

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

Decision notice

Date: 12 July 2021

Public Authority: Caerphilly County Borough Council
Address: foi@caerphilly.gov.uk

Decision (including any steps ordered)

1. The complainant requested information about the contract management review of a PFI project. Caerphilly County Borough Council (the Council) disclosed some information but withheld other information under sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) (effective conduct of public affairs). The Commissioner's decision is that the Council has correctly applied 36(2)(b)(i) and 36(2)(b)(ii) to the withheld information. However, the Commissioner has found that the Council breached section 17(1) of the FOIA. She does not require any steps to be taken.

Request and response

2. On 3 July 2020, the complainant wrote to Council and requested information in the following terms:

"1 What is the current timescale on the possible buy back of the PFI contract with details and cost including the contract break clauses, funding from Assembly, Council Budgets , and what calculations will be used to terminate the contract

2 I understand that in October 2016 Local Partnerships were engaged by the Acting Director to undertake a review of the schools and highways. If this is correct please confirm what dates after the new administration took office in May 2017 that the Cabinet reviewed the cost implications

and contents of any reports and approved any additional costs. Alternatively, was it an operational matter for CMT only? - can minutes, documents be provided

3 I further understand that in April 2017 CMT agreed Local Partnerships and undertook further work in regards to a contract management review and value testing support. Please define what input the Cabinet , Senior Officers and CMT had into these reports in regard evaluation and discussion and all decisions taken by CMT / Cabinet, and the specific cost paid to Local Partnerships for this additional work

4 As the matters directly affect our wards please provide the local elected members with a summary of these reports with as appropriate any confidential information removed

5 Please define all costs paid to Local Partnerships to date from April 2016.

6 In regard to procurement, I understand this may not have been subject to a full procurement rules process. If so does this mean a tendering exercise, evaluation and shortlisting was not required, and if so could you provide the documentation”

3. The Council responded on 3 August 2020 and provided the majority of the information requested. In respect of part 4 of the request the Council advised that it was unable to provide reports from Local Partnerships as they were still considered to be confidential at that time. The Council also confirmed that a report would be prepared for the relevant Scrutiny Committee prior to any firm proposals being presented to Cabinet. The Council did not cite any specific exemptions it considered applicable to the information in question.
4. The complainant wrote to the Council on 13 November 2020 and asked it to conduct an internal review into the handling of his request under the FOIA. The Council confirmed that it would not be conducting an internal review into the response provided on 3 August 2020 and suggested the complainant appeal the decision to the ICO.
5. Following a discussion and a letter the Commissioner sent to the Council, on 28 January 2021, it provided the outcome of its internal review. The Council stated that it considered the information held relevant to part 4 of the request to be exempt under sections 36(2)(b) and 36(2)(c) of the FOIA.

Scope of the case

6. The complainant initially contacted the Commissioner on 26 September 2020 to complain about the way his request for information had been handled. The complainant contacted the Commissioner again on 31 January 2021 following the internal review response to express his continued dissatisfaction with the Council's handling of the request.
7. The scope of the Commissioner's investigation is to consider whether the Council should disclose the information held relevant to part 4 of the request or whether it was correct in relying on section 36 of the FOIA.

Reasons for decision

Background

8. The request in this case request relates to a review of the Council's Schools PFI contracts. The Council has two PFI projects – Fleur de Lys (Ysgol Gyfun Cwm Rhymni) and Pengam (Lewis Boys) Secondary Schools, and Sirhowy Enterprise Way (SEW). PFI (Private finance initiative) contracts are a form of public private partnerships which have been used in the UK since the 1990s. PFI is a way to finance and provide public sector infrastructure and capital equipment projects, such as roads, hospitals and schools. To assist with the review the Council commissioned a company called Local Partnerships.

Section 36 – prejudice to the effective conduct of public affairs

9. Section 36 of the FOIA states that information is exempt where, in the reasonable opinion of a qualified person, disclosure would or would be likely to prejudice the effective conduct of public affairs. Section 36 operates in a slightly different way to the other prejudice based exemptions in the FOIA. Section 36 is engaged, only if, in the reasonable opinion of a qualified person, disclosure of the information in question would, or would be likely to, prejudice any of the activities set out in sub-sections of 36(2).
10. In this case the Commissioner is considering the application of the exemptions at sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c).
11. Sections 36(2)(b)(i) and (ii) provide that information is exempt if its disclosure would, or would be likely to, inhibit the free and frank provision of advice, or the free and frank exchange of views for the purposes of deliberation. Section 36(2)(c) provides that information is exempt if its disclosure would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

Are the exemptions engaged?

