

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 April 2024

Public Authority: Blaenau Gwent County Borough Council

Address: The General Offices
Steel Works Road
Ebbw Vale
South Wales
NP23 6DN

Decision (including any steps ordered)

1. The complainant has requested information relating to the occupation of the 'Techboard Factory'. Blaenau Gwent County Borough Council (the council") refused to confirm or deny (NCND) the requested information was held, under section 41(2) FOIA (information provided in confidence) and section 31(d) and 31(3) (law enforcement).
2. The Commissioner's decision is that the council is entitled to rely on section 31(3) FOIA to NCND whether any information is held and that the public interest favours maintaining the exemption.
3. The Commissioner does not require further steps.

Background

4. In 2017 the Welsh Government bought the former Techboard Factory in Ebbw Vale to support a project for TVR to produce a new sports car. There has been a significant investment in the site. It was reported in August 2023 that the factory was still unused and then in December 2023 that TVR had lost the exclusive rights to rent the building.

Request and response

5. On 25 August 2023, the complainant wrote to the council and requested information in the following terms:

"Under the Freedom of Information Act would you please provide information to the following questions concerning the TVR Automotive Car Company and the factory building that they are using. The building formally known as the Techboard Factory has been renovated by the Welsh Government, who own it. The chairman of TVR has stated in the press in the Daily Telegraph, that his company occupies the building which makes it liable for business rates.

1. Have you been notified by the TVR Automotive car company that they now occupy the building?
 2. On what date did TVR state that they had occupied the building from?
 3. Confirm whether or not TVR has already informed you of their entry date for business rates purposes.
 4. If TVR has occupied the building without having informed you, please detail the steps you will take to recover any outstanding monies due from business rates."
6. The council responded on 25 September 2023 and neither confirmed nor denied (NCND) the requested information was held, under section 41(2) FOIA (information provided in confidence).
7. The council provided an internal review in which it maintained its original position. Following correspondence from the Commissioner, the council amended its position and wrote to the complainant on 2 February 2024. It stated:

"...we confirm that we are still unable to provide the information and maintain our decision to apply Section 41 of the Freedom of Information Act and can neither confirm nor deny that any information is held.

Further to this, we can neither confirm nor deny whether we hold this information under Section 31(3) of the Freedom of Information Act. By either confirming or denying whether we hold this information, could in itself disclose information which would or would be likely to prejudice the prevention or detection of crime.

If we were to confirm or deny whether information is held on any named company this would inform the company in question that they were

under investigation and therefore hinder or damage the investigation or any further investigations of a similar nature.”

Scope of the case

8. The complainant contacted the Commissioner on 24 October 2023 to complain about the way their request for information had been handled.
9. The Commissioner considers that the scope of his investigation is to determine whether the council is entitled to NCND that it holds information in scope of the request.

Reasons for decision

Neither confirm nor deny ('NCND')

10. Section 1(1)(a) of FOIA requires a public authority to inform a requester whether it holds the information specified in the request. This is commonly known as “the duty to confirm or deny”. However, there are exemptions to this duty, whereby a public authority may NCND whether it holds the requested information.
11. The decision to use an NCND response will not be affected by whether a public authority does, or does not, in fact hold the requested information. The starting point, and main focus for NCND in most cases, will be theoretical considerations about the consequences of confirming or denying whether or not a particular type of information is held.
12. A public authority will need to use the NCND response consistently, over a series of separate requests, regardless of whether or not it holds the requested information. This is to prevent refusing to confirm or deny being taken by requesters as an indication of whether or not information is in fact held.
13. The council has taken the position of neither confirming nor denying whether it holds any of the requested information in its entirety, citing section 31(3) of FOIA. The issue that the Commissioner has to consider is not one of disclosure of any requested information that may be held, it is solely the issue of whether or not the council is entitled to NCND whether it holds any information of the type requested by the complainant.

Section 31 – Law enforcement

14. Section 31(3) provides:

'The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice any of the matters mentioned in subsection (1).

15. Subsection 1 provides a relevant list of activities relating to law enforcement and at part (d) refers to 'the assessment or collection of any tax or duty or of any imposition of a similar nature.'

