

Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)
Decision notice

Date: 23 August 2022

Public Authority: Wrexham County Borough Council
Address: foi@wrexham.gov.uk

Decision (including any steps ordered)

1. The complainant requested information between specific councillors and officers relating to the sale of Kings Mill, Melin y Brenin. Wrexham County Borough Council (the Council) withheld the information requested under section 36 (effective conduct of public affairs). The Commissioner's decision is that the Council has correctly applied sections 36(2)(b)(i) and 36(2)(b)(ii) to the withheld information. The Commissioner does not require any steps to be taken.

Request and response

2. On 7 April 2021, the complainant wrote to the Council and requested information in the following terms:

"Can I have copies of emails or other records from Cllrs [name redacted] and [name redacted] to officers relating to the sale of Kings Mill, Melin y Brenin, over the last 12 months and referencing the local group that had expressed an interest in leasing the building".
3. The Council responded on 6 May 2021 and stated that the information requested was exempt under section 36 of the FOIA.
4. On 15 May 2021 the complainant requested an internal review into the Council's refusal to provide the information requested.
5. The Council provided the outcome of its internal review on 13 July 2021 and upheld its position that section 36 applied to the request.

Scope of the case

6. The complainant contacted the Commissioner on 12 July 2021 to complain about the way their request for information had been handled.
7. During the course of the Commissioner's investigation the Council disclosed some information, subject to some personal data (names and email addresses being redacted under section 40(2)). The Council maintained that the remaining information was exempt under sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c). The Council also stated that it considered some of the withheld information to be exempt under section 40(2).
8. The scope of the Commissioner's investigation is to consider whether the Council should disclose the remaining information held relevant to the request.

Reasons for decision

Background

9. The request in this case relates to the Council's plans for Kingsmill former Visitor Centre in Wrexham. The property was gifted to the Council by former Erddig estate owner Philip Yorke and is subject to a covenant which states that it can only be used as a public amenity for culture and heritage purposes. The Commissioner understands that the Council decided to sell the property under auction in early 2021. However, the sale did not go through as bidding for the property did not reach the guide price. Prior to the decision made to sell the property Melin y Brenin Community Group had attempted, unsuccessfully, to acquire the building from the Council to create a "hub of culture, heritage and wellbeing".

Section 36 – prejudice to the effective conduct of public affairs

10. Section 36 of the FOIA states that information is exempt where, in the reasonable opinion of a qualified person, disclosure would or would be likely to prejudice the effective conduct of public affairs. Section 36 operates in a slightly different way to the other prejudice based exemptions in the FOIA. Section 36 is engaged, only if, in the reasonable opinion of a qualified person, disclosure of the information in question would, or would be likely to, prejudice any of the activities set out in sub-sections of 36(2).

11. In this case the Commissioner is considering the application of the exemptions at sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c).
12. Sections 36(2)(b)(i) and (ii) provide that information is exempt if its disclosure would, or would be likely to, inhibit the free and frank provision of advice, or the free and frank exchange of views for the purposes of deliberation. Section 36(2)(c) provides that information is exempt if its disclosure would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

Are the exemptions engaged?

13. In order to establish whether the exemptions have been applied correctly the Commissioner has:
 - Ascertained who is the qualified person or persons for the public authority in question;
 - Established that an opinion was given;
 - Ascertained when the opinion was given; and
 - Considered whether the opinion given was reasonable.
14. The Council confirmed that its qualified person is the Chief Officer, Governance & Customer (Monitoring Officer). The Council explained that the qualified person considered the requested information and is of the opinion that the exemptions at all three limbs of section 36(2) are engaged for all of the withheld information.
15. The Commissioner is satisfied that the Council's Monitoring Officer is authorised as the qualified person under section 36(5) of the FOIA. The Council provided the Commissioner with a copy of the submission put to the qualified person and confirmation that they agreed the engagement of section 36 on 22 April 2021. The qualified person was provided with actual copies of the withheld information with the submission. The Commissioner notes that the qualified person signed their agreement to the submission which indicated that the level of prejudice claimed was the lower threshold of "would be likely".
16. The Commissioner has gone on to consider whether the qualified person's opinion is reasonable. It is important to highlight that it is not necessary for the Commissioner to agree with the opinion of the qualified person in a particular case. The opinion also does not have to be the only reasonable opinion that could be held or the most reasonable opinion. The Commissioner only needs to satisfy himself that the opinion is reasonable or, in other words, it is an opinion that a reasonable person could hold.