12. In order to establish whether the exemptions have been applied correctly the Commissioner has:
 - Ascertained who is the qualified person or persons for the public authority in question;
 - Established that an opinion was given;
 - Ascertained when the opinion was given; and
 - Considered whether the opinion given was reasonable.
13. The Council confirmed that its qualified person is the Head of Legal Services and Monitoring Officer. The Council explained that the qualified person considered the requested information and is of the opinion that the exemptions at all three limbs of section 36(2) are engaged for all of the withheld information.
14. The Commissioner is satisfied that the Council's Monitoring Officer is authorised as the qualified person under section 36(5) of the FOIA. As stated earlier in this notice, the Council introduced its reliance on section 36 at the internal review stage. The Council provided the Commissioner with a copy of the submission put to the qualified person and confirmation that he agreed the engagement of section 36 on 21 January 2021. The qualified person was not provided with actual copies of the withheld information with the submission, but the information was described to him. The Commissioner notes that the qualified person signed his agreement to the submission which indicated that the level of prejudice claimed was the lower threshold of "would be likely".
15. The Commissioner has gone on to consider whether the qualified person's opinion is reasonable. It is important to highlight that it is not necessary for the Commissioner to agree with the opinion of the qualified person in a particular case. The opinion also does not have to be the only reasonable opinion that could be held or the most reasonable opinion. The Commissioner only needs to satisfy herself that the opinion is reasonable or, in other words, it is an opinion that a reasonable person could hold.
16. The Council advised the Commissioner that it appointed Local Partnerships to undertake an in depth review of the Schools PFI contracts as it was recognised that there were areas in which management of the contract could be improved. This element of the wider PFI review is required to identify areas where any improvement can be made in the contract management function and processes. The Council contends that the withheld information "*relates to sensitive*

matters relating to the Schools PFI contracts” and includes the contract review methodology, recommendations and the findings and analysis of the PFI contracts, along with details of the parties who were interviewed as part of the process. The review formed part of the work to draft a report and business case for consideration by relevant scrutiny committees and Cabinet to look at options for the future of this type of contract, including the possible termination of the contracts and associated post termination arrangements.

17. In the opinion of the qualified person the exemptions at 36(2)(b) and 36(2)(c) are applicable to the withheld information because:

“the release of the documents, whether in part or in full, would inhibit the free and frank exchange of views and the provision of advice in future deliberations which are required for the purpose of completing the report and business case which will be presented to Scrutiny Committees and Cabinet. The Council will need to draw heavily on all of the work undertaken by Local Partnerships throughout the review process to enable Officers to determine what is the best way forward in relation to the PFI contracts, including the contract relating to Cwm Rhymni School and Lewis Boys School”.

18. In relation specifically to section 36(2)(b)(i) the Council explained that, as part of the review process interviews were conducted with key stakeholders including the Council’s contract management staff, special purpose representatives and facilities management representatives. The purpose of these interviews was to gain an objective overview of the contract, including how it was perceived and how well it was operating. The interviews were conducted in confidence and although the views/information contained within the withheld information are not attributed to individuals, they refer to the processes and controls in respect of the contract, along with the risks and other matters related to performance management.
19. The Council pointed out that the withheld information contains advice on what needs to be done to ensure that the contract is fit for purpose. The Council considers it important that key stakeholders are able to provide and record candid advice when considering matters relating to the future of the schools PFI contracts. This assists the Council in creating a proactive and resilient contract management function. The Council argues that disclosure of the withheld information would be likely to deter and inhibit Local Partnerships from providing free and frank advice in the future and/or recording it in a forthright manner. This in turn could hamper the Council’s ability to make clear and decisive decisions. As PFI contracts are a very sensitive issue, it is critical that the Council is able to obtain clear advice on the best way forward with contracts of this nature.