16. The council has relied on the NCND exclusion on the basis that confirming or denying whether it holds information within the scope of the request would be likely to prejudice the assessment or collection of any tax, in this case, business rates.

17. In order for a prejudice based exemption such as section 31(3) to be engaged the Commissioner considers that three criteria need to be met:

- Firstly, the actual harm which the public authority alleges would, or would be likely, to occur if it confirmed whether or not it held the requested information 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 confirming whether or not the requested information is held 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 – ie, confirming whether or not the information is held 'would be likely' to result in prejudice or 'would' result in prejudice. In relation to the lower threshold the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather there 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 to discharge

18. The Commissioner accepts that the potential prejudice envisaged by the council clearly relates to the interests which the exemption contained at section 31(1)(d) is designed to protect.

19. The Commissioner is also satisfied that there is a causal relationship between complying with section 1(1)(a) and that confirming or denying

the information is held could jeopardise the assessment and collection of taxes. Therefore the second criterion is met.

20. Finally, the Commissioner accepts that the chance of such prejudice is more than a hypothetical possibility; rather there is a real and significant risk of it occurring if the Council complied with section 1(1)(a) of FOIA. The third criterion is therefore met and the exemption is engaged.

Public interest test

21. The public interest can cover a wide range of values and principles relating to the public good, or what is in the best interests of society. Thus, for example, there is a public interest in transparency and accountability, to promote public understanding and to safeguard democratic processes. There is a public interest in good decision-making by public bodies, in upholding standards of integrity, in ensuring justice and fair treatment for all, in securing the best use of public resources and in ensuring fair commercial competition in a mixed economy. This is not a complete list; the public interest can take many forms.
22. The council acknowledged there is a public interest in confirming whether the requested information is held or not to provide reassurance that rates are being applied correctly and collected. There is also, as a public authority, an expectation of transparency and accountability
23. However, it argued that due to the impact on public finances that business rates avoidance has, it felt that the balance of public interest falls on the side of NCND whether the information is held until any potential investigation has concluded.
24. The complainant referred to a request made to the Welsh Government in September 2023 and provided a copy of its response. They argued that the Welsh Government had already responded to a similar request and furnished the details requested.
25. The Commissioner reviewed the response from the Welsh Government and considers the only similar information requested relates to occupancy by TVR and if it pays for that occupancy. Although the Welsh Government confirmed occupation of part of the building and that rent was being paid under a six month lease, it does not provide any details of whether the council has been informed, business rates that may be due or what steps may be taken to recover those rates.
26. The complainant further argued that it is clearly obvious the information is in the public domain. The Commissioner therefore carried out his own research into the matter and has not been able to find anything in the public domain relating to the information requested.

27. In the circumstances of this case there is a possibility that confirming whether or not the information is held to parts 1-3 could undermine the council's ability to pursue any potential legal action.
28. Although the council may hold information relating to the steps it takes to recover unpaid business rates, this would most likely be exempt from disclosure under section 31(1)(g) – the exercise by any public authority of its functions for any of the purposes specified in subsection (2), by virtue of section 31(2)(a) – the purpose of ascertaining whether any person has failed to comply with the law.
29. In reaching a view on where the public interest lies in this case, the Commissioner accepts there is a legitimate public interest in informing the public about whether the council has appropriate policies and procedures in place to ensure that business rates are collected.
30. Balanced against this is the need to allow the council to assess any possible breaches of the law and prepare any potential legal case, without premature disclosure of that information through the FOIA, to the world at large.
31. The Commissioner also recognises that there is a very strong public interest in ensuring that a court is able to administer justice without this being undermined by premature publication of any evidence that may need to be presented.
32. Whilst weight must be given to the general principles of accountability and transparency, greater weight must be afforded to the potential negative impact on the council that confirming or denying the information is held is likely to bring about. Therefore, the Commissioner considers that the public interest in maintaining the exemption outweighs the public interest in disclosing the information. It follows that the Council was entitled to rely on section 31(3) FOIA to NCND whether the information is held.

Right of appeal

33. 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

34. 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.
35. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Susan Duffy
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF