

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

### **Decision notice**

**Date:** 26 February 2014

**Public Authority:** Carmarthenshire County Council  
**Address:** County Hall  
Carmarthen  
SA31 1JP

#### **Decision (including any steps ordered)**

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1. The complainant requested information about a particular development in Llanelli. The Council provided some information but withheld other information under section 43(2) of the FOIA. The Commissioner has investigated and determined that the Council correctly applied section 43(2) to the withheld information. He does not require any steps to be taken.

#### **Request and response**

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2. On 13 May 2013, the complainant wrote to the Council and requested information relating to the Eastgate development in Llanelli, in the following terms:
  1. "Who are the businesses that have been awarded the 'franchises'?"
  2. How many have been given rent or rates or both free for how many years?
  3. Were any local businesses allowed to bid for the franchises, if not, why not?
  4. Is it true the Council are taking up the majority if not all the office space there, how much will it cost the taxpayer?
  5. How long is the 'office space' agreement for?
  6. Is it true that many, if not all office departments at Ty Elwyn are moving to the Eastgate Development, if so what is wrong with the

- office space at Ty Elwyn which was built not too many years ago to replace the then 'not fit for purpose' Old Llanelli Town Hall?
7. What is the total cost to the tax payer for the Eastgate Development, please would you supply a breakdown".
  3. On 12 June 2013 the Council responded to questions 1, 3, 4, 5, 6 and 7 in full. In respect of question 2 the Council confirmed that no businesses had been given a "rate free period" and refused to disclose information about rent free periods agreed under section 43(2) of the FOIA.
  4. On 13 June 2013, the complaint requested an internal review of the Council's handling of the request and its decision to withhold information about rent free periods.
  5. The Council provided the outcome of its internal review on 11 July 2013. The Council upheld its decision that the remaining information held relevant to question 2 was exempt under section 43 of the FOIA.

### **Scope of the case**

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6. The complainant contacted the Commissioner on 29 September 2013 to complain about the way his request for information had been handled.
7. The scope of the Commissioner's investigation in this case is to determine whether the Council should disclose the remaining information held relevant to question 2 of the request of 13 May 2013, comprising details of rent free arrangements at the Eastgate development.

### **Reasons for decision**

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#### **Section 43 – commercial interests**

8. Section 43(2) of the 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).
9. Broadly speaking, section 43(2) protects the ability of a party to participate competitively in a commercial activity, for example the purchase and sale of goods or services. The successful application of section 43(2) is dependent on a public authority being able to demonstrate that the following conditions are satisfied –

- Disclosure of the requested information would, or would be likely to, prejudice the commercial interests of any party (including the public authority holding it).
  - In all the circumstances, the weight of the public interest in maintaining the exemption outweighs the public interest in disclosure.
10. Therefore, the first issue for the Commissioner to assess is whether, in this case, the Council has identified relevant prejudice that the exemption is designed to protect against. If this is not found to be the case, the exemption is not engaged and there is no requirement to go on to consider the prejudice or public interest tests.
  11. The Council has argued that section 43(2) is engaged with regard to the interests of the developer of the site. The Council considers that disclosure would prejudice the developer's future negotiations with potential tenants for the vacant units on the site in question, which will in turn impact on the revenue and profitability of the project. The Council is also of the view that disclosure would allow rival landlords to undercut the developer in offering alternative commercial premises.
  12. The term 'commercial interests' is not defined in the FOIA, however, it is understood to have a broad meaning, encompassing activities which have both a direct and an indirect effect on commercial activities. This will therefore include the buying or selling of goods and services as well as information which can be shown to affect a person's ability to undertake such activities effectively.
  13. The developer of Eastgate is clearly engaged in commercial activities, namely commercial property development and letting. The developer, as a commercial landlord faces competition from other commercial landlords seeking to attract tenants.
  14. The Commissioner accepts that the information relates to the commercial interests of the developer and therefore the withheld information falls within the scope of the exemption. The next step is therefore to consider the nature and likelihood of the prejudice to those commercial interests.
  15. In the Commissioner's view, the term "prejudice" implies not just that the disclosure of information must have some effect on the applicable interest, but that this effect must be detrimental or damaging in some way. If a "trivial or insignificant" prejudice is claimed, such that it cannot be said to have any real detrimental or prejudicial effect, then the exemption should not be accepted. The detrimental effect need not

necessarily be severe although the level of severity will inform any relevant public interest considerations.

16. There are two limbs of prejudice within section 43(2). "Would be likely to prejudice" means that the possibility of prejudice should be real and significant, and certainly more than hypothetical or remote. "Would prejudice" places a much stronger evidential burden on the public authority and must be at least more probable than not. In this case the Council has stated that disclosure of the requested information *would* prejudice commercial interests. Where the Commissioner is not satisfied that the higher threshold of would prejudice is met but there is sufficient evidence to meet the lower threshold he may find that disclosure is likely to prejudice the specified interests.
17. In view of the Information Tribunal decision in *Derry City Council v The Information Commissioner (EA/2006/0014)* the Commissioner considers that any arguments regarding the prejudice to the commercial interests of a third party should come from the third party. In this case, the Council sought the views of the developer in question both at the time the request was received, and again during the Commissioner's investigation.
18. The developer stated that, when appraising any development opportunity, financial assumptions are made on all aspects of the development including the likely rents achievable, the length of time it will likely take to secure occupiers for the units and "incentive packages" (such as rent free periods, steps rents, capital contributions), which would need to be offered to secure lettings. These assumptions help to formulate a balanced, viable financial appraisal against which a developer can take an informed decision to progress a particular project, which was the case in the Eastgate development.
19. Within the Eastgate development there are in excess of 15 units, 6 of which are currently vacant. The developer advised that the rent free periods which have been agreed with the existing occupiers vary considerably. The developer advised that the terms agreed are dependent on a number of factors such as "the stage of the leasing process the deal was done, the covenant strength of the occupier and the overall attractiveness of the physical offer that would be accommodated as a result of agreeing a deal with them". As there are still a number of vacant units, the developer considers it essential that it is able to secure occupational terms in line with its original financial assumptions otherwise their profit could be significantly eroded or potentially removed completely.
20. The developer has been working on the Eastgate development for around 6 years and its leasing agents are actively engaged in marketing

