

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 24 June 2024

Public Authority: Monmouthshire County Council
Address: County Hall
The Rhadyr
Usk
NP15 1GA

Decision (including any steps ordered)

1. The complainant requested information about the decision to purchase Newport Leisure Park, including the most up to date audit. Monmouthshire County Council (the Council) provided links to some publicly available information and stated that a report that was considered in a closed session of a meeting was exempt under section 44 (prohibitions on disclosure) of the FOIA. The complainant disputed the Council's application of section 44 and considered that the Council held additional information relevant to the request.
2. The Commissioner's decision is that the Council does not hold any additional information relevant to the request. The Commissioner has also determined that section 44 of the FOIA is not engaged.
3. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation.
 - Disclose the information withheld under section 44 of the FOIA.
4. The Council must take these steps within 30 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 30 December 2023 the complainant wrote to the Council regarding Newport Leisure Park and requested information in the following terms:

"1. Please could you send me the committee decision documents , discussion, (including those present, their designations and the voting etc) or direct me to them on the MCC site, when the decision by the council was taken to buy the above park.

I do not need the exact financial amounts as the cost £21m has been stated,

2. The most up to date audit of how much the purchase has now cost the council".

6. The Council responded on 17 January 2024 and stated that some reports were publicly available on its website and provided the relevant links. It also provided a link to documents relevant to its Investment Committee, which was established in May 2018. The Council also stated that some documents were discussed in closed sessions of meetings and any documents held were considered exempt under Schedule 12A of the Local Government Act 1972. In light of this, the Council stated that the information was exempt under section 44 of the FOIA.
7. On 17 January 2024 the complainant requested an internal review of the handling of their request. They pointed out that no information had been provided on voting by officers and employees, or the latest audit. They also confirmed that they were not seeking access to any commercially sensitive information.
8. The Council provided the outcome of its internal review on 23 January 2024 and upheld its position as outlined in its original response.

Scope of the case

9. The complainant contacted the Commissioner on 23 January 2024 to complain about the way their request for information had been handled.
10. The scope of the Commissioner's investigation into this case is to determine whether the Council holds any additional information falling within the scope of the request and to consider whether the Council correctly applied section 44 of the FOIA to the request.

Reasons for decision

Section 1 – general right of access

11. Section 1 of the FOIA states that any person making a request for information is entitled to be informed in writing by the public authority whether it holds information of the description specified in the request and, if that is the case, to have that information communicated to him.
12. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request, the Commissioner will consider the complainant's evidence and arguments. He will also consider the actions taken by the authority to check that the information is not held and he will consider any other reasons offered by the public authority to explain why the information is not held. The Commissioner will also consider any reason why it is inherently likely or unlikely that information is not held.
13. In their internal review request and their complaint to the Commissioner, the complainant pointed out that, to date, the Council had not disclosed any information regarding any voting by officers, members and employees, and no information regarding any audits undertaken relating to the purchase. The Commissioner specifically asked the Council to confirm whether any information regarding these issues is held.
14. The Council confirmed to the Commissioner that it did not hold any information on voting rights or any audits relating to the purchase. The Council stated that it only records individual Councillor votes at Full Council meetings, which are held once a month. The Council pointed out that this "is not to be confused with any other Council meeting that go on [sic] where no vote is recorded. For votes to be taken in a Full meeting, this is only done if ten Councillors request to have a recorded vote on a particular item". As such, the Council only records individual votes where its constitution allows it to, and where the process is set out within the constitution to allow that to happen. Further, when the Council is required to record a vote, it isn't required to record who voted or how many people voted. In summary, the Council confirmed that it "did not capture individual Councillor votes" in relation to the decision concerning Newport Leisure Park and it does not hold any recorded information relating to this issue.
15. The Council also advised the Commissioner that no specific audit was undertaken of the Newport Leisure Park site or any of the costs involved. It confirmed that it was not required to undertake an audit under any statutory provisions, and as such it does not hold any

recorded information on audits relating to the decision concerning Newport Leisure Park.

