

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

Date: 26 September 2023

Public Authority: Cardiff Council
Address: County Hall
Atlantic Wharf
Cardiff
CF10 4UW

Complainant: CJ Williams
Address: secretary@cardiffcivicsociety.org

Decision (including any steps ordered)

1. The complainant requested a copy of the confidential appendices to a report about St David's Hall from Cardiff Council ("the Council"). The Council has disclosed part of one of the appendices, but has withheld the remainder of the requested information citing sections 40(2), 41, 42 and 43(2) of FOIA as its bases for doing so.
2. The Commissioner's decision is that:
 - the information in Confidential Appendices 1-3 falls within the definition at regulation 2(1)(f) and that these parts of the request should have been considered under the EIR.
 - the commercial confidentiality exception under regulation 12(5)(e) of the EIR is engaged for all of the information in Confidential Appendices 1-3, however, for most of this information the public interest in disclosure outweighs that in maintaining the exception.
 - Some of the information within Confidential Appendix 1 should not be disclosed as it is exempt under regulation 12(5)(a) of the EIR as its disclosure would adversely affect public safety and the public interest test favours maintaining the exception.

3. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation.
 - Disclose the information within Confidential Appendix 1, Confidential Appendix 2 and Confidential Appendix 3, other than:
 - a) Specific cost information related to the proposed works across all three appendices as described in paragraph 36 of this notice.
 - b) The images within Confidential Appendix 1.
 - c) Appropriate redactions for personal data as described in paragraph 36 of this notice.
4. The Council must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of FOIA and may be dealt with as a contempt of court.

Request and response

5. On 9 December 2022, the complainant wrote to the Council and requested information in the following terms:

“Could you please publish the set of appendices to the Cardiff Cabinet report on St David's Hall, 15 December 2022. The full list is:

 - Confidential Appendix 1 - Conditions Survey 2021
 - Confidential Appendix 2 - Conditions Survey Cost Report
 - Confidential Appendix 3 - Property Management Summary
 - Confidential Appendix 4 - Outline Business Case
 - Confidential Appendix 5 - AMG Proposal - Heads of Terms
 - Confidential Appendix 6 - Legal Advice
 - Confidential Appendix 7 - Financial Overview”
6. The Council withheld all of the requested information under section 43(2) of FOIA (prejudice to commercial interests). It upheld this position at internal review.

Scope of the case

7. During the course of the Commissioner's investigation the Council revised its position regarding the information within Confidential Appendix 4, Confidential Appendix 6 and Confidential Appendix 7.
8. The Council disclosed some of the information within Confidential Appendix 4, which it had previously withheld. It also changed the exemptions under which it was withholding some of the information within Confidential Appendix 4, Confidential Appendix 6 and Confidential Appendix 7 (although it continued to withhold Confidential Appendix 6 and Confidential Appendix 7 in full). The new exemptions it cited were sections 40(2), 41 and 42 of FOIA.
9. However, the complainant has indicated that they wish to complain about the Council's refusal to provide Confidential Appendix 1, Confidential Appendix 2 and Confidential Appendix 3 only.
10. This notice therefore considers only whether the Council was entitled to rely on section 43(2) of FOIA to withhold Confidential Appendix 1, Confidential Appendix 2 and Confidential Appendix 3. As part of this, the Commissioner has first considered whether the information in Confidential Appendix 1, Confidential Appendix 2 and Confidential Appendix 3 is environmental information as defined in regulation 2(1) of the EIR.

Reasons for decision

Regulation 2(1) – definition of environmental information

11. Regulation 2(1) of the EIR provides the following definition of environmental information:
 - "...any information in written, visual, aural, electronic or any other material form on-
 - (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
 - (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and

other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);

(c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;

(d) reports on the implementation of environmental legislation;

(e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and

(f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);”

12. It is important to ensure that requests for information are handled under the correct access regime. This is particularly important when refusing to provide information, since the reasons why information can be withheld under FOIA (the exemptions) are different from the reasons why information can be withheld under the EIR (the exceptions). In addition, there are some procedural differences affecting how requests should be handled.
13. The Commissioner has produced guidance¹ to assist public authorities and applicants in identifying environmental information. The Commissioner’s well-established view is that public authorities should adopt a broad interpretation of environmental information, in line with the purpose expressed in the first recital of the Council Directive 2003/4/EC, which the EIR enact.
14. The Commissioner’s view is that the information in Confidential Appendices 1-3 relates to how a built structure (and cultural site) has been affected by the elements of the environment.

