

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 March 2012

Public Authority: Craigavon Borough Council
Address: Civic Centre
Lakeview Road
Craigavon
Co. Armagh
BT64 1AL

Decision (including any steps ordered)

1. The complainant requested a copy of all information and documentation relating to the "Heaton Report," a report about human resources and management issues across Craigavon Borough Council's ("the Council's") leisure sites. The Council initially refused to disclose this under section 40 of FOIA (personal data of third parties), however it eventually, following the Commissioner's intervention, disclosed a copy of the Heaton Report itself to the complainant. It stated to the Commissioner that it did not hold any further information relevant to the complainant's request, however upon further searching it located one further relevant document ("the withheld information"), which it withheld under section 40(2) and section 36(2)(c) (disclosure would otherwise prejudice the effective conduct of public affairs) of FOIA.
2. The Commissioner's decision is that Craigavon Borough Council has correctly applied the section 36(2)(c) exemption to the withheld information. He has not considered the application of section 40(2) as he is of the view that section 36(2)(c) covers the entirety of the withheld information. He is also satisfied that the Council holds no further information relevant to the complainant's request, other than that which has already been disclosed to the complainant.

Request and response

3. On 6 October 2010, the complainant wrote to the Council and made several requests for information, most of which it treated as subject access requests under the Data Protection Act 1998 (the DPA). However, it treated one of those requests as a request under the FOIA. That request was for:

"All information/documentation relating to....."a copy of the Heaton Report."
4. The Council responded on 5 November 2010, refusing to disclose the requested information under section 40 of the FOIA (personal data of third parties).
5. Following an internal review the Council wrote to the complainant on 15 March 2011, upholding its decision.
6. Following the Information Commissioner's intervention, the Council disclosed a copy of the Heaton Report to the complainant. The complainant still wanted the Information Commissioner ("the Commissioner") to investigate why the Council had not disclosed the remaining requested information, that is, information and documentation relating to the Heaton Report.
7. The Commissioner asked the Council whether it held any information and documentation relating to the Heaton Report which it had not disclosed. The Council said that it didn't. The Commissioner then asked a number of detailed questions regarding the Council's management of the request and its search procedures.
8. The Council answered his queries and said that it had now found one document relevant to the complainant's request, but was withholding it under sections 36(2)(c) and 40 of the FOIA.

Scope of the case

9. The Commissioner has considered the Council's handling of the original request, its assertion that it did not hold the remaining requested information and its application of sections 36(2)(c) and 40(2) to the information it discovered it did hold.

Reasons for decision

Is the remaining requested information held by the Council?

10. Section 1(1) of FOIA states that:

"Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him."

11. The Commissioner asked the Council a number of detailed questions to determine what information it held that was relevant to the scope of the complainant's request.

12. In considering whether or not the information is held by the Council, the Commissioner is mindful of the Tribunal's decision in the case of *Bromley v the Information Commissioner and the Environment Agency*¹ in which it was stated that *"there can seldom be absolute certainty that information relevant to a request does not remain undiscovered somewhere within a public authority's records"*. The Tribunal clarified that it was applying the application of the balance of probabilities test, which required a number of factors to be considered, that is:

- the quality of the public authority's initial analysis of the request;
- the scope of the search that it decided to make on the basis of that analysis and the thoroughness of the search which was then conducted; and
- the discovery of materials elsewhere whose existence or content point to the existence of further information held by the public authority which had not been brought to light.

13. It was therefore clarified in that case that the test to be applied as to whether or not information is held was not certainty but the balance of probabilities.

