



16 November 2017

Dear ,

Request for Information – ATISN 11585

I wrote to you on 23 October regarding your request for information. You asked for a full and un-redacted copy of all of the Due Diligence Report into the Circuit of Wales Racetrack.

I confirm we hold information captured by your request. The Due Diligence Report consists of separate documents provided to the Welsh Government by external advisors and internal legal advice. Summary documents for some of these external documents are available on the Welsh Government website:

Regeneris - Circuit of Wales: Review of Economic Impact Evidence

<http://gov.wales/docs/det/publications/171006-economic-impact-summary-report.pdf>

Chandler KBS - Construction Cost Due Diligence Report – Executive Summary

<http://gov.wales/docs/det/publications/171006-construction-cost-summary-report.pdf>

Chandler KBS - Main Contractor Procurement Due Diligence Report, Circuit of Wales – Executive Summary

<http://gov.wales/docs/det/publications/171006-construction-procurement-summary-report.pdf>

Grant Thornton - Circuit of Wales, Extracts from the Due Diligence Review Report

<http://gov.wales/docs/det/publications/171006-business-plan-market-summary-report.pdf>

In addition to the above, we hold a Corporate Intelligence report (also known as a Fit and Proper Person Test report) and external and internal legal advice.

I have concluded that the full and un-redacted reports of the five documents referred to above, together with the separate legal advice, are exempt from disclosure. Full



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reasoning for withholding this information, together with the relevant exemptions being relied upon, are given at Annex A to this letter.

If you are dissatisfied with the Welsh Government's handling of your request, you can ask for an internal review within 40 working days of the date of this response. Requests for an internal review should be addressed to the Welsh Government's Freedom of Information Officer at:

Information Rights Unit, Welsh Government, Cathays Park, Cardiff, CF10 3NQ or FreedomOfInformationOfficer@wales.gsi.gov.uk. Please remember to quote the ATISN reference number above.

You also have the right to complain to the Information Commissioner. The Information Commissioner can be contacted at: Information Commissioner's Office, Wycliffe House, Water Lane, Wilmslow, Cheshire, SK9 5AF.

However, please note that the Commissioner will not normally investigate a complaint until it has been through our own internal review process.

Yours sincerely

ATISN 11585 – CONSIDERATION FOR AND AGAINST DISCLOSURE

The Freedom of Information Act 2000 exemptions upon which the Welsh Government is relying to withhold the requested information are:

- Section 40(2), personal data
- Section 41, information provided in confidence
- Section 42, legal professional privilege
- Section 36(2)(c), otherwise prejudice the effective conduct of public affairs

Section 40(2) – Personal Data

The information withheld under this exemption is:

- Grant Thornton – Corporate Intelligence Review

Section 40 of the Freedom of Information Act sets out an exemption from the right to know if the information requested is personal information protected by the Data Protection Act 1998 (DPA). Personal data is defined in Section 1(1) of the DPA as: *“personal data” means data which relates to a living individual who can be identified from those data; or from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller”*.

I have concluded that, in this instance, the withheld information within the Corporate Intelligence Report amounts to third party personal data.

Under Section 40(2) of the FOI Act, personal data is exempt from release if disclosure would breach one of the data protection principles. I consider the principle being most relevant in this instance as being the first.

The first data protection principle states:

Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless -

(a) at least one of the conditions in Schedule 2 is met, and (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.

I consider that the withheld information in relation to Mr Michael Carrick falls within the description of personal data as defined by the DPA and that its disclosure would breach the first data protection principle. The first data protection principle has two components:

1. Personal data shall be processed fairly and lawfully and
2. Personal data shall not be processed unless at least one of the conditions in DPA schedule 2 is met

Guidance from the Information Commissioner's Office (Personal information (section 40 and regulation 13) v 1.4) states:

If disclosure would not be fair, then the information is exempt from disclosure.

This approach was endorsed by the Court of Appeal in the case of Deborah Clark v the Information Commissioner and East Hertfordshire District Council where it was held:

"The first data protection principle entails a consideration of whether it would be fair to disclose the personal data in all the circumstances. The Commissioner determined that it would not be fair to disclose the requested information and thus the first data protection principle would be breached. There was no need in the present case therefore to consider whether any other Schedule 2 condition or conditions could be met because even if such conditions could be established, it would still not be possible to disclose the personal data without breaching the DPA" (paragraph 63).

Our analysis of the ICO's key considerations in assessing 'fairness', as set out in the Guidance, are presented below.