16. The Commissioner finds the representations provided by the Council, as set out above, sufficiently explains why it does not hold information relating to voting or audits concerning Newport Leisure Park.
17. In the absence of any evidence from the complainant to suggest that the Council holds additional information relevant to the request, the Commissioner finds that, on the civil standard of the balance of probabilities, the Council does not hold any further recorded information relevant to the request to that covered under the section 44 heading below.

Section 44 – prohibitions on disclosure

18. Section 44(1)(a) of FOIA states that information is exempt information if its disclosure (otherwise than under FOIA) by the public authority holding it is prohibited by or under any enactment. Section 44 is an absolute exemption which means it's not subject to the public interest test.
19. Information is exempt under section 44(1)(a) if its disclosure would breach any of the following:
 - Primary legislation (an Act of Parliament); or
 - Secondary legislation (a Statutory Instrument.)
20. The Council's position is that disclosure of the requested information is defined as Exempt Information under Schedule 12A of the Local Government Act (1972)¹ (the LGA), and is therefore exempt from disclosure under the provisions of section 44(1)(a) of the FOIA. The Council maintains that, the requested information is confidential, as it constitutes information relating to the financial or business affairs of any particular person (including those of the Council), and it is not prevented from being exempt by virtue of paragraphs 19 or 20 of the LGA ie "it is not requiring to be registered by subsections a-f, nor does it relate to a proposed development and/or planning permissions". The Council argues that the public interest is better served by withholding the information due to its commercial sensitivity.

¹ <https://www.legislation.gov.uk/ukpga/1972/70/schedule/12A>

21. In the Commissioner's opinion, and as referred to in his guidance on section 44², and previous decision notices³, the Commissioner considers that Schedule 12A of the LGA does not operate as a statutory bar to disclosure under the FOIA for the following reasons:

- Firstly, Schedule 12A lists the information that is exempt from the requirements of part VA⁴ of the LGA to make information available, as opposed to information that is exempt from disclosure under any other regime. In the Commissioner's opinion, the combined provisions of sections 100B (1), (2), (5), and schedule 12A (3) of the LGA do not impose a statutory prohibition from disclosure on the Council. They instead grant the public authority the discretion to exclude from publication, information from minutes of its meetings which fit any of the descriptions in schedule 12A. This exclusion from publication provided for by the LGA is therefore not the same as exemption (or prohibition) from disclosure under the FOI Act in response to a request for information made under it. As such this provision of the LGA cannot form the basis of the claim to section 44(1)(a).
- Secondly, nothing else in Part VA or Schedule 12A of the LGA actually prohibits the disclosure of information. At no point is it provided that such information should not be disclosed, merely that it is not subject to the Part VA requirement to disclose.

22. In his letter to the Council, the Commissioner referred to his guidance on section 44 and previous decision notice. He pointed out that he does not consider that Schedule 12A of the LGA operates as a statutory bar on disclosure under the FOIA and as such, he advised the Council that section 44 was not engaged in this case. The Commissioner asked the Council to reconsider its position in respect of the information withheld under section 44 of the FOIA and either disclose the information or confirm which other exemption(s) it considered applicable to the information.

² <https://ico.org.uk/media/for-organisations/documents/1186/section-44-prohibitions-on-disclosure.pdf>

³ https://ico.org.uk/media/action-weve-taken/decision-notices/2014/970282/fs_50517099.pdf - paragraphs 14 - 15

https://ico.org.uk/media/action-weve-taken/decision-notices/2011/649742/fs_50368614.pdf - paragraphs 33 - 39

⁴ Part VA LGA 1972, sections 100A to 100K, provides for what information local government authorities must make available to the public and how.

23. In its response to the Commissioner, the Council advised that it did not consider any new exemptions applicable to the withheld information and advised that it had “applied all of the relevant exemptions”.
24. In light of the above, the Commissioner has concluded that section 44(1)(a) is not engaged in this case. As the Council has not applied any other exemptions to the withheld information, the Commissioner has ordered disclosure of the withheld information.

Right of appeal

25. 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

26. 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.
27. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Joanne Edwards
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF