

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 1 October 2019

Public Authority: Wrexham County Borough Council

Address: foi@wrexham.gov.uk

Decision (including any steps ordered)

1. The complainant requested various information in respect the Welsh Government's TrawsCymru bus network including a feasibility study into the introduction of a possible new TrawsCymru bus route in North Wales during the period 2016 to 2018. Wrexham County Borough Council initially refused to confirm or deny whether it held information in respect of item 12 but did not cite an exemption. Following the intervention of the Commissioner, the Council confirmed that it was relying on section 43(2) to refuse the information in respect to item 12 and the complainant's follow on questions to item 11.
2. The Commissioner's decision is that Wrexham County Borough Council has complied with its obligations in respect of section 1(1) of the FOIA in respect of item 11 of the original request but has breached section 1(1) in respect of the subsequent follow on questions. The Commissioner has also concluded that the Council was not entitled to rely on section 43(2) to refuse information in respect of item 12 and the complainant's follow on questions to item 11.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the information in respect of item 12 and the complainant's follow on questions to item 11.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 7 February 2018, the complainant wrote to Wrexham County Borough Council ('the Council') with a 12 part request in respect of the Bevan Foundation and the routing of the T3 bus service from Wrexham to Barmouth. The Commissioner has not reproduced the request in its entirety, but focused on those parts which form part of this decision notice, namely items 11 and 12:

11. Could you please tell me whether Wrexham Borough Council and its officials hold any documentation relating to discussions/feasibility studies in the years 2016 to 2018 regarding the future introduction of the new Trawscymru services in North/Mid Wales. E.g. memos, meeting minutes, meeting notes, data gathering exercise, reports etc?

12. If Wrexham Borough Council have been involved in discussions in the years 2016 to 2018 regarding the future introduction of new Trawscymru services in North/Mid Wales could you please tell me the proposed new bus routes involved? "

6. The Council responded on 7 March 2018. It confirmed that it holds documentation relating to discussions/feasibility studies regarding the future introduction of new Trawscymru services in North/Mid Wales for the specified time period in respect of item 11 and refused to either confirm or deny whether it held relevant information in respect of item 12.
7. The complainant was not satisfied with the Council's response in respect of items 11 and 12 and also raised a number of follow on questions in respect of item 11 reproduced below:

"1. Could you please tell me whether Wrexham Borough Council and its officials hold any meeting minutes relating to discussions/feasibility studies in the years 2016 to 2018 regarding the future introduction of new Trawscymru services in North/Mid Wales.

2. If meetings were held ... could you please tell me the other Council's who were involved in those meetings.

3. If meetings were heldcould you please tell me the dates on which they were held.

4. Could you please tell me whether Wrexham Borough Council and its officials hold any reports relating to discussions/feasibility studies...

5. If Wrexham Borough Council and its officials hold reports ...could you please tell me the title of the reports and the date produced.

6. *Could you please tell me whether Wrexham Borough Council ... hold any data gathering exercises relating to discussions/feasibility studies ...regarding the future introduction of new Trawscymru services in North/Mid Wales.*
7. *....could you please tell me the subject of the data gathering exercises and the date produced."*
8. Following an internal review the Council wrote to the complainant on 6 April 2018, upholding its original response. There was no reference to his follow on questions in respect of item 11 of his original request.
9. During the course of the Commissioner's investigation, the Council provided a link to the complainant in respect the Welsh Government's review of the TrawsCymru T3 Route Review. The complainant confirmed to the Commissioner that he remained dissatisfied with the Council's response, as the T3 route covers the existing Wrexham to Barmouth service and neither his question 11 or question 12 related to this route, but the proposed introduction of new TrawsCymru services in North/Mid Wales for the years 2016 to 2018.
10. Following further correspondence between the Council and the Commissioner, the Council confirmed that:
- "an exemption would have been triggered under section 43 without necessarily triggering the NCND.*
11. It further confirmed that:
- "The Council remain of the view that the information should be withheld under Section 43 FOIA."*

Scope of the case

12. The complainant contacted the Commissioner 8 April 2018 to complain about the way his request for information had been handled. He expressed concern that the Council had changed its response to item 11 and ignored his seven clarification questions he asked in response to the Council's initial answer in respect of item 11.
13. The Commissioner considers that the scope of her investigation is to consider whether the Council has complied with its obligations under section 1(1) of the FOIA and to determine whether it was entitled to rely on s43 of the FOIA.

