

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

Decision notice

Date: 22 March 2021

Public Authority: Swansea Council

Address: freedomofinformation@swansea.gov.uk

Decision (including any steps ordered)

1. The complainant requested financial information about major events over a three year period. Swansea Council ('the Council') provided some information but withheld other information under section 43 of the FOIA. The Commissioner's decision is that the Council has correctly applied section 43 to the withheld information. She does not require any steps to be taken.

Request and response

2. On 7 October 2019, the complainant wrote to the Council and requested information in the following terms:

"I would like to ask about special/major events arranged by Swansea Council, under the 2000 Freedom of Information Act.

1) Can the council list the special/major events it organised or helped organise in the financial years 2017-18, 2018-19, and 2019-20 to date?

2) Can the council list how much money each event cost the council? (ie Wales National Airshow 2018, £65,000)

3) Can the council list how much revenue each event generated for the council (ie Wales National Airshow 2018, £80,000)"

3. The Council responded on 21 November 2019 and provided some information but withheld other information under section 43 of the FOIA.
4. On 26 November 2019 the complainant requested an internal review of the handling of the request.
5. The Council provided the outcome of its internal review on 24 December 2019 and upheld its decision that the remaining information was exempt under section 43 of the FOIA.

Scope of the case

6. The complainant contacted the Commissioner on 3 January 2020 to complain about the way his request for information had been handled.
7. The scope of the Commissioner's investigation into this complaint is to determine whether the Council should disclose the remaining information held relevant to the request of 7 October 2019.

Reasons for decision

Section 43 – Commercial interests

8. Section 43(2) of the FOIA states that information is exempt if its disclosure would prejudice the commercial interests of any person, including those of the public authority holding it.
9. The exemption can be engaged on the basis that disclosing the withheld information either 'would' or 'would be likely to' prejudice commercial interests. This establishes two thresholds for engaging the exemption. The lower one, 'would be likely to' prejudice has been interpreted by the Tribunal as meaning that the chance of prejudice being suffered should be more than a hypothetical possibility; there must be a real and significant risk. It follows there must be a greater risk of the prejudice occurring for the exemption to be engaged on the basis that the prejudice 'would' occur.
10. The Council disclosed information relating to in-house events which are completely managed, delivered and marketed by the Council. It also disclosed information relates to general park and open space hire events. a spreadsheet showing. The information which the Council has withheld relevant to the request comprises the expenditure, revenue and net cost to the Council for promoter-led commercial events.

11. The Council considers that disclosure of the withheld information would have a prejudicial effect on its own commercial interests, specifically the day-to-day business of its Special Events Team and its annual events programme. This is because disclosure of the amounts paid by suppliers, as a share of potential profits for staging events, has a direct effect on the Council's ability to provide best value for its residents.
12. The Council explained that event promoters would be able to use the withheld information to negotiate lower fees for any future events in the Swansea area. In addition, the Council considers that publication of the fees that event providers have paid would damage its relationship with the providers, which may result in them withdrawing events from Swansea in the future. These effects would prejudice the Council's ability to negotiate future agreements with event suppliers.
13. The Council explained that whilst there are a number of similar recurring events such as an annual air show and an open-air music event, no two years' events programmes are identical. The Events team manage and deliver three different type of events:
 - a. In-house events which are entirely managed, delivered and marketed by the Council itself, for example the Wales Airshow. These events are financed wholly by the Council through its special events budget.
 - b. General park and open space hires, for example community park hires.
 - c. A range of promoter-led commercial events which are brought to Swansea by third party commercial event promoters such as music concerts and the Swansea Triathlon. These events are financed by the promoter who bears the main financial risk of the event. On average the Council has around 10 of these types of events each year.
14. As mentioned earlier in this notice, the Council has only withheld information relating to promoter led commercial events (type c events). Type c events provide an income for the Council through a negotiated share of the potential income from the event. The Events Team budget is set up in a way that income from type c events cross-subsidises part of the cost of type a and b events. This means that the amount of income that the Council is able to raise from type c events has a direct bearing on its ability to deliver any in house events. The Council confirmed that events delivered by the Events Team contribute in excess of £20million every year to the local tourism economy. Any reduction in the number, size, or quality of events "*would negatively impact on that economic return for the community*".

