

FOI Review: 9274

Review held 13.03.19

Membership of panel:

Ali Evans, Information Governance and Complaints Manager

Lee McSparron, Head of IT

Jo Collis, Property Records Officer

1. Background:

FOI request:

Request for information regarding properties owned by Pembrokeshire County Council:-

As a follow up could the council please provide updated information to the same request posed in 2016:

Please can you provide a list of properties owned by Pembrokeshire County Council currently allocated for the purpose of renting to other organisations for commercial purposes, which are located in Haverfordwest.

For each property could you provide the following information - The address - Whether it is currently occupied - If not occupied, how long it has been empty – if occupied, how long it has been occupied by the current tenant – **The rent chargeable** – The business rates chargeable.

FOI response:

Please see spreadsheet attached.

The rent and business rates information is deemed to be commercially sensitive.

Section 43 of FOIA - Commercial interests. This information is exempt from release under section 43(2) of the Act, as it would, or would be likely to prejudice the commercial interests of the party involved if the information were to be disclosed.

Request for review:

I am writing to request an internal review of Pembrokeshire Council's handling of my FOI request 'Request for information regarding council owned commercial rental properties'.

The information requested is a repeat and update of that made in 2016 which was answered more completely, no such commercial issues were stated previously and weren't used as a reason not to answer the FOI as most of them are on the public record already it seems churlish to attempt to omit them now.

A full history of my FOI request and all correspondence is available on the Internet at this address:

https://www.whatdotheyknow.com/request/request_for_information_regardin_128

2. ICO guidance on Commercial Interests and S.43:

What is a commercial interest?

A commercial interest relates to a person's ability to participate. Competitively in a commercial activity. The underlying aim may be to make a profit however it could also be to cover costs or to simply remain solvent.

Public authorities will have financial interests in the information that they hold but these will not always be covered by the commercial interest exemption. For example, details of how a council sets Council Tax rates is information that relates to the council's financial interests, but does not relate to any of the council's commercial activities. However, if the council issues a tender for a third party to. Calculate and decide on Council Tax rates, then information about that commercial tender will potentially relate to the council's commercial interests.

There will be situations where a public authority cannot seek the views of a third party, for example due to time constraints for responding to requests. In such circumstances, the public authority may present arguments regarding the likelihood of prejudice based on its prior knowledge of the third party's concerns. In doing so, a public authority will need to provide evidence that its arguments genuinely reflect the concerns of the third party involved.

If it is established that a third party does not itself have any arguments or concerns about prejudice to its commercial interests, then the public authority should not present speculative arguments on behalf of that third party.

Openness and transparency – Public authorities should bear in mind the strong case for openness and transparency in their affairs when balancing public interest arguments.

Ability to generate income – it is part of the role and duties of many public authorities to generate income. However it is not always in the public interest to place information which explains how that income is generated into the public domain. This could inform potential competitors and may lessen any competitive advantage held by the public authority. This may have a significant impact upon the ability of the public authority to operate in the relevant marketplace.

Considerations at panel:

- Rental amount is part of a legal agreement between the owner/landlord and the tenant/licensee.
- It could be that other business could charge a lower amount to entice tenants away from PCC or offer a lower rental figure.
- It could cause issues between previous or current tenants if different rates are charged to different tenants (even if appropriate) and the information provided as part of the FOI is out of context.
- Business Rates are set based on national calculations and so could be considered for release as not subject to commercial influence, however as they are in the public domain we will provide the link as publically available.
<https://www.gov.uk/topic/local-government/business-rates>
- If properties are showing as empty (due to low rent payable) it does potentially highlight properties for criminal activities and S.31 may apply.

3. **Public Interest Test:**

The public interest can cover a wide range of values and principles relating to the public good, or what is in the best interests of society. Thus, for example, there is a public interest in transparency and accountability, to promote public understanding and to safeguard democratic processes. There is a public interest in good decision-making by public bodies, in upholding standards of integrity, in ensuring justice and fair treatment for all, in securing the best use of public resources and in ensuring fair commercial competition in a mixed economy. This is not a complete list; the public interest can take many forms.

General public interest in transparency. The public interest arguments in favour of maintaining an exemption must relate specifically to that exemption, but this is not necessarily the case when considering the arguments in favour of disclosure.

Public interest in the issue. As well as the general public interest in transparency, which is always an argument for disclosure, there may also be a legitimate public interest in the subject the information relates to. If a particular policy decision has a widespread or significant impact on the public, for example changes to the education system, there is a public interest in furthering debate on the issue. So, this can represent an additional public interest argument for disclosure.

Public interest in the information. In addition to the general public interest in transparency and accountability, and any public interest arising from the issue concerned, there may be a specific public interest in disclosing the information in question. This will of course depend on the circumstances of the case.