the vacant units. Negotiations with a number of potential occupiers are ongoing at any one time, and terms of occupancy are negotiated based on the original financial appraisal assumptions. The developer is of the opinion that disclosure of information about rent free periods already agreed will undermine the leasing negotiations for the remaining vacant units and its ability to secure rental levels in line with the projections within the financial viability assumptions.

21. The Council has explained that the developer, as a commercial landlord, faces competition from other commercial landlords seeking to attract tenants. In the current economic climate, the Council advise that this is a highly competitive field. The information in question is considered to be "highly commercially sensitive" and as well as giving prospective tenants a significant advantage in disclosing the developers likely negotiating position, it would also allow rival commercial landlords to undercut the developer when offering alternative premises.
22. The Commissioner is mindful of the current challenging economic climate and accepts that the market for renting business units is highly competitive. The Commissioner also accepts that knowledge of the incentive packages agreed with existing tenants on the site in question would put the developer in a disadvantaged negotiating position in relation to agreeing leases/terms for the current vacant units on the site. The Commissioner also agrees that knowledge of the incentive packages agreed by the developer on the site would be invaluable to rival commercial landlords in inducing prospective tenants to rent their premises and in so doing would place the developer at a commercial disadvantage with its competitors.
23. Based on the above, the Commissioner considers that if the withheld information were disclosed, it is more probable than not that the developer's commercial interests would be prejudiced. He has therefore concluded that section 43(2) of the FOIA 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**

24. The Council accepts that there is general public interest in openness and transparency regarding such prominent developments as East Gate. However, the Council has confirmed that, the cost of any concessions given to tenants has been at the developer's cost, not the Council's. As such, it considers that there are no significant public interest issues in terms of accountability of public expenditure involved in this case.

### **Public interest arguments in favour of maintaining the exemption**

25. The Council's public interest arguments in favour of maintaining the exemption are summarised below.
26. Disclosure would prejudice the developer's negotiations with prospective tenants for the vacant units. This is because prospective tenants would be seeking to obtain similar terms as those already agreed with existing tenants which may not be in line with the projections in the original financial appraisal for the site. This would lead to an erosion or eradication of profits the developer makes from the site.
27. The development has been partly funded by commercial loans obtained, in part, based on rental income projections. As disclosure would prejudice the developer's ability to let the units at rental levels which meet the original projections, it would potentially undermine the commercial lenders' confidence in the developer's ability to meet rental income projections in the future.
28. Disclosure would place the developer at a disadvantage with its competitors. Knowledge of the rent free periods agreed to date would be invaluable and make it easier for rival landlords to undercut the developer in offer alternative business premises. This could result in units being vacant for longer, which would again impact on the developer's profit and return for the site.
29. The Council considers that, if a current scheme such as Eastgate is not able to secure a reasonable return for the developer, it will have a negative impact on any future developer interest, and confidence in Llanelli town centre (the location of Eastgate). If the Council is unable to attract developers, and returns for exiting properties are poor, it will reduce the socio-economic benefits of the scheme as it is hoped that Eastgate will be a catalyst for further development in the town. An erosion of the development return could also lead to units remaining vacant for a prolonged period which would be detrimental to the town centre.
30. The Council also consider that timing is an important factor in considering this case. At the time of the request, the process of letting the units was, and still is ongoing. The vacant units on the site are being marketed and are at a very sensitive stage in the leasing process.

### **Balance of the public interest**

31. The Commissioner accepts that there is a general public interest in openness and transparency particular concerning significant developments such as Eastgate. However, the Commissioner notes that there do not appear to be any issues around accountability of public spending in relation to the actual subject matter of rent free periods offered by the developer in this case.
32. The Commissioner considers that the arguments regarding placing the developer at a disadvantage with its competitors and in future negotiations with potential tenants for the site are both strong and compelling. He is also mindful that disclosure could lead to units being vacant for longer than necessary and it could affect the Council's ability to attract future developers into the area. This will in turn have an adverse effect on economic and social objectives for the town centre. In reaching a view on where the public interest lies in this case the Commissioner has placed significant weight on the fact that, at the time of the request, there were vacant units on the site which were, and still are, being actively marketed.
33. On balance, the Commissioner considers in this case that the public interest arguments in favour of disclosure are outweighed by the public interest arguments in favour of maintaining the exemption. He has therefore concluded that the Council has correctly applied 43(2) to the withheld information.

## Right of appeal

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34. 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)

35. 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.
36. 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**