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https://ico.org.uk/media/fororganisations/documents/1146/eir_what_is_environmental_information.pdf

15. The Commissioner is therefore satisfied that the information in Confidential Appendices 1-3 falls within the definition at regulation 2(1)(f) and that these parts of the request should have been considered under the EIR.
16. Following from this finding, the Commissioner has exercised his discretion to consider provisions not cited by the public authority and proactively applied the commercial confidentiality exception under regulation 12(5)(e) EIR which, although not a direct equivalent to the commercial interests exception under section 43(2) of FOIA, has significant similarities.

Regulation 12(5)(e) - Commercial confidentiality

17. Information can be withheld under regulation 12(5)(e) of the EIR if disclosure would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest.
18. The exception can be broken down into a four-stage test. All four elements are required in order for the exception to be engaged:
 - The information is commercial or industrial in nature.
 - Confidentiality is provided by law.
 - The confidentiality is protecting a legitimate economic interest.
 - The confidentiality would be adversely affected by disclosure.
19. In this case the withheld information comprises the following three documents:
 - **Confidential Appendix 1 - Conditions Survey 2021**
The conditions surveys are technical documents highlighting areas that may need replacing or repairing, with the suggested approach to remediation.
 - **Confidential Appendix 2 - Conditions Survey Cost Report**
This report uses the information and outputs from the Conditions Survey to create a spreadsheet that details at a granular level how the survey would translate into a programme of works. Each item is costed and given a priority RAG status.

- **Confidential Appendix 3 - Property Management Summary**
This summary outlines key elements of the building management programme specific to the high priority items identified in the conditions survey.
20. St David's Hall is owned by the Council, although it is heavily subsidised, the Council nevertheless operates the venue within a competitive commercial market. The Commissioner is therefore satisfied that the requested information is commercial in nature as it relates to a commercial activity.
 21. The Commissioner has next considered whether the information is subject to confidentiality provided in law. He is satisfied that the information is subject to confidentiality provided by law because it is not trivial and is not otherwise accessible and so has the necessary quality of confidence.
 22. Next, the Commissioner has considered whether the confidentiality is provided to protect a legitimate economic interest. The Council argues that disclosure of the withheld information would prejudice the economic interests of the Council. Specifically, it argues that disclosure of the information within Confidential Appendix 1 and Confidential Appendix 3 would impact the commercial running of the venue and as a result lead to a loss of income for the Council. In addition it argues that disclosure of the information within Confidential Appendix 1 and Confidential Appendix 3 would prejudice the Council's ability to negotiate competitive rates for building works.
 23. The Commissioner is satisfied that, with respect to all of the withheld information, the confidentiality is provided to protect the legitimate interests of the Council. He considers both that some impact on the commercial operation of the venue and a worsened negotiating position regarding rates for the works to be more likely than not should the information be disclosed.
 24. With respect to the fourth test, the Commissioner is satisfied that, the confidentiality would inevitably be affected if the Council disclosed the withheld information.
 25. Since the four tests have been satisfied the Commissioner finds that regulation 12(5)(e) of the EIR is engaged for all of the information within Confidential Appendix 1, Confidential Appendix 2 and Confidential Appendix 3. He has gone on to consider the associated public interest test for this information.
 26. The Council concluded that the public interest in maintaining the exception outweighs that in disclosing the withheld information.

27. It took in to account the following factors in favour of disclosure:

- "The importance of transparency, openness and accountability in Public Authority decision making."
- "There is a legitimate public interest in understanding the information which informs the Council's decision making process."
- "The legitimate public interest in information which demonstrates that the Council is acting appropriately to safeguard an important cultural facility for the city of Cardiff."
- "The need to demonstrate that the Council is securing best value in any proposed deal."

28. It took in to account the following factor in favour of maintaining the exception:

- "There is a strong public interest in withholding information about the building condition and finances of St David's Hall, as this would prejudice the Council's commercial interests, specifically, its ability to secure best value in operating the venue within a competitive commercial market, and in successfully securing an alternative operator."

29. It also provided the following information to the Commissioner about how it had carried out the balancing test:

- "The public interest in exempting parts of the requested information (as identified above) is strong because it relates to ongoing exploration of options and negotiations in respect of a renowned national concert venue which is operated by the Council within a competitive commercial market."
- "The legitimate public interest in disclosure of information relevant to the Council's decision in relation to St David's Hall is satisfied by the information published within the Cabinet report [link to the published report of which the requested documents are confidential appendices] and the further information now being disclosed within the unredacted sections of the Outline Business Case (Appendix 4)."