Reasons for decision

Section 1 – General right of access to information held

14. Under section 1(1) of the FOIA, in response to a request for information a public authority is only required to provide recorded information it holds and is not therefore required to create new information in order to respond to a request.
15. In scenarios where there is some dispute between whether a public authority holds relevant information, the Commissioner, following the lead of a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities.
16. The Commissioner's judgement in such cases is based on the complainant's arguments and the public authority's submissions and where relevant, details of any searches undertaken. The Commissioner expects the public authority to conduct a reasonable and proportionate search in all cases.
17. In this particular case, the complainant was not satisfied with the Council's response to item 11 of his request and his subsequent questions following the Council's original response.
18. Item 11 has been reproduced in full in paragraph 5 of this notice. However, the Commissioner notes that the complainant was asking whether the Council held relevant documentation relating to discussions/feasibility studies in relation to the introduction of new TrawsCymru bus services in North/mid Wales to which the Council answered yes. Given the terms of the request, this is all the requestor had asked.
19. With regard to question 11 of the complainant's request therefore, the Commissioner has concluded that the Council has complied with its obligations under section 1(1) of the FOIA and has gone on to consider his follow on questions in his correspondence with the Council of 8 March 2018.
20. The Council has informed the Commissioner that in respect of the complainant's follow on questions to item 11, section 43 was applied and this was conveyed to the complainant under a separate response sent to the requester on 5 April 2018. The Commissioner has had sight of this response and whilst she notes that there was no reference to the follow on questions.
21. Therefore, whilst the Council was of the view that it had responded to the complainant's follow on questions, it is by no means apparent from

the correspondence that this was the case. The Commissioner has no option therefore but to conclude that the Council breached section 1(1) in respect of the complainant's follow on questions. However, as the Council has subsequently confirmed to the Commissioner that it is relying on section 43 of the FOIA in respect of these questions, they are included in the Commissioner's analysis of section 43 of this notice.

Section 43 – prejudice to commercial interests

22. The following consideration of section 43 relates to item 12 of the Council's refusal of the complainant's original request under section 43(2) and its subsequent refusal under the same exemption of the complainant's follow on questions to item 11.
23. Section 43 of FOIA states that information is exempt from disclosure if its disclosure would or would be likely to prejudice the commercial interests of any person (including the public authority holding it).
24. In order for a prejudice based exemption such as section 43(2), to be engaged the Commissioner considers that three criteria must be met:
 - Firstly, the actual harm which the public authority alleges would, or would be likely to occur if the withheld information was disclosed 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 the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance.
 - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – i.e. disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold the Commissioner believes 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.
25. The Commissioner's guidance explains that a commercial interest relates to a person's ability to participate competitively in a commercial activity i.e. the purchase and sale of goods or services. In this case the withheld information relates to a feasibility study conducted on behalf of the Welsh Government into the possible introduction of new TrawsCymru

bus service in North Wales. The Council has not specified the commercial activity, but the Commissioner assumes it relates to the costs of running the proposed route to the Welsh Government and any potential implications to the private bus companies operating within the region.

26. When a public authority is claiming that disclosure of requested information would prejudice the commercial interests of a third party the Commissioner follows the findings of the Information Tribunal decision in the case *Derry Council v Information Commissioner [EA/2006/0014]*. This confirmed that it is not appropriate to take into account speculative arguments which are advanced by public authorities about how prejudice may occur to third parties. Instead, the Commissioner expects that arguments advanced by a public authority should be based on its prior knowledge of the third party's concerns.
27. The Council has stated that at the time of the request, there was an ongoing viability study being undertaken by the Welsh Government and details of the proposed routes could impact on the commercial interests of itself, the Welsh Government and the Commercial operating firms. However, the Commissioner notes that it has not specified the nature of the impact (prejudice) or therefore any causal relationship between the impact of such a disclosure or the likelihood of the prejudice occurring.
28. The Council did however contact the Welsh Government at the time and the Commissioner notes it expressed concern about the information being released into the public domain while there was ongoing viability study. However, there were no details of the impact (positive or negative) of such a disclosure, any causal relationship or the likelihood of any such impact occurring as a consequence of disclosure.
29. The Commissioner also notes that the Council has not contacted the private bus companies, and therefore consistent with the findings of the Tribunal in the case of Derry Council referred to in paragraph 26 of this notice, the Commissioner does not accept the Council's position in respect of the commercial bus companies.
30. In light of the lack of details and evidence provided the Council, the Commissioner has no option but to conclude that the exemption at section 43(2) of the FOIA is not engaged. As the Commissioner has concluded that the exemption is not engaged, it is not necessary to consider the public interest test.

Right of appeal

31. 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: 0870 739 5836

Email: grc@justice.gov.uk

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

32. 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.
33. 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

Catherine Dickenson
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