17. The Council's representations in this case are very similar to those provided in IC-107642-Y4T3¹ involving a request about the same subject matter. The Commissioner therefore repeats his understanding of that reasoning here.
18. In the opinion of the qualified person the exemptions at 36(2)(b) and 36(2)(c) are applicable to the withheld information because disclosure of the information could inhibit the future free and frank provision of advice, views and formulas when reaching decisions. Disclosure could also result in "an adverse effect on the local authority's ability to offer an effective public service or to meet its wider objectives or purpose".
19. In terms of sections 36(2)(b)(i) and (ii) the Council contends that it needs a safe space to develop ideas, debate live issues and reach decisions away from external interference and distraction. This aids internal deliberation and decision making processes. The Council pointed out that the withheld information includes communications between officers and elected members containing views, questions and discussions about the process of disposal of the property. The withheld information also includes draft reports to the Corporate Land and Buildings Committee "which are considered confidential as are the attendees of the meeting". The Council explained that all of the withheld information comprises internal documents which were not intended for disclosure into the public domain.
20. At the time of the request the Council pointed out that the subject matter - the sale and disposal of the site - was very much live as it was due to be sold by auction. In addition, it was a sensitive subject as it was a Heritage Centre and, as a consequence, it was politically sensitive. Disclosure would inhibit the provision of advice and exchange of views on an issue that was live at the time of the request and thus affect the quality of decision making by the Council.
21. The Commissioner accepts that it is reasonable for the qualified person to consider that there was a need for a safe space to deliberate upon matters concerning the disposal of the site as they developed. The process which the qualified person is referring to as needing to be protected under section 36 is the process of being able to discuss and debate issues, such as the sale and disposal of properties, away from the public eye.

¹ i <https://ico.org.uk/media/action-weve-taken/decision-notice/2022/4020337/ic-107642-y4t3.pdf>

22. In reaching a decision in this case, the Commissioner has taken into account that the sale and disposal of the site in question was live at the time of the request and the property had not been sold. Having reviewed the withheld information the Commissioner is satisfied that the reasons outlined by the qualified person fit substantially with the application of sections 36(2)(b)(i) and (ii). He is also satisfied that the qualified person's opinion - that inhibition relevant to those subsections would be likely to occur through disclosure of the withheld information - is reasonable. The Commissioner's conclusion is, therefore, that the exemptions provided by sections 36(2)(b)(i) and (ii) are engaged.
23. In terms of section 36(2)(c) although the Council has stated that disclosure would have an adverse effect on its ability to offer an effective public service or to meet its wider objectives or purpose it has not explained exactly how disclosure of the withheld information would be likely to have this effect. The Council has failed to provide sufficient detail and explanation as to why it considers disclosure in this case would otherwise prejudice the conduct of public affairs. It follows that the Commissioner is not satisfied that the qualified person's opinion about the likelihood of prejudice under section 36(2)(c) is reasonable. Therefore he does not find section 36(2)(c) engaged.

Public interest test

24. Section 36 is a qualified exemption and therefore the Commissioner must consider the public interest test and whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosing the information

25. Again, the Council's representations in respect of its public interest considerations are almost identical to those provided in a previous complaint the Commissioner has considered, as referred to paragraph 17 of this notice. The Commissioner therefore repeats his understanding of that reasoning here.
26. The Council submitted the following arguments in favour of disclosure:
- The general public interest in promoting transparency, accountability, public understanding and involvement in the democratic process.
 - The legitimate public interest in the subject matter associated with the request, that is in knowing the options being considered for the Kings Mill Heritage Centre.

