

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 January 2023

Public Authority: Wrexham County Borough Council
Address: Guildhall
Wrexham
LL11 1AY

Decision (including any steps ordered)

1. The complainant submitted an information request to Wrexham County Borough Council (the Council) for a copy of the report titled Wrexham Gateway-Delivery of LUF and its appendices.
2. The Commissioner's decision is that section 36(2)(b)(ii) of FOIA is engaged. However, he finds that the public interest in maintaining the exemption does not outweigh the public interest in disclosure. He also finds that section 36(2)(c) of FOIA is not engaged.
3. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation
 - Disclose the requested information, with any personal data redacted.
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 FOIA and may be dealt with as a contempt of court.

Background

5. The Wrexham Gateway is a multi-million pound project aimed to regenerate key sites and transport infrastructure in the area.
6. It includes improvements to rail, bus and car travel connectivity, new hotel and conference facilities, office space and improvements to the Racecourse stadium.
7. The project is split into two key areas: the 'eastern side' and the 'western side.' The eastern side will see major redevelopment of the site around the Wrexham General station, and the western side incorporates the redevelopment of the Kop stand at the Racecourse stadium and surrounding land, alongside or incorporating an exhibition facility and a four-star standard hotel.
8. The finance proposal, which was put before the Council's Executive Board on 18 April 2023, was regarding the reallocation of a substantial amount of the funds, given to the Council by the Welsh Government, from the eastern side to the western side¹.

Request and response

9. On 15 April 2023, the complainant wrote to the Council and requested information in the following terms:

"I request publication in full of the Report and appendices titled Wrexham Gateway - Delivery of LUF, tabled for debate in secret at Wrexham Council's Executive Board on the 18th April 2023."
10. A response was provided on 21 April 2023, in which the request was refused under section 44(1)(a) of FOIA.
11. Upon receiving this response, the complainant requested an internal review on 30 April 2023, and on 16 June 2023, the Council provided its internal review response in which it removed its reliance on section 44(1)(a) and instead withheld the information under sections 36(2)(b)(ii) and 36(2)(c) of FOIA.

¹ <https://news.wrexham.gov.uk/councillors-consider-new-package-to-finance-key-parts-of-wrexham-gateway-project-including-new-kop/>

Reasons for decision

Section 36-prejudice to the effective conduct of public affairs

12. Section 36(2) of FOIA provides that information is exempt if, in the reasonable opinion of a qualified person, disclosure of the information:
 - (b) would, or would likely to inhibit:
 - (ii) the free and frank exchange of views for the purposes of deliberation, or
 - (c) would otherwise prejudice, or would otherwise be likely to prejudice, the effective conduct of public affairs.
13. The Council has applied sections 36(2)(b)(ii) and 36(2)(c) to withhold the requested information in its entirety.
14. The Commissioner will first consider whether the Council is entitled to rely on section 36(2)(b)(ii) to withhold the information. If it is not, the Commissioner will then consider the application of 36(2)(c).

Section 36(b)(ii)

15. The Commissioner's guidance on section 36² states that information may be exempt under section 36(2)(b)(ii) if its disclosure would, or would be likely to, inhibit the ability of public authority staff, and others, to express themselves openly, honestly and completely, when giving their views as part of the process of deliberation, and that arguments are usually based on the concept of a 'chilling effect'.
16. For any part of the exemption at section 36 to be engaged, the qualified person (QP) within the public authority is required to give a reasonable opinion about the likelihood of prejudice or inhibition.
17. When determining whether the QP's opinion is a reasonable one, the Commissioner takes the approach that the opinion is in accordance with reason and not irrational or absurd; in short, if it is an opinion that a reasonable person could hold.

² <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/section-36-prejudice-to-the-effective-conduct-of-public-affairs/>

18. The Commissioner is satisfied that the Chief Officer Governance and Customer/Monitoring Officer is authorised as the QP under section 36(5) of FOIA.
19. The Council has provided evidence that, after submission of the internal review request, it sought the advice of the QP, who was provided with a copy of the withheld information and advice on the application of section 36 to the request.
20. On 15 June 2023, the QP advised that, in their opinion, the inhibition, specified in section 36(2)(b)(ii), 'would be likely' if the requested information were to be disclosed, due to the Council needing to receive confidential information to deliberate on for decision.
21. With regard to the substance of the opinion (i.e., the advice to which the QP was asked to agree), the Commissioner is of the view that it lacks the detail which is normally included in such documents. The Commissioner notes that the Council's submissions do provide detailed reasons as to why section 36(b)(ii) applies, so he would remind the Council that this is the type of analysis and argument that the Commissioner would expect to have been put to the QP.
22. However, having inspected the withheld information, the Commissioner accepts that the QP's opinion is one that a reasonable person could hold, as the Commissioner considers that disclosure would be likely to prejudice free and frank deliberations between council officials and elected members.
23. The Commissioner therefore finds that section 36(2)(b)(ii) is engaged. He has therefore gone on to consider the public interest.