15. The Council advised that the income that is obtained from each type c event does not follow a set fee structure but is instead negotiated individually with the event promoter. Although income is a key concern, the fee negotiated takes into account a number of other factors including:

- i. The event type and how it relates to, and provides 'balance' to the annual events programme.
- ii. The impact the event may have on the local community, for example whether it will draw in people from outside the Swansea area.
- iii. The size and return compared to similar providers.
- iv. Reputational issues for the Council such as anticipated ticket prices.
- v. The time of year the event is to take place and any impact this may have on the tourism season. For example, some events may be less appealing during an already busy month.
- vi. Whether costs can be saved by sharing event infrastructure across more than one event or more than one commercial promoter.
- vii. How long the Council has had a relationship with the event promoter and the depth of the promoter's perceived commitment to the aims and values of the Council.
- viii. Other income that the Council may derive from as a result of the event, for example car park charges.
- ix. The overall size of the event and the impact it may have on Swansea, Swansea Bay region or on Wales itself.
- x. The potential impact on the tourism economy, including the number of hotel stays by visitors as opposed to day visitors. This can be dependent on the timing of the event and whether it takes place over more than one day.
- xi. The perceived public demand for the type of event.
- xii. The likely level of national and international media coverage and its impact.

16. The Council and commercial events promoters operate in a challenging and commercially sensitive environment and competition is high. The Council advised that there is only a small pool of commercial operators

with the right level of reputation who operate in Wales. The location of Swansea and its relatively small urban population makes it more difficult to attract and maintain relationships with events promoters when compared to other cities such as Cardiff and Bristol.

17. The Events team has to consider each year whether some events are better delivered through commercial providers, or in-house. The Council contends that *"releasing events to commercial promoters affects the Council's ability to obtain best value for its residents and the local economy by passing the bulk of potential income to the providers, along with the risk. Given the complexity of such decisions, the amount paid by commercial suppliers is considered highly sensitive. The Council is concerned that the potential for other promoters to amend their offers in light of disclosure of previous financial benefits received by the Authority"*. The Council confirmed that all contracts with commercial event promoters contain a standard clause confirming that financial information about the event will not be published:

"It is agreed between both parties that details of the Event's financial performance will not be made available to public or press provide this remains in accordance with all statutory and Local Authority regulations".

18. Although the Council confirmed that it treats all FOI requests impartially, it pointed out that the request in this case was made by a journalist. It considers it reasonable to expect that any information disclosed would be published online. The Council considers that this would 'magnify' the prejudicial impact caused through disclosure of the withheld information.
19. In order for a prejudice based exemption, such as section 43(2), to be engaged, the Commissioner believes that three criteria must be met:
- Firstly, the actual harm which the public authority believes would, or would be likely, to occur if the withheld information was disclosed has to be related 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 potential prejudice against 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 – i.e., disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice.

20. 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. The anticipated prejudice must be more likely than not.
21. With regard to the first criterion of the three limb test described above, the Commissioner accepts that the potential prejudice described by Swansea Council clearly relates to the interests which the exemption contained at section 43(2) is designed to protect.
22. With regard to the second criterion, the Commissioner has considered the arguments put forward by the Council and considers that it is reasonable to accept that disclosing the withheld information has the potential to harm the Council's commercial interests. This is because, in the Commissioner's view, it is logical to argue that, in a competitive and lucrative market, event promoters would seek to use the withheld information to try to negotiate lower fees for future events held in the Swansea area. This in turn would be likely to prejudice the Council's ability to negotiate agreements for future events with event promoters. The Commissioner notes that the Council arranges around 10 promoter-led commercial events each year. The Commissioner has also taken into account the Council's comments about the small pool of event promoters available and the difficulties in attracting events to the area compared to other cities.
23. The Commissioner also accepts that, in light of the confidentiality clause within event agreements, disclosure has the potential to damage the Council's relationship with event promoters, which could lead to them withdrawing events from Swansea in the future.
24. The Commissioner understands the point that has been made about the likelihood of wider dissemination of the disputed information given the request was submitted by a journalist. However, it is important to reiterate that the FOIA is largely applicant and purpose blind. Therefore, the Commissioner has not given additional weight to the fact that the complainant in this case is a journalist.
25. The Commissioner has gone on to consider the third criterion in the prejudice test. The Council has confirmed it is relying on the higher level of 'would' cause prejudice to its commercial interests. The Commissioner does not accept that the likelihood of prejudice meets the threshold of 'would' cause prejudice to Council's own commercial interests, in that it would more likely than not cause prejudice. The Commissioner does, however, accept that the likelihood of prejudice occurring meets the

lower threshold of 'would be likely to' prejudice the unsuccessful companies as there is a more than hypothetical chance that event promoters would attempt to use the withheld information to their advantage in negotiating lower fees for events in the future.