30. The Commissioner considers that the withheld information can be split in to three broad categories: information about the current state of the building, information about the nature of the proposed works and specific cost information related to the proposed works.

31. With respect to each of these three types of information the Commissioner has already acknowledged in determining that the exception is engaged that to disclose this information would prejudice the commercial interests of the Council. The Commissioner acknowledges that prejudicing the Council's commercial interests is not in the public interest. However, he notes the public interest in transparency in relation to each of these three types of information. He has considered the balance of the public interest test for each of these types of information in turn.
32. With regards to the first category, information about the current state of the building, the Commissioner, having viewed the withheld information, considers that the public interest in disclosure of this information is significant enough to outweigh the public interest in maintaining the exception. St David's Hall is a significant cultural asset and there is a strong and legitimate public interest in information regarding how it is being maintained by the Council. There is also a strong public interest in disclosure of information relating to the safety of the building.
33. With regards to the second category, information about the nature of the proposed works, again the Commissioner finds that the public interest in disclosure of this information is significant enough to outweigh the public interest in maintaining the exception. This is due to the significant public interest in information regarding how St David's Hall is being maintained by the Council.
34. With regards to the third category, specific cost information related to the proposed works, although the Commissioner recognises the public interest in how public money is being spent, the Commissioner's decision is that this is outweighed by the public interest in maintaining the exception. This is because, in his view, to disclose the specific cost information would result in such a strong likelihood of prejudice to the Council's ability to negotiate competitive rates for the required works that this weighs very heavily in favour of maintenance of the exception. In relation to this category of the withheld information, the public interest in the maintenance of the exception outweighs the public interest in disclosure of the information.
35. The Commissioner's decision is therefore that:
 - the information about the current state of the building and the information about the nature of the proposed works should be disclosed as the public interest in maintaining the exception does not outweigh that in favour of disclosure.

- The Council is entitled to withhold the specific cost information related to the proposed works as the public interest in maintaining the exception outweighs that in disclosure.
36. The Commissioner has therefore ordered the disclosure of Confidential Appendix 1, Confidential Appendix 2 and Confidential Appendix 3, other than:
- Specific cost information related to the proposed works across all three appendices, that is to say the specific figures in pounds for actual or estimated costs. These are located on pages 3-4, 163-164 and 173-176 of Confidential Appendix 1, on sheets 3 and 4 of Confidential Appendix 2 and on pages 2 and 3 of Confidential Appendix 3.
 - Appropriate redactions for personal data within Confidential Appendix 1 and Confidential Appendix 2, that is the names and signatures of those individuals involved in producing the reports and the names and email addresses of the recipients of Appendix 1 at the Council.
 - The information the Commissioner has decided is exempt under regulation 12(5)(a) as indicated below.

Regulation 12(5)(a) – adversely affect international relations, defence, national security or public safety

37. Regulation 12(5)(a) of the EIR states that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect international relations, defence, national security or public safety.
38. In this case the Commissioner has proactively applied this exception to some of the information within Confidential Appendix 1, specifically the many images contained within the document. As stated above, his decision is that, with regard to the confidentiality of commercial information, the public interest in disclosing the information in Confidential Appendix 1 outweighs the public interest in maintaining this exception. However, the Commissioner does not consider that the images within Confidential Appendix 1 should be disclosed to the world at large under the EIR.
39. The Commissioner considers that the disclosure of such detailed images of so many parts of the building would adversely affect public safety. St David's Hall is a large capacity public building and as such is, like all venues of this type, a potential target for a terrorist attack. The Commissioner therefore considers that the disclosure of these images

would constitute a security threat as they could be used by a malicious actor to plan such an attack. Disclosure of the images would therefore adversely affect public safety.

40. The Commissioner acknowledges the public interest in the public better understanding the current state of St David's Hall. However, he considers that the disclosure of the text within Confidential Appendix 1 goes a long way to meet this public interest. He considers that the public interest in ensuring the safety of those using the building far outweighs that in greater transparency. His decision is therefore that the images within Confidential Appendix 1 should be withheld under regulation 12(5)(a) of the EIR.

Right of appeal

41. 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

42. 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.
43. 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



Victoria James
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