20. In respect of section 36(2)(b)(ii) the Council reiterated that stakeholders who were involved and/or interviewed during the review were under the impression that their opinions and views were provided in confidence for the purposes of deliberation. Whilst stakeholders may not have been discouraged from actually contributing to the review the Council is of the opinion that they would have been less forthright and candid in providing their views and opinions if they believed the information would be published. The Council contends that it is only through the free and frank exchange of views and testing ideas, some of which may be somewhat controversial, will it be able to ensure that all options are identified and considered and thus a comprehensive review is undertaken.
21. The Council considers that disclosure would adversely affect the ability of the Local Partnerships to discuss and debate matters in a free and frank manner. This would have an adverse effect on the Council's ability to effectively conduct the contract management review into the future arrangements for PFI contracts in schools. Failure to conduct the contract management review appropriately would impair the quality of decision making relating to PFI contracts in schools, which would be to the detriment of the community.
22. The Council considers it is essential that it is allowed "*a safe space to clearly communicate and share any such action being proposed or taken so that we can carry out our obligations to safeguard public funding and releasing such information would be likely to have an impact on how candid people are in the future when advising the Council. As the information will be used to draft a report that will be presented to relevant Scrutiny Committees and Cabinet, the public can be confident that proper democratic procedures have been followed*".
23. The Council advised the Commissioner that as a result of the Covid 19 pandemic, at the end of March 2020, meetings regarding the contract review were suspended. A meeting was then scheduled for August 2020 to discuss and agree next steps and a timescale for completing the draft business case. Once a draft business case has been completed, a comprehensive report will be prepared for the relevant scrutiny committees prior to any firm proposals being presented to Cabinet. The Council explained that the full range of information provided by the Local Partnerships has only been shared with officers who were directly involved in the project. It was never intended for publication to a wider audience. The business case and report will be drawing heavily on the work carried out by the Local Partnerships.
24. In January 2021, the Council were still working with the Local Partnerships with the aim of preparing a draft business case by the end

of March 2021. As a result of the ongoing pandemic, the PFI Review Report and business case was delayed further and as at the end of April 2021, no reports had been presented to Cabinet for consideration.

25. In relation to section 36(2)(c) the Council argued that disclosure would be likely to prejudice its *"ability to ensure that we create a pro-active and resilient contract management function which provides value for money while preserving service delivery"*. Primarily the Council's arguments in support of this exemption refer to it needing a safe space to ensure full and frank provision of advice and for an exchange of views and mirror its representations in support of section 36(2)(b)(i) and 36(2)(b)(ii). However, the Council has also argued that disclosure of the withheld information could *"interfere with or distract from the issue at hand e.g. there are people who may not agree with PFI schools and releasing this information could cause concerns/objections being raised by the public which may not be based on the full facts"*. This is because disclosure could cause concerns or objections from members of the public, including parents, and elected members. The Council considers that would remove any safe space which officials would have to discuss options and outcomes in a free and frank manner and it would also divert officers in order to respond to concerns/objections.
26. Addressing sections 36(2)(b)(i) and (ii) first, the Commissioner is satisfied that it is a reasonable opinion to hold that disclosure of the withheld information would prejudice the free and frank provision of advice and the free and frank exchange of views for the purposes of deliberation. She notes that, at the time of the request, the contract review was ongoing and progress had been put on hold due to the Covid 19 pandemic. The Commissioner considers that it is reasonable to conclude that the Council still required the safe space to obtain and discuss the advice and views of those involved and deliberate internally on the issues which were the subject of the review. It is a reasonable opinion to hold that disclosure would be likely to prejudice the free and frankness of such exchanges and debate and weaken the advice and views being shared.
27. Turning to section 36(2)(c) for this subsection to also apply, the prejudice envisaged must be different to that covered by any other exemption. The fact that section 36(2)(c) uses the phrase "otherwise prejudice" means that it relates to prejudice not covered by section 36(2)(a) or (b). The First-tier Tribunal made this point in the hearing of *Evans v Information Commissioner and the Ministry of Defence (EA/2006/0064, 26 October 2007)*.
28. The Commissioner recognises that there is a need for public authorities to have a safe space in which to develop ideas or make decisions. If the disclosure of information would or would be likely to prejudice this, she accepts this may be an argument for engaging section 36(2)(c).

