Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 April 2014

Public Authority: Welsh Assembly Government
Address: Cathays Park
Cardiff
CF10 3NQ

Decision (including any steps ordered)

1. The complainant requested a copy of a contract between British Telecom ('BT') and the Welsh Government regarding the delivery of broadband services across Wales. The Welsh Government initially refused the request under section 14(2) as it considered the request to be repeated. At the time of the internal review, the Welsh Government withdrew reliance on section 14(2) and stated the information requested was exempt under section 43(2). During the course of the Commissioner's investigation, the Welsh Government disclosed some information relevant to the request and the complainant withdrew his request for some parts of the contract. The Welsh Government maintained that the remaining information falling within the scope of the request was exempt under sections 31, 41 and 43(2).

2. The Commissioner's decision is that:

   - The Welsh Government correctly withheld some information under section 43(2), namely clause 20.1 and schedule 8.

   - Sections 43(2), 31 and 41 are not engaged in relation to clauses 7.14 and 20.2 of the main contract and schedule 4 of the contract.

3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.

   - To disclose clauses 7.14 and 20.2 of the main contract and schedule 4 of the contract.

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 1 May 2013, the complainant wrote to the Welsh Government and requested information in the following terms:

   "The contract document that forms an agreement between BT and the Welsh Government pertaining to the delivery of Superfast Broadband which has a target date of 2015".

6. The Welsh Government issued a refusal notice on 29 May 2013 stating that it was refusing the request under section 14(2) as a repeated request as it had received two earlier requests for a copy of the contract with BT, one of which was responded to only a month earlier.

7. On 3 June 2013, the complainant requested an internal review of the Welsh Government's handling of the request. He said that he understood section 14(2) could only apply if the authority had already provided the information to the requestor and as he had not been provided with the requested information, section 14(2) could not apply.

8. The Welsh Government provided the outcome of its internal review on 3 July 2013 and concluded that section 14(2) had been incorrectly applied to the request. However, it stated that it considered the information requested to be exempt under section 43(2) of the FOIA and the public interest favoured non-disclosure.

Scope of the case

9. The complainant contacted the Commissioner on 17 July 2013 to complain about the way his request for information had been handled.

10. During the course of the Commissioner's investigation, the Welsh Government disclosed a redacted copy of the contract. It also introduced reliance on sections 31, 41 and 44 of the FOIA. On receipt of the redacted copy of the contract, the complainant accepted that some of the information was likely to be commercially sensitive and had been properly withheld.

11. In light of the above, the Commissioner considers this complaint to relate to the remaining information contained within the contract which the complaint is still interested in receiving and whether the information has been properly withheld. This information is detailed below:

(i) Clause 7.14 of the contract – cost of passing premises
- entire clause withheld under sections 41 and 43(2).

(ii) Clauses 20.1-20.2 of the contract – drop dead date
- entire clauses withheld under sections 41 and 43(2).

(iii) Schedule 4 – contract intervention area
- Entire schedule withheld under sections 31, 41 and 43(2).

(iv) Schedule 8 – milestones
- parts of the schedule withheld under sections 41 and 43(2).

Reasons for decision

Section 43 – commercial interests

12. 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).

13. 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.

14. In order for a prejudice based exemption, such as section 43, 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 withheld information 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, ie disclosure 'would be likely' to result in prejudice or disclosure '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.

15. The Welsh Government has argued that section 43(2) is engaged with regard to the interests of BT. The Welsh Government's position is that disclosure of the withheld information would be likely to prejudice the commercial interests of BT as it is actively competing with other companies to win similar business.

16. 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.

17. The Commissioner understands that the contract with BT was agreed following a procurement process which began in January 2011. A contract notice was published in the Official Journal of the European Union inviting expressions of interest from companies across Europe. Following a tendering process and a process of competitive dialogue to develop and refine initial proposals from bidders, the contract was agreed with BT to deliver the Next Generation Broadband for Wales project.

