any other person and disclosure would constitute an actionable breach of confidence. This exemption is absolute and therefore not subject to a public interest test.

Was the information obtained from another person?

10. The name of the financier clearly constitutes information provided by a third party (the developer - Celtic Instrumentation Ltd ('Celtic Marine' and the development partner - Waterstones Estate ('Waterstones')) to the Council and the Commissioner therefore accepts the first limb of section 41 is met.

Would disclosure constitute an actionable breach of confidence?

11. In considering whether disclosure of information constitutes an actionable breach of confidence the Commissioner will consider the following:
 - Whether the information has the necessary quality of confidence;
 - Whether the information was imparted in circumstances importing an obligation of confidence; and
 - Whether disclosure would be an unauthorised use of the information to the detriment of the confider.
12. During the course of the Commissioner's investigation, whilst the Council continued to withhold the identity of the funder, it advised the complainant that the financier is "a major financial institution".
13. The Council's position is that the information relates to a private funding matter between Celtic Marine, Waterstones and the financier. The Council confirmed that details of how the companies concerned obtained their funding, and from whom, is not in the public domain.
14. The Council provided the Commissioner with copies of correspondence from Celtic Marine and Waterstones, who it consulted with in relation to disclosure of the information requested. Celtic Marine stated that they consider information on how their company is funded to be a private matter. Waterstones advised that they worked long and hard to establish funding arrangements that were tailored to their business needs. Both companies are of the view that the issue of development funding is commercially sensitive and consider that disclosure could prejudice the current development proposal and future relationships with the financier for existing and future projects.
15. The Commissioner finds that information will have the necessary quality of confidence if it is not otherwise accessible, and if it is more than trivial. Whilst the Commissioner accepts that the name of a major financial institution is not in itself sensitive information, he accepts that, the identity of the funder for this particular development is not available elsewhere and is clearly of importance to the confiders. The Commissioner is therefore satisfied that the information has the necessary quality of confidence.
16. The Commissioner has gone on to consider whether the information was imparted in circumstances importing an obligation of confidence.
17. In support of its position, the Council explained that the name of the financier was provided to it as part of confidential development

negotiations with the parties concerned. In light of this, the Council considers that the developers would have had no expectation that it would be disclosed to the public. Therefore the Council argues that there is an implied obligation of confidence in this case.

18. The Commissioner accepts that information relating to privately arranged funding matters would be reasonably understood as having been shared in circumstances importing an obligation of confidence. On this basis the Commissioner accepts that the information was communicated in circumstances importing an obligation of confidence.
19. The third element of the test of confidence involves the likely detriment to the confider if the confidence is breached. The test under section 41 is whether disclosure would constitute a breach of confidence actionable by the person who provided the information or any other person.
20. As stated previously in this notice, the Council contacted the companies involved to ask if they consented to disclosure or had any objections. Celtic Marine and Waterstones both registered strong objections to disclosure.
21. The Commissioner has reviewed the submissions from the developers and notes the following objections:
 - Disclosure of the information could be used by “a malicious competitor” to seriously damage future projects and growth.
 - Concerns that disclosure would result in contact being made with the financier and unfounded allegations about the project being made to them.
 - Disclosure would prejudice the ongoing relationship with the financier for existing and future projects.
22. The Council explained that, when a financier looks to support a scheme, its support will usually be conditional, for example, based on approved planning consents, lease agreements, the engagement of approved contractors. As such, it is open to the financier to withdraw its funding arrangements at any stage before the conditionality of an offer is met. The timing of the request in this case is an important factor because the project was, and still is, very much a live issue in that the planning application for the development has not been determined. The Council argues that, it is therefore a particularly sensitive time for the scheme as the financier could withdraw at any time. These concerns are echoed in the letters of representation from Celtic Marine and Waterstones.
23. The Council also argues that, if the financier were to withdraw, it would have a detrimental impact on the Council itself as the development

would not progress and this would adversely affect regeneration of the area in question. The Council also considers that the breach of confidence between itself and the development partners would have significant consequences for future projects. This is because developers would be reluctant to consider working with the Council if they were not confident that commercially sensitive information would be kept confidential by the Council.