29. However, the safe space argument can also apply to section 36(2)(b) if disclosure would or would be likely to prevent or hinder the free and frank exchange of views or provision of advice.
30. Having read the qualified person's opinion and the submissions received from the Council the Commissioner does not consider the arguments presented are sufficiently different to those that would come under section 36(2)(b) to warrant the application of section 36(2)(c). The arguments presented primarily relate to the prejudice to the review and the ability of the Council to deliberate internally and to reach the right conclusions. It refers to the need for safe space to assess and debate the views and advice presented. The Commissioner considers these are more fitting to section 36(2)(b). For section 36(2)(c) to also apply the Council would have to provide arguments which suggested that the prejudice is different – for example disclosure would interfere with or distract from the issue at hand in another way or would prejudice or undermine the decision itself rather than the frankness of the discussions specifically.
31. For the above reasons, the Commissioner is not satisfied that section 36(2)(c) of the FOIA applies to this request. As stated above, however, she is satisfied that sections 36(2)(b)(i) and (ii) are engaged and will therefore now go on to consider the public interest test.

Public interest test

32. Section 36 is a qualified exemption and therefore the Commissioner must consider the public interest test and whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosing the information

33. The Council acknowledges that there is a public interest in it being as transparent and accountable as possible in the way that it operates. This assists the public in understanding how the Council operates and fosters trust.
34. The Council recognises that the public have a legitimate interest in the future of the PFI schools and disclosure would allow the public to better understand the decision making process around the future of PFI school contracts.
35. However, the Council is of the view that, as the review process has not been completed there is a stronger public interest in preserving its *“ability to successfully complete the consultation process involving Local Partnerships to discuss, debate, consider and prepare a business case to determine the future of our PFI schools”* without discussions and

decisions being prejudiced through disclosure of the withheld information.

36. The Commissioner agrees that there is a significant public interest in understanding exactly what the future will be for PFI schools in the area, what recommendations have been made and the reasons for recommendations. This would allow the public to participate in the decision making that is ongoing. In addition, the Commissioner accepts that there is always a public interest where information relates to the spending of public money.

Public interest arguments in favour of maintaining the exemption

37. The Council explained that the information held relating to the review of the PFI schools project has not been shared internally with any staff who are not directly involved in the review process. The Council believes that disclosure could prejudice the effective conduct of public affairs because it is vital that the Council is able to identify, discuss, debate and scrutinise the options available within a "safe space" without the fear or threat of publication.
38. The Council pointed out that, at the time of the request, the review was very much live and ongoing as matters had been put on hold as a result of the pandemic. As such, the Council still needed a "safe space" in order to formulate and debate issues, particularly where the future of its schools and the spending of public money is concerned in private. This 'safe space' is considered to be essential to promote open, honest and constructive decision making.
39. The Council considers that it is in the public interest to maintain Local Partnerships' ability to speak openly, freely and frankly and for those views to be accurate and reflective. The Council argues that disclosing the withheld information before a comprehensive report on the possible termination of PFI schools contracts and associated post terminations arrangements have been completed for consideration may result in the those involved in the process being less free and frank in providing advice and exchanging and expressing views and opinions in discussions.
40. The Council accepts that there is a strong public interest in disclosure of information where it concerns the use of public funds. However, in this case it is essential that the Council is in possession of all relevant information to enable it to make sound decisions without the threat of disclosure. The Council considers that disclosure would be likely to adversely affect its ability to hold necessary discussions and debates with relevant stakeholders and in turn this would inhibit the effectiveness of its ability to consider all options open for the future of

its PFI schools. This would have a detrimental impact on the quality of its decision making around such an important issue. The Council believes this would be contrary to good public administration and it would not be in the public interest.

Balance of the public interest

41. When considering complaints regarding the application of the exemption at section 36(2)(b), where the Commissioner finds that the qualified person's opinion was reasonable she will consider the weight of that opinion in applying the public interest test. This means that the Commissioner accepts that a reasonable opinion has been expressed that prejudice or inhibition would, or would be likely to, occur. However, she will go on to consider the severity, extent and frequency of that prejudice or inhibition in forming her own assessment of whether the public interest test favours disclosure.
42. The Commissioner considers that some weight must always be given to the general principle of achieving accountability and transparency through the disclosure of information held by public authorities. This assists the public in understanding the basis and how public authorities make their decisions and carry out their functions, and in turn fosters trust in public authorities. Disclosure in this case would allow the public to scrutinise the basis on which any decisions about the future of PFI school contracts are made.
43. The Commissioner understands the Council's concerns relating to disclosure of the requested information are that disclosure would erode the safe space needed to investigate options and recommendations regarding the future of PFI school contracts and that it could lead to changes in the ways stakeholders interact with discussions about the subject matter prior to a business case and proposals being formulated.
44. The Commissioner considers that the need for a safe space will be strongest when an issue is still "live". Once a public authority has made a decision, a safe space for deliberation will no longer be required and the Commissioner has previously adopted the approach that the public interest will sway more towards disclosure. In this case, the Commissioner notes that whilst the Council had been in receipt of the report from the Local Partnerships for some time when it applied the exemption under section 36, it was still in the process of considering issues relating to the PFI schools contract. Matters around the review had been put on hold as a result of the Covid 19 pandemic, no business case had been prepared and no report on proposals had been considered by the Council. The subject matter was therefore very much live and ongoing at the time of the request.

45. Taking all factors into consideration the Commissioner considers the public interest is best served by maintaining the exemption in this particular case. The Commissioner must consider the circumstances at the time of the request and accepts that, at that time, the Council required a safe space to obtain and consider free and frank advice and deliberate openly, candidly and honestly on how to move forward.
46. The Commissioner therefore concludes that the council has correctly engaged the exemptions at section 36(2)(b) FOIA and that the balance of the public interest lies in maintaining the exemption for all of the withheld information.

Section 17 – Refusal of request

47. Section 17(1) provides that if a public authority wishes to refuse a request it must issue a refusal notice within the 20 working day time limit for compliance, citing the relevant exemption(s).
48. In this case the request was submitted on 3 July 2020 and the Council's initial response dated 3 August 2020 stated that the information held relevant to part 4 of the request could not be disclosed as it was considered to be confidential at that time. The Council failed to cite an exemption until it completed its internal review on 28 January 2021, where it cited section 36 as the basis to withhold the information in question. The Council confirmed to the Commissioner that this was an error on its part and an apology was provided to the complainant in its internal review response.
49. In view of the above, the Commissioner finds that the Council breached regulation 17(1) as it took longer than 20 working days to inform the complainant that it was relying on an exemption.

Other matters

Internal review

50. The Commissioner cannot consider the amount of time it took a public authority to complete an internal review in a decision notice because such matters are not a formal requirement of the FOIA. Rather they are matters of good practice which are addressed in the code of practice issued under section 45 of the FOIA.
51. Part VI of the section 45 Code of Practice states that it is desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information,

and that the procedure should encourage a prompt determination of the complaint. The Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the FOIA, the Commissioner considers that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may take longer but in no case should the time taken exceed 40 working days; it is expected that this will only be required in complex and voluminous cases.

52. In this case, initially there was some confusion about the complainant's request for a review of the handling of the request as he had been engaged in a correspondence exchange with the Council about the possibility of him having access to the information under the Councillors' "need to know" scheme as the complainant in this case is an elected member of the Council.
53. The complainant made it clear on 13 November 2020 that he was requesting an internal review specifically into the handling of his request under the FOIA. However, the Council did not provide the outcome of its internal review until 28 January 2021 and the review was only undertaken following correspondence from the Commissioner. An explanation and apology for this oversight was provided to the complainant on 26 November 2021.
54. The Council explained that the delay in completing the internal review was a result of it identifying the error in its initial handling of the request in failing to specify an exemption. In addressing its oversight the Council considered section 36 of the FOIA, but it needed more time to consider the public interest test. The Council acknowledged that it should have advised the complainant at an earlier stage that it considered section 36 to apply and that it needed more time to consider the public interest test. The Council accepted that there had been a number of procedural failings in the handling of this request and confirmed that it would be reviewing its procedures to reduce the risk of similar failure occurring in the future.
55. Whilst the Commissioner notes the Council's explanations for the delays experienced in this case, she does not consider that any exceptional circumstances existed to justify the delay. The Commissioner would like to take this opportunity to remind the Council of the expected standards in this regard and that it should ensure that it aims to complete its future reviews within her recommended timescale of 20 working days.

Right of appeal

56. 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

57. 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.
58. 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

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