18. The Commissioner accepts that the information contained within the contract which the Welsh Government has continued to withhold relates to the commercial interests of BT and therefore 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.

19. 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 is not engaged. The detrimental effect need not necessarily

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

20. As explained in paragraph 14 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 Welsh Government is relying on the lower threshold.

21. 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 Welsh Government sought the views of BT both at the time the request was received, and again during the Commissioner's investigation and provided the Commissioner a copy of representations it received from BT.

22. BT's submissions are detailed in nature and include information which BT considers to be, in itself, commercially sensitive. Such information encompasses references to the redacted information and also includes a number of reasons why BT considers that prejudice would occur specifically in relation to the disclosure of clauses 7.14, 20.1 to 20.2 of the main contract, and schedules 4 and 8. Therefore the Commissioner's analysis which is set out below does not include an explicit assessment of all of the reasons why BT considers the redacted information to be exempt from disclosure. Further consideration of BT's representations is set out however in the confidential annex which will be sent to the public authority only.

23. The Welsh Government considers the withheld information to be commercially sensitive information which could be used to advantage by BT's competitors. BT is actively competing with other companies in relation to a pipeline of opportunities currently available to provide similar services to other public authorities. Additionally, the Welsh Government argues that some of the withheld information would reveal BT's strategy for products that are not yet launched.

24. The Welsh Government contends that disclosure of the withheld information may also create an expectation/reliance by BT's national Communications Providers that such products are or will be available when BT is at a stage of the project where there is still reasonable uncertainty as to the timescales for their delivery. It considers it likely that failure to meet these expectations would be damaging to BT's reputation and thus affect their business and share price. The Welsh

Government is of the view that disclosure would be highly prejudicial to BT's competitive position in relation to these opportunities and future business and considers the resultant harm to BT's commercial interests would be substantial.

25. Based on the representations provided by the Welsh Government, the submissions made by BT and the consideration of these submissions, as set out in the confidential annex to this notice, the Commissioner is satisfied that disclosure of clause 20.1 and schedule 8 would be likely to prejudice BT's commercial interests and as such section 43(2) is engaged in relation to this information.

26. However, it is the Commissioner's view that the Welsh Government has failed to date to submit any convincing arguments to demonstrate that disclosure of clauses 7.14, 20.2 or schedule 4 would be likely to prejudice BT's commercial interests, or any evidence of the likelihood of a real and significant risk of prejudice being caused to its own commercial interests. The Commissioner does not, therefore, consider that section 43(2) is engaged in relation to this information.

27. As the Commissioner has concluded that section 43(2) is engaged in relation to clause 20.1 and schedule 8, he has gone on to consider the public interest test in respect of this information.

Public interest arguments in favour of disclosure (Clause 20.1 and Schedule 8)

28. The Welsh Government acknowledges there is a public interest in openness and transparency within government, particularly in terms of promoting transparency and accountability in the spending of public funds.

29. The Welsh Government also recognises that the public have a right to know that it is investing public money wisely and that the awarding of public sector contracts is done fairly and in accordance with the relevant rules and procedures.

Public interest arguments in favour of maintaining the exemption (Clause 20.1 and Schedule 8)

30. The Welsh Government considers the timing of the request to be important as BT is currently actively competing for similar contracts. The withheld information could be used by its competitors and thus unfairly disadvantage BT in future bidding processes. In addition, as the project which is the subject of this request is ongoing, there is still reasonable uncertainty with regard to the timescales for delivery.

31. The Welsh Government acknowledges that the withheld information may be of interest to those working in direct competition with BT, but it does not consider there to be any wider public interest in releasing the withheld information, given the fact that a redacted copy of the contract has been disclosed.