- The public interest in good decision-making by public bodies, in upholding standards of integrity and securing the best use of public resources by demonstrating proper scrutiny, exchange of views and professional advice.
27. In their internal review request, the complainant indicated that one of the interested parties in the sale of this property was a Community Interest Company led by a member of the political parties. The complainant alleges that the member “took the company interest to Offa Community Council to request support” who declined to support the request following what the complainant describes as “a personal attack” by one of the councillors named in the request. The complainant also contends that one of the councillors named in the request was opposed to the project purely because of his dislike for the political party concerned and the fact that the member was/is a member of that party. The complainant believes that disclosure of the requested information would reveal whether any councillors pressurised officers into favouring one bid over another.
28. The complainant also indicated that they did not consider the Council’s internal review to be thorough in determining both whether the exemption was properly engaged or that the Council had considered the public interest test in an meaningful way.

Public interest in favour of maintaining the exemption

29. The Council pointed out that that the overall purpose of the communications that have been withheld was to share free and frank views and for the purposes of obtaining and providing advice. The communications were intended for internal use only and not for dissemination into the public domain. The Council considers that disclosure would impact on the future free and frank provision of advice, views and formulas when reaching decisions as officers would be wary of not having a ‘safe space’ to debate if it was thought that such communications would end up in the public domain.
30. The Council considers that the loss of frankness and candour in the course of such deliberations would be highly likely to damage the quality of advice to decision makers and thus inhibit the Council’s ability to make informed decisions relating to the sale of the site, or indeed future decisions.
31. The Council pointed out that, at the time of the request, the information was very much live as the property had not been sold. The argument for protecting internal deliberation and decision making processes was applied to preserve a ‘safe space’ to debate issues away from external

scrutiny, and preventing a 'chilling effect' on free and frank views in future. In light of the timing of the request the Council attributed weight to the need to protect this private thinking space and ongoing deliberations relating to the subject matter.

Balance of the public interests

32. In the Commissioner's view, having accepted the reasonableness of the qualified person's opinion that disclosure of the information would be likely to prejudice the effective conduct of public affairs, he must give weight to that opinion as valid evidence in his assessment of the balance of the public interest. However, he must also consider the severity, extent and frequency of the prejudice claimed.
33. The Commissioner understands that there has been significant local interest about the disposal of the Kings Mill Heritage centre, including a number of media articles about the matter. The Commissioner accepts that disclosure of the withheld information would provide the public with an insight into the decision making process around the sale/disposal of the property and the reasons for the decision. Disclosure would also reveal how and in what capacity the councillors' named in the request were involved in decision making relating to the building in question. In addition, the Commissioner accepts that there is always a public interest where information relates to public money.
34. The Commissioner recognises that, inherent in the section 36(2)(b) exemptions is the argument that a public authority should be afforded private space for staff in which issues can be considered and debated, advice from colleagues and subject experts can be sought and freely given and ideas tested and explored to protect the integrity of the deliberation process.
35. In this case, the Commissioner notes that the subject matter associated with the withheld information was live at the time of the request and the property had not been sold. The Commissioner accepts that a safe space is required when issues under discussion are still live and in the development/proposal stage. At the time of the request, the Commissioner considers that there was a real likelihood that disclosure would hinder the Council's ability to consider its options fully and discourage those staff involved in the process from participating in a free and frank way. These effects would be likely to be fairly extensive and severe and impact negatively on the Council's ability to arrive at the most appropriate way forward
36. In terms of the complainant's argument that disclosure would reveal whether any councillors pressurised officers into favouring one bid over another. The Commissioner has viewed the withheld information and he has seen no evidence of any favouritism, pressure or impropriety on the

part of any of the councillors named in the request in terms of their involvement in decisions regarding the sale/disposal of the property.

37. The Commissioner has considered the withheld information and the wider context that informs the public interest, including the principles of transparency and accountability. For the reasons set out above, the Commissioner considers that in all the circumstances of the case, the public interest in maintaining the exemptions at section 36(2)(b) outweighs the public interest in disclosure. The Council was not, therefore, obliged to disclose the requested information.

Right of appeal

38. 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

39. 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.
40. 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

Joanne Edwards
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