24. In light of the above, and the correspondence received from the development partners, the Council's view is that it could be subject to an action for breach of confidence if it disclosed the name of the financier.
25. Where commercial information is purported to have been imparted in confidence the Commissioner considers that there would have to be a detrimental impact to the commercial interests of the confider for section 41 to be engaged. As such, the Commissioner has not taken into account any detrimental impact that disclosure may have on the Council itself, or on regeneration of the area in question.
26. The Commissioner accepts that if the information was disclosed, the commercial interests of the development partners would be potentially compromised. He also accepts that disclosure would be likely damage their commercial relationship with the funder in relation to this project and potential future projects.

Would a public interest defence be available?

27. The final step when considering if this exemption is engaged is to consider whether there would be a public interest defence to the breach of confidence that would result through the disclosure of the information in question. Such a defence would mean that this breach of confidence would no longer be actionable and so the exemption provided by section 41(1) would not be engaged.
28. The public interest test attached to the duty of confidence assumes that the information should be withheld unless the public interest in disclosure exceeds the public interest in maintaining the confidence. The Commissioner has therefore gone on to consider whether there would be a defence to a claim for breach of confidence. In taking this approach, it is important to consider the consequences of disclosing confidential information in order to properly weigh the public interest in preserving the confidence against the public interest in disclosure. People would be discouraged from confiding in public authorities if they did not have a degree of certainty that such confidences would be respected and not easily overridden.

29. The Council acknowledges that there is always a public interest in ensuring that public authorities discharge their functions properly, particularly in relation to the matters involving public expenditure. The Council accepts that, in favour of disclosure are matters of openness, transparency and accountability in relation to decisions about public money and the decision making process in entering commercial deals of this nature.
30. However, in considering the public interest in disclosure of the actual information requested in this case, the Council referred to the Information Tribunal case of *Telford & Wrekin v Information Commissioner* (EA/2013/0035)¹. In this case, the Tribunal stated that:
- “an obligation of confidence should not be lightly overridden on public interest grounds, and that there must be specific and clearly stated factors in favour of disclosure for this to outweigh the public interest in the maintenance of confidence”. (paragraph 33)
31. The Council reiterated that it considered the information to relate to a private funding matter between Celtic Marine, Waterstones and their financier. The Council’s view is that there is no overriding legitimate public interest in disclosure of the name of the financier.
32. The Commissioner is aware that the subject matter of this case ie the development proposal following the granting of the 250 year lease has been the subject of criticism by some local residents and the matter has received media publicity. The Council stated that any criticism by the public in relation to the development proposal has already been dealt with by way of an independent investigation report which the Council requested from the Wales Audit Office. The report was issued in February 2014 and did not find any fault in relation to the lease negotiation. The Council believes that the development proposal has therefore been open to public scrutiny and it does not consider the name of the financier to be relevant to any public scrutiny. However, the Council considers there is a public interest in it being able to maintain the trust and confidence of developers in order to move forward on schemes to regenerate the area.
33. In reaching his decision the Commissioner is not minded to accept there is any significant public interest in disclosure of the name of the

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http://www.informationtribunal.gov.uk/DBFiles/Decision/i1134/030%20031213%20Decision%20_rule%2040_.pdf

financier. However, he recognises the strong public interest argument in maintaining the principle of confidentiality. Having considered the arguments put forward by the Council, the Commissioner has concluded that the public interest in maintaining the duty of confidence outweighs the public interest in disclosure in this case.

34. Therefore the Commissioner finds that the name of the financier was correctly withheld under section 41 of the FOIA. He has not gone on to consider the Council's application of section 43(2) FOIA to the information.

Right of appeal

35. 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

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

36. 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.
37. 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
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Water Lane
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