32. The Welsh Government considers that the public interest lies only in the wider detail of the contract rather than the detailed financial and operational information contained in the withheld information. When a company shares its commercially sensitive information with the Welsh Government, it is doing so on the basis that the commercial sensitivity of that information is recognised by the Welsh Ministers and will be protected. The Welsh Government considers that the public interest would not be best served by key suppliers such as BT not being able to share confidential information with them as this would then impair its ability to engage in a fair and effective procurement exercise. Some key suppliers of services would not then disclose confidential information as part of any such procurement exercise. This would mean that the Welsh Government's ability to discharge its statutory duty to obtain "good value" from private sector suppliers would be materially impaired.

Balance of the public interest test (Clause 20.1 and Schedule 8)

33. The Commissioner considers that there is a public interest in openness and transparency, and in accountability for the efficient use of public funds. However he notes that in this case the majority of the contract has been disclosed and considers that this goes some way towards meeting this public interest.

34. The Commissioner does however consider that there is a strong public interest in not disclosing information which would be likely to commercially disadvantage private companies in the bidding process relating to contracts with public authorities, such as in this case.

35. On balance, the Commissioner considers that the public interest arguments in favour of disclosure of clause 20.1 and schedule 8 are outweighed by the public interest arguments in favour of maintaining the exemption.

Section 31 – law enforcement

36. Section 31 provides a prejudice based exemption which protects a variety of law enforcement interests. For the exemption to be engaged it must be at least likely that the prejudice identified would occur. Even if the exemption is engaged, the information should be disclosed unless the public interest in maintaining the exemption outweighs the public interest in disclosure.

37. The Welsh Government has applied section 31(1)(a) to schedule 4 of the contract. As the Commissioner has determined that section 43 is not engaged in relation to schedule 4, he has gone on to consider the Welsh Government's application of section 31 to the information.

38. In the Commissioner's view, section 31(1)(a) will cover all aspects of the prevention and detection of crime. It is also his view that the exemption covers information held by public authorities without any specific law enforcement responsibilities. For example, it can be used by a public authority that has no law enforcement function to protect the work of one that does. The Commissioner considers that the exemption could be used to withhold information that would make anyone, including the public authority itself, more vulnerable to crime.

The Welsh Government's position

39. In a response issued to the complainant during the Commissioner's investigation, the Welsh Government argued that section 31(1)(a) applied to schedules 4, 5 and appendix 1 of the contract because:

"The release of information requested would place in the public domain information that provides exact locations of assets and infrastructure owned by BT. In so doing, this would be likely to comprise BT's ability to keep secure its assets on behalf of both private and public sector customers. Releasing information on the location of sites and hosting protocols for internet websites would be likely to make the network vulnerable to e-crime. Harm would be likely to occur because criminals would be likely to have detailed information on internet gateways and target cyber attacks".

40. The Commissioner considers that some of the Welsh Government's arguments in relation to the public interest test could also be considered relevant to the nature of the prejudice. The Welsh Government referred to the Tribunal case in Mr C P England and London Borough of Bexley v Information Commissioner (EA/2006/0060 & 0066). This case involved a request for a list of vacant, empty or abandoned residential properties. The request had been refused under section 31(1)(a) on the grounds that information about empty properties was likely to prejudice the prevention of crime as it would make it easier to identify them and therefore make it more likely they would be targeted for theft and vandalism. The Welsh Government stated that:

"The release of exact locations of infrastructure deployed would likely increase the risk of theft and/or criminal damage to the network. There have previously been a number of attempted thefts of network assets, with one attack breaching the security in one location. There have also been acts of criminal damage on several locations in the past which

were investigated by North Wales Police. This resulted in significant costs to repair the damage caused. Release of information on asset locations would be likely to increase the risk of further attacks".

41. The arguments referred to above were submitted by the Welsh Government in relation to the disclosure of schedules 4, 5 and appendix 1 of the contract. As stated earlier in this notice, following disclosure of a redacted copy of the contract, the complainant limited his request to certain items which had been withheld. The Commissioner wrote to the Welsh Government asking whether it wished to submit any further representations in relation to the reduced scope of the request.

42. The Welsh Government confirmed that it still considered section 31 to apply to schedule 4 of the contract and submitted identical representations as it did in relation to its application of section 31 to schedules 4, 5 and appendix 1 of the contract.

Complainant's position

43. The complainant has not had sight of schedule 4 of the contract, but suggested that if it referred to contract delivery information – ie postcodes where the contract will intervene, he considers disclosure is necessary to assess the efficacy of the contract.

The Commissioner's position

44. With regard to the first criterion of the three limb prejudice test (as outlined in paragraph 14 above), the Commissioner accepts that potential prejudice to the security of BT's network assets which could also leave the network vulnerable to e-crime relates to the interests which the exemption contained at section 31(1)(a) is designed to protect.

45. With regard to the second criterion, he accepts the logic of the Welsh Government's argument that disclosure of information that would reveal the exact location of BT owned assets and infrastructure and hosting protocols would be likely to prejudice the prevention of crime. However, the withheld information comprises a list of over 50,000 postcodes across Wales, with the corresponding number of properties/premises within each postcode area, for example "SK9 5AF – 1". The redacted contract which has been disclosed provides the following explanation about the information contained within schedule 4:

"Details of the Premises and postcodes which lie within the Contract Intervention Area are set out in Schedule 4 (Contract Intervention Area)".

46. The contract provides various targets in relation to the carrying out of works to ensure that broadband coverage is achieved throughout the contract intervention area, for example:

    "a minimum of ninety per cent (90%) of all Premises in the Contract Intervention Area are capable of having access to broadband services at a minimum of 30Mbps PPIR with 2Mbps CIR"

47. Based on the above, it appears that the withheld information is a complete list of postcodes and the number of properties associated with each postcode that lie within the contract intervention area. The Commissioner notes that the contract provides for certain percentages of these properties to have access to high speed broadband as a result of the project, and as such not all of the postcodes/corresponding properties contained within the withheld information will actually receive high speed broadband. He also notes that the information contained within schedule 4 is of a fairly high level, generic nature.

48. Taking into account the generic nature of the withheld information and the Welsh Government's representations, the Commissioner is not persuaded that disclosure would reveal the exact locations of BT assets and infrastructure which may result in the attempted theft of network assets. As far as the Commissioner can see, disclosure of schedule 4 would also not reveal "hosting protocols for internet websites". He is therefore unable to see how disclosure would provide criminals with detailed information on internet gateways in order to target any cyber attacks.

49. In the Commissioner's opinion, the Welsh Government has failed to provide sufficient evidence to demonstrate that a causal relationship exists between the potential disclosure of the schedule 4 and the prejudice which the exemption is designed to protect, or that there is real and significant risk that disclosure would be likely to prejudice the prevention and detection of crime. The Commissioner has therefore concluded that section 31 is not engaged in relation to schedule 4 of the contract.

Section 41 – information provided in confidence

50. Section 41(1) of the FOIA provides an exemption for information that was obtained by the public authority from another person and where the disclosure of that information would constitute an actionable breach of confidence. Consideration of this exemption is a two-stage process; first, the information in question must have been provided to the public authority by a third party. Secondly, the disclosure of this information must constitute an actionable breach of confidence.

Was the information obtained by the Welsh Government from any other person?

51. In deciding whether information has been "obtained from any other person", the Commissioner will focus on the content of the information rather than the mechanism by which it was imparted and recorded.

52. The Commissioner's general view is that a concluded contract agreed between a public authority and another person is not usually information being provided by one party and obtained by the other. Therefore, in most cases, information in a concluded contract cannot be exempt under section 41 because it has not been obtained by the public authority from another party.

53. However, depending on the circumstances of the case, some information relevant to a contract may count as confidential information obtained from another party, for example, information regarding a pre-contractual negotiating position or technical information either contained within the body of a contract or provided as a separate schedule. This follows the approach taken in the Information Tribunal case Derry City Council v The Information Commissioner (EA/2006/0014)[1].