Suspicion of wrongdoing. A further example of a potential public interest in transparency is where there is a suspicion of wrongdoing on the part of the public authority. A requester may, for instance, allege that a public authority has committed some form of wrongdoing, and that the information requested would shed light on this. For this to be considered as a factor in the public interest test, disclosure must serve the wider public interest rather than the private interests of the requester (see Private interests above); and the suspicion of wrongdoing must amount to more than a mere allegation; there must be a plausible basis for the suspicion, even if it is not actually proven

| Public interest in maintaining the exception | Public interest in disclosing the information |
|--|---|
| Likelihood of adverse effect | General public interest in transparency |
| Severity | Public interest in the issue |
| Age of the information | Public interest in the information |
| | Suspicion of wrongdoing |
| | Presenting a 'full picture' |

Likelihood of adverse effect

Briefly, in engaging a prejudice based exemption, the authority has to decide whether disclosure would or would be likely to cause the prejudice described in the exemption.

Considerations of panel: There would be commercial advantage over other members of the public knowing this information, for example other landlords. It would also potentially put PCC at a disadvantage as our rental charges for properties would be in the public domain. Tenants could be targeted for 'better rents' by other landlords and it could jeopardise our relationships with our tenants as well as our financial flow.

Severity

This is about the impact of the prejudice when it happens and not about how frequently the prejudice may happen; that is part of the likelihood of it occurring. Prejudice may still happen, even if its impact would not be severe. However, if the prejudice has a particularly severe impact on individuals or the authority or other public interests, then this will carry considerable weight in the public interest test.

Considerations of panel: There is an impact on the council were we to lose our tenants, this would have a significant effect on the property service and our financial income position.

Age of the information

Is the information recent?

Considerations of panel: The information which could be provided relates to current rents on properties rented by PCC. All applicable and current now, they are not historic rents. For example we have a lease with RNLi began in 2013 and pay 32K a year and the published info on land registry is already out of date compared to our records as ours are the most recent.

General public interest in transparency

There is a general public interest in promoting transparency, accountability, public understanding and involvement in the democratic process. FOIA is a means of helping to meet that public interest, so it must always be given some weight in the public interest test.

Considerations of panel: It was felt there is unlikely to be a general public interest in this request in relation to rental income. The rental contract is individual and is therefore not in the public interest as it is the negotiation between the LA and the customer. Any response would also be out of context as the request is for the rental income only, however other factors will play a part in the rental figure charged, for example an upfront payment to secure a peppercorn rent going forward or a specific decision between PCC and that tenant. It was not felt there was a general interest in transparency in relation to rental figures for properties as they are specific and bespoke to each tenant. They are also an agreement between those parties and have no general public interest.

Public interest in the issue

As well as the general public interest in transparency, which is always an argument for disclosure, there may also be a legitimate public interest in the subject the information relates to.

Considerations of panel: As above, unlikely to be a general interest in this request.

Public interest in the information

In addition to the general public interest in transparency and accountability, and any public interest arising from the issue concerned, there may be a specific public interest in disclosing the information in question

Considerations of panel: The panel did not feel there was an overriding public interest in the rental figures charged. In fact, it was felt the balance was in favour of PCC in terms of public interest to not release this information as it is commercially sensitive for PCC for our rental charges to be in the public domain.

Suspicion of wrongdoing

Potential public interest in transparency is where there is a suspicion of wrongdoing on the part of the public authority. A requester may, for instance, allege that a public authority has committed some form of wrongdoing, and that the information requested would shed light on this. For this to be considered as a factor in the public interest test, disclosure must serve the wider public interest rather than the private interests of the requester and the suspicion of wrongdoing must amount to more than a mere allegation; there must be a plausible basis for the suspicion, even if it is not actually proven.

Considerations of panel: N/A in this case

Presenting a 'full picture'

Even if wrongdoing is not an issue, there is a public interest in fully understanding the reasons for public authorities' decisions, to remove any suspicion of manipulating the facts, or 'spin'

Considerations of panel: N/A in this case

Private Interests

FOIA section 2(2) refers to the public interest; furthermore, disclosures of information under FOIA are in effect to the world at large and not merely to the individual requester. So the requester's private interests are not in themselves the same as the public interest and what may serve those private interests does not necessarily serve a wider public interest.

Considerations: Not in wider public interest. Landlords or rival owners of rental properties would find this information of interest and this is the risk to PCC.

4. Decision of Panel:

Less than half of the properties in the response are in the public domain, and the information in the public domain is very limited. Even information in the public domain is easily and quickly out of date; for example we have a lease with RNLI which began in 2013 and the details in the lease regarding the rent are already out of date.

The FOI referred to by the customer (which was released previously in 2016) was reviewed again by panel and all members of the panel felt the information provided as part of that FOI, which included rental income, should not have been provided. S.43 applied at that time but was not engaged by the officer at that time. Panel agreed this was incorrect.

The panel felt that PCC could be placed at risk if this information was released as it could lead to changes to tenancies and it was felt it would undermine the relationship with our tenants. It was also considered to be commercially damaging in relation to the rental income PCC relies upon for its properties.

Decision by panel to signpost customer to VOA website for information re business rates as this was missed on the original response.

Outcome of Panel:

Decision of panel was unanimous to UPHOLD original decision and rely on S.43 Commercial Interest.

Ali Evans

13.03.19