The withheld information amounts to the personal data of Mr Carrick and other individuals. It includes details and findings of the work undertaken by Grant Thornton.. Grant Thornton gathered intelligence on the individuals in consultation with them and interviewed them in order to complete their report. In partaking in these interviews and consultations, there would be no expectation that their personal details would at any time be placed in the public domain. The individuals, including Mr Carrick, would not expect the personal data contained in the withheld information to be released, indeed Mr Carrick and the other individuals have in another context denied consent for the withheld information to be publicly released.

The Welsh Government does not believe there is any legitimate interest in the public or the requestor having access to this personally sensitive information, and we do not see any legitimate reason why the personal details of the individuals should be placed into the public domain. Because of that, it is believed release of this information would be unfair and so breach the first data protection principle.

For that reason, I believe the information should be withheld under section 40(2) of the Freedom of Information Act. This is an absolute exemption and not subject to the public interest tests .

Section 41 – Information Provided in Confidence

The information withheld under this exemption is:

- Chandler KBS - Construction Cost Due Diligence
- Chandler KBS - Main Contractor Procurement Due Diligence
- Grant Thornton - Due Diligence Review
- Grant Thornton – Corporate Intelligence Review

Section 41 sets out an exemption from the right to know where the information requested was provided to the public authority in confidence and disclosure of the information would give rise to an actionable breach of confidence.

Section 41 states that:

(1) Information is exempt information if—

- (a) it was obtained by the public authority from any other person (including another public authority), and*
- (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.*

The information contained in each of the reports contains detailed financial and technical project information provided to both Chandler KBS and Grant Thornton by the Circuit of Wales. As such the information is neither trivial nor is it publicly accessible. Both companies entered into an agreement with the Heads of the Valley Development Company Limited which prevents them from releasing information provided to them in confidence, other than to the Welsh Government. To release this information into the public domain would place both companies in breach of this agreement.

Consequently I believe that the information is owed a legal duty of confidence and that disclosure without consent would result in an actionable breach of that confidence.

Section 41 is an absolute exemption and is not, therefore, subject to the public interest test.

Section 42 – Legal Professional Privilege.

The information withheld under this exemption is both the external and internal advice received by the Welsh Government.

This exemption states (inter alia):

(1) Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.

Legal professional privilege (LPP) covers communications between lawyers and their clients for the purpose of obtaining legal advice, or documents created by or for lawyers for the “dominant” (main) purpose of litigation. The information in question concerns confidential communications made for the purpose of providing or obtaining legal advice or for lawyers to use in preparing a case for litigation.

The section 42 exemption is qualified, which means that it is subject to a public interest test. That there is a public interest served in public authorities being able to access advice which benefited from professional legal privilege was noted in *Bellamy v the Information Commission and DTI* [EA/2005/0023] in which the tribunal, on the subject of LPP said:

"there is a strong element of public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt interest....it is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear case...".

The Welsh Government is of the firm view that it is highly important to maintain legal professional privilege and that, in the absence of at least equally strong countervailing considerations, any attempt to undermine the principle of legal professional privilege would result in substantial harm.

Legal advisers need to be able to present the full picture to their clients, in this case all UK Government and devolved administrations, which includes arguments in support of final conclusions and any relevant counter-arguments. This is the purpose behind the long-established principle of legal professional privilege.

It is in the nature of legal advice that it often sets out the possible arguments both for and against a particular view. If recipients or providers of legal advice believe that it is likely that the legal advice would be published, especially so soon after being sought and in a complex political environment, then it is unlikely that comprehensive advice would be commissioned or provided. This would be likely to result in substantial harm to the quality of decision-making since it would not be fully informed. It would also undermine the ability of legal advisers and their clients to rely confidently on the protection afforded by the principle of legal professional privilege.

Moreover, disclosure of legal advice has a significant potential to prejudice the governments' ability to defend its legal interests - both directly by unfairly exposing its legal position to challenge, and indirectly by diminishing the reliance it can place on the advice having been fully considered and presented without fear or favour.

Section 43 (2) – Commercial Interests

The information withheld under this exemption is:

- Chandler KBS - Construction Cost Due Diligence
- Chandler KBS - Main Contractor Procurement Due Diligence
- Grant Thornton - Due Diligence Review
- Grant Thornton – Corporate Intelligence Review

Decisions relating to non-disclosure of this information have been taken with due consideration of the exemptions identified under Section 43(2) of the Freedom of Information Act 2000 (FOIA). This exemption states that:

(2) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).