26. In order to accept the exemption is engaged the Commissioner usually requires evidence of a causal link between the information in question and the alleged prejudice argued. This is usually easier to argue where an issue is ongoing, such as retendering or negotiating a new commercial contract or deal. The Commissioner notes that the Council has a frequent need to negotiate contracts with event promoters as it arranges around 10 events each year. Taking all of the above into account, the Commissioner is satisfied that section 43(2) is engaged in relation to the withheld information and she has gone on to consider the public interest test in this case.

Public interest test

27. The exemption under section 43(2) of the FOIA is qualified which means that the information in question should only be withheld where the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosure

28. The Council acknowledged that disclosure would ensure that the Council is seen to be open and transparent and would enable the public to better scrutinise how it spends/manages public monies.
29. The Council also considered whether disclosure of the information requested could lead to better value for money as it would likely increase openness and transparency in future tender processes.
30. The complainant considers that the public interest favours disclosure on this case in terms of openness and transparency. He believes the Council should be "*held to account for decisions to hold big events which were the subject of numerous press releases promoting those events*". As the Council gets credit for holding such events, the complainant considers that the public is entitled to know the costs and revenue associated with the events.

Public interest in favour of maintaining the exemption

31. The Council advised the Commissioner that when it considered the public interest test in this, it took into account the following points/questions:

- *"Would releasing the information affect the Council's ability to operate in a commercially competitive environment?"*
 - *Would the Council suffer an unreasonable level of reputational damage from the disclosure which may affect its ability to plan for future events?"*
 - *Some promoters may feel they have been overcharged or that they have overpaid for the rights to stage their event in Swansea compared to others. Having seen what fees others have paid, this may negatively impact on future negotiations. Is the maintenance of a positive working relationship with event promoters of greater public interest in that disclosure may cause certain promoters to refuse to work with the Council in future or to increase or reduce their terms of contract?"*
 - *Would the Authority's ability to generate income be affected should any of the above happen?"*
 - *Given that the Councils in-house events are in part funded by the income from externally promoted events. Will the annual events programme be damaged or diminished as a result of a lack of future income from event promoters?"*
32. Having considered the points listed above, the Council reached the view that the public interest favours maintaining the exemption in this case because disclosure of the information requested would:
- affect its ability to negotiate and compete in the commercial event market in the future as promoters will be aware of fees paid by other parties and this would lessen the Council's competitive advantage;
 - affect the overall size and balance of the Council's annual programme of events;
 - impact on the Council's ability to operate effectively in what is a small market of event promoters; and
 - provide a precedent for disclosure of information in the future which may impact on negotiations with suppliers on other contracts or procurement exercises.

Balance of the public interest

33. The Commissioner considers that there is a public interest in openness and transparency about the relationships the Council enters into with commercial organisations, and in accountability for the efficient use of public funds.
34. Disclosure of the information requested in this case would provide members of the public with information about the costs and revenues of

large commercial events in the area, which are often publicised in the media. It would also provide the public with an insight into any financial benefit the Council has received as a result of decisions taken in respect of its annual events programme.

35. The Commissioner has already accepted that disclosure has the potential to prejudice the Council's own commercial interests by affecting its ability to negotiate contracts with events promoters in the future. The Commissioner considers that protecting the ability of the Council to operate effectively within a small specialised market, by not disclosing information that competitors could use to its commercial disadvantage, outweighs any public interest arguments for the information's disclosure.
36. Furthermore, in the Commissioner's opinion, there is clear public interest in ensuring the Council maximises its funds and maintains its service provision in respect of its annual events programme. She gives weight to the argument that disclosure of the information may cause reputational damage to the Council, which may in turn damage its ability to negotiate with events promoters in the future. In the circumstances of this case the Commissioner considers these arguments to attract significant weight given that disclosure of the information presents a real risk of harming the Council's commercial interests with regard to the income available for its annual events programme. Any reduction in this income will ultimately affect the services it is able to provide to its residents, and visitors to the area.
37. Having taken into account all of the public interest arguments for and against disclosure of the withheld information, the Commissioner has concluded that the public interest in maintaining the exemption outweighs the public interest in disclosure in all the circumstances of this case.

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: 0300 1234504
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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