Public interest test

24. As section 36(2) is a qualified exemption, the Commissioner will consider whether, in all circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Factors in favour of disclosure

25. The complainant argues that "the report deals with the spending of a vast amount of taxpayers money on a private sector project", and as such the public interest outweighs the exemption.
26. The Council accepts that there is a public interest in "openness and transparency and the accountability of public bodies."

Factors in favour of maintaining the exemption

27. The Council argues that disclosure of the information would not be in the public interest as it would prejudice and disrupt the “free and frank exchange of views.”
28. The Council further argued that officers would be wary of not having a ‘safe space’ to debate knowing that the information might end up in the public domain.

The balance of the public interest test

29. In balancing the public interest test, the Commissioner accepts that a public authority should be afforded private space for its staff to consider and debate issues, and in which advice can be sought and given, whilst protecting the integrity of the deliberation process.
30. The Commissioner also notes that the Council’s arguments against disclosure are based on the concept of a ‘chilling effect’, and that these arguments are likely to be strongest when the issue in question is still live and ongoing, as it is in this instance.
31. However, the fact that prejudice has been identified and accepted is not conclusive evidence that the requested information should be withheld. It is important to be clear that the exemptions, contained in section 36, focus on the processes that may be inhibited, rather than what is in the withheld information. The issue is whether disclosure would inhibit the process of exchanging views. If the information only consists of relatively neutral statements, then it may not be reasonable to think that its disclosure could inhibit the exchange of views.
32. Looking at the withheld information, the Commissioner is not convinced that the information records candid views on sensitive issues. Furthermore, the Commissioner is aware that the result of the meeting is already in the public domain³
33. In addition, the Commissioner accepts the complainant’s argument that there is a strong public interest in disclosure, for the project involves a significant sum of public money and is a key local development.

³ <https://www.bbc.co.uk/news/uk-wales-65313484>

34. The Commissioner notes that the Council has put forward concerns around the commercial sensitivity of the information in terms of the money and value associated with the project, which would make a strong public interest argument in favour of maintaining an exemption. However, these concerns do not relate to the particular exemption applied.
35. Consequently, the Commissioner's decision is that the public interest in maintaining the exemption does not outweigh the public interest in disclosing the requested information.
36. In light of this decision, the Commissioner will now go on to consider the application of section 36(2)(c) of FOIA to the withheld information.

Section 36(2)(c)

37. The Commissioner's guidance states that information may be exempt under section 36(2)(c) if its disclosure would, or would likely, have an adverse effect on a public authority's ability to offer an effective public service.
38. As referenced above, when considering whether the exemption is correctly engaged, the Commissioner must determine whether the QP's opinion was a reasonable one. This test of reasonableness is not meant to be a high hurdle.
39. The QP confirmed that they considered section 36(2)(c) to be engaged as the release of the information 'would be likely' to prejudice the effective conduct of the Council with its commercial partners, for they need to have confidence that commercially sensitive negotiations are not prejudiced by being in the public domain.
40. It is the Commissioner's view that the QP's opinion is not reasonable, as there is no causal link demonstrated between the withheld information and the ability of the Council to offer a public service. The QP's opinion is vague and mentions nothing about the Council's public services being compromised.
41. The Commissioner notes that the Council has provided further submissions to him, on this exemption, however, as mentioned above, they demonstrate concerns around the commercial sensitivity of the information, and not about how it will affect the Council's ability to offer an effective public service.
42. For the reasons set out above, the Commissioner has found the exemption is not engaged, and so he has not gone on to conduct the public interest test.

43. As the Commissioner has found that the Council could not rely on sections 36(b)(ii) and 36(2)(c) to withhold the requested information, the Commissioner orders that the withheld information be released to the complainant within 35 calendar days of the date of this decision notice.

Other matters

44. The Commissioner would like to remind the Council, that when asking for submissions, he expects to be provided with a full response. This is to prevent him having to contact the Council, multiple times, delaying the process for all involved.
45. The Commissioner also notes, that in its internal review response, the Council applied both sections 36(2)(b)(ii) and 36(2)(c), without distinguishing between the prejudice claimed under each section. Even though it corrected this in its submissions to the Commissioner, the Commissioner would like to remind the Council that whilst both sections can be applied to the same information, the prejudice claimed under section 36(2)(b) cannot be the same as that claimed under section 36(2)(c) of FOIA.

Right of appeal

46. 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

47. 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.
48. 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.....

Joanna Marshall
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