Section 43 is a qualified (public interest tested) exemption. This means that in order to engage it, I must show that the public interest in withholding the information is greater than the public interest in releasing it. I have therefore given consideration to the

effects of disclosure of the information to the world at large as the information is made available to anybody and everybody, not just the requestor.

I recognise the general public interest in openness and transparency and releasing the information would help the public gain a better understanding of the decisions made by Government. It is also recognised that there is a public interest in how public money is to be, or has been, used to ensure that Government gets the best value from the public purse.

The information contained in the full reports contains highly sensitive commercial information in relation to the proposed Circuit of Wales project, including financial analysis, funding options, operational data, construction cost estimates, budgets and yardstick analyses. The Heads of the Valleys Development Company is still in the process of developing proposals for the proposed Circuit of Wales project. To disclose this information would mean disclosing operational data upon which the company is still very much reliant on progressing the proposed project in a competitive market and thus cause the company commercial prejudice with its competitors.

I believe the public interest is satisfied by the amount of information already disclosed in relation to the proposed Circuit of Wales project.

I am aware that as a general rule, the sensitivity of information is likely to reduce over time, so that the age of information, or timing of the request may be relevant in determining whether to apply the exemption, or where the public interest may lie. In this case, however, the information captured is very much current information.

In conclusion, I believe that the balance of the public interest therefore falls in favour of withholding the full and unredacted reports.

Section 36(2)(c), otherwise prejudice the effective conduct of public affairs

The information withheld under this exemption is:

- Regeneris - Review of Economic Impact Evidence

The Freedom of Information Act 2000 (FOIA) has introduced a two-stage process for considering and using the s36 exemption. Stage 1 is to ascertain whether the basic conditions for triggering the application of the exemption apply. This is the role of the 'qualified person' and in relation to the Welsh Government, the qualified person usually means the First Minister. If the qualified person decides that the information would, or would be likely to, have the specified adverse effect(s), then the exemption is said to be engaged and Stage 2 can commence.

Stage 1 – Engagement of Exemption

The First Minister, as the 'qualified person', has agreed that Section 36(2)(c) is engaged. The full and unredacted version of the Economic Impact report contains very technical material and very similar data from a number of different perspectives which illustrate different conclusions. This raises the genuine potential for confusion, misunderstanding and misrepresentation by third parties who hold divergent views on the proposed project. Those who oppose the project would be likely to misrepresent

its contents in order to promote their own viewpoint. Because of this likely misrepresentation, a summary report was prepared and published to ensure clarity on the key findings supported by presentation of the key underlying evidence data.

The publication of the full and unredacted report would be likely to prejudice the effective conduct of public affairs as it would likely distract and divert Ministers and Officials from their normal course of business in managing the impact of disclosure. It is important to avoid public resources being unnecessarily expended in explaining misrepresented or misunderstood aspects of the report, when taken out of context and without the supporting and underlying evidence data.

It was decided the above prejudicial effects would be relevant to the “would be likely to” limbs of section 36(2)(c). After due consideration, the Qualified Person was in agreement that the exemption was engaged.

Stage 2

Section 36 is a public interest tested exemption. This means that in order to withhold information under its provisions, it has to be shown that the public interest in withholding the information outweighs that in releasing it.

The Welsh Government acknowledges the inherent public interest in the openness and transparency that release of the information would engender. It would also demonstrate that Government officials and Ministers are fully exploring all possible avenues so that business support decisions are based on sound evidence.

Guidance from the Information Commissioner’s Office states that the section 36(2)(c) exemption can be applied if releasing the information would otherwise prejudice, or would be likely to otherwise prejudice, the effective conduct of public affairs, and can be about the process that may be inhibited, rather than what is in the information.

The withheld information was generated through the Welsh Government due diligence process of seeking independent analysis of providing a company with support. Internal due diligence is always undertaken before agreeing to provide such support. For major projects such as the proposed Circuit of Wales, external and specialist advice is sought as part of this process.

It would not be in the public interest for Ministers and Officials to be distracted from their normal duties by having to respond to misunderstood or misrepresented aspects of the full report, if it were to be released, particularly given the complexity of the information, as described above. The Welsh Government is of the view that the summary report which has been published on the Welsh Government website satisfies the public interest as it provides a sufficient level of clarity on the key findings, supported by presentation of the key underlying evidence data.

Accordingly, the information requested has been withheld under Section 36(2)(c) of the Freedom of Information Act for the reasons set out above.