54. As stated earlier in this notice, the Welsh Government first introduced its reliance on section 41 during the Commissioner's investigation. In its letter to the complainant of 30 October 2013 the Welsh Government stated it was relying on section 41 in relation to schedule 2, annex 1 and schedule 6 of the contract. At the same time, the Welsh Government disclosed a redacted copy of the contract.

55. On receipt of a redacted copy of the contract, the complainant accepted that it was likely some parts had been withheld correctly and limited his request to clauses 7.14, 20.1 to 20.2 of the main contract, and schedules 4 and 8 to the contract. Based on this, the Commissioner asked the Welsh Government whether it wished to submit any further representations specifically based on the reduced scope of the request. The Welsh Government subsequently confirmed that it considered clauses 7.14, 20.1 to 20.2 of the main contract, and schedules 4 and 8 to be exempt under sections 41. As the Commissioner has already determined that clause 20.1 and schedule 8 are exempt under section 43, he has not gone on to consider the Welsh Government's application of section 41 to this information. As such, the Commissioner has limited his assessment of the Welsh Government's application of section 41 to clauses 7.14 and 20.2 and schedule 4.

[1] http://www.informationtribunal.gov.uk/DBFiles/Decision/i69/Derry.pdf

56. In a response to the complainant of 30 October 2013, the Welsh Government argued that section 41 applied as the information had been "inserted into the contract from documents that were originally provided to us by BT in confidence as part of the competitive dialogue process during the bidding stage". This statement is echoed in submissions made by BT to the Welsh Government in connection with the consultation process about disclosure of the information requested.

57. As it was not entirely clear to the Commissioner, he asked the Welsh Government to provide further evidence to demonstrate that the information withheld under section 41 had been obtained from BT. For example he asked the Welsh Government whether it would be able to provide copies of the documents it had referred to as being provided by BT from which the information had then been inserted into the contract.

58. The Welsh Government did not provide copies of any specific documents provided to it by BT throughout the tender/procurement process. However, it explained that:

    "BT's agreement and inclusion of the information exempt under s41 was negotiated under a competitive bid process for the project. The information includes details on the intervention area, and the method they would use for deploying their Superfast Broadband. BT's response document was provided as part of its bid submission with the expectation that it would not be shared in the public domain. This is explicitly stated in the confidentiality clauses within the contract (See Clause 29, Confidentiality). The information was then incorporated into the contract and/or formed the basis of agreeing to include certain provisions into the contract. The contract was negotiated in the course of confidential discussions and negotiations between the parties, whereby it was not expected that the content of those discussions would be placed in the wider public domain".

59. In addition, the Welsh Government advised the Commissioner that:

    "certain provisions in the contract (such as clauses 7.14, 20.1 to 20.2 of the main contract, and schedules 4 and 8) were shaped and finalised during confidential contract discussions and negotiations".

    The Welsh Government referred to, and provided a copy of a Confidentiality Agreement which it entered into with BT on or around 20 December 2010 and is still in force. The Welsh Government stated that the information withheld under section 41 was provided to it pursuant to this Confidentiality Agreement.

60. The Commissioner notes that the Confidentiality Agreement between the Welsh Government contains exceptions that refer to disclosures made

pursuant to a request under the FOIA or the EIR. The Confidentiality Agreement acknowledges that the Welsh Government is subject to the requirements of the FOIA. It contains provisions for the Welsh Government to consult with BT prior to disclosure of any information relating to the contract provided that BT acknowledges and agrees that the final decision on whether information is disclosed rests with the Welsh Government.

61. Given that the Welsh Government acknowledges that clauses 7.14, 20.2 and schedules 4 were shaped and finalised during discussions between the parties, the Commissioner is not satisfied that they contain information which was "obtained" by the public authority from a third party. Rather, the information appears to have been agreed between the parties during contract negotiations. In the absence of any firm evidence that the information has been obtained by the Welsh Government from BT, the Commissioner is of the view that section 41 is not applicable to this information as it fails the first condition of section 41.

Right of appeal

62. 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
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

63. 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.

64. 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
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