¹ EA/2006/0072

14. The Commissioner is also mindful of the case of *Ames v the Information Commissioner and the Cabinet Office*². In this case the complainant expected that the information would be held because it was extremely important, but the Tribunal concluded that it was not held. Therefore even where the public may reasonably expect that information should be held, this does not mean that it is held.
15. On 23 September 2011 the Council responded to the Commissioner's questions. It also explained that, other than the newly identified letter, it did not hold any information or documentation relating to the Heaton Report. There were no investigations into any allegations contained in the report, therefore there had never been any investigation reports.
16. The Council explained that it had undertaken searches of the then Chief Executive's email inbox and Council, Committee and Corporate management team meeting minutes. It had also searched Council headquarters for any relevant files belonging to the then Chief Executive. In addition to these searches, it had also asked the Director of Corporate Services, the Director of Environmental Services and the Director of Building Control Services, who all stated that they were not aware of any investigations having taken place, nor had they ever seen any relevant reports.
17. The Council explained that if the information existed, it would expect there to be a manual file on the subject of investigation reports for consideration by the Corporate Management Team and/or the relevant Committee. Some documents might also be held in electronic form.
18. The Commissioner has considered the Council's explanation of its search procedures and has concluded that these were thorough and that the Council took all reasonable steps to ascertain what recorded information, if any, it held which was relevant to the complainant's request.
19. The Commissioner had considered what information he would expect the Council to hold and whether there is any evidence that it was ever held. In doing so he has taken into account the responses the Council provided to his questions. The Commissioner is also mindful of the Tribunal decisions highlighted at paragraphs 12 to 14 above. The Commissioner considers that on the balance of probabilities the Council holds no further recorded information relevant to the scope of the

² EA/2007/0110

complainant's request. He has therefore gone on to consider whether the Council correctly applied the exemption under section 36(2)(c) to the remaining information which it does hold and did not disclose.

Exemptions

Section 36 - prejudice to the effective conduct of public affairs

20. 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. The phrase 'otherwise prejudice' means that this section refers to prejudice not covered by section 36(2)(b).
21. In order to engage any limb of section 36, the 'qualified person' must give an opinion that the prejudice would or would be likely to occur, but that in itself is not sufficient; the opinion must be reasonable.
22. To establish whether section 36 has been applied correctly the Commissioner considers it necessary to:
 - ascertain who is the qualified person for the public authority;
 - establish that an opinion was given;
 - ascertain when the opinion was given; and
 - consider whether the opinion was reasonable.
23. In deciding whether an opinion is reasonable the Commissioner will consider the plain meaning of that word, that is, not irrational or absurd, and in accordance with reason. If it is an opinion that a reasonable person could hold, then it is reasonable. This is not the same as saying that it is the *only* reasonable opinion that could be held on the subject. The qualified person's opinion is not rendered unreasonable simply because other people may have come to a different (and equally reasonable) conclusion. It is only unreasonable if it is an opinion that *no* reasonable person in the qualified person's position could hold. The qualified person's opinion does not even have to be the *most* reasonable opinion that could be held; it only has to be a reasonable opinion.
24. The Commissioner has also been guided by the Information Tribunal's comments in *Guardian Newspapers & Brooke v Information Commissioner & BBC*³ (paragraph 91), in which it indicated that the

³ EA/2006/001/0011 and 0013

reasonable opinion is limited to the degree of likelihood that inhibition or prejudice may occur and thus,

'does not necessarily imply any particular view as to the severity or extent of such inhibition [or prejudice] or the frequency with which it will or may occur, save that it will not be so trivial, minor or occasional as to be insignificant'.

25. Therefore, in the Commissioner's opinion this means that when assessing the reasonableness of an opinion, the Commissioner is restricted to focusing on the likelihood of that inhibition or harm occurring, rather than making an assessment as to the severity, extent and frequency of prejudice or inhibition of any disclosure.

The engagement of section 36(2)(c)

26. Section 36(5)(l) states that in relation to information held by a Northern Ireland public authority other than the Northern Ireland Audit Office, the qualified person includes the public authority, or

'(ii) any officer or employee of the authority authorised by the First Minister and deputy First Minister in Northern Ireland acting jointly'.

In this case the Commissioner has established that the opinion was given by Dr Theresa Donaldson, the current Chief Executive of the Council. As Chief Executive, she is an officer of the Council authorised by the First Minister and deputy First Minister as per the provisions of the above section. The Commissioner is therefore satisfied that Dr Donaldson was a qualified person for the purposes of section 36(5)(l) of the FOIA.

27. The Council explained that the qualified person's opinion was sought before a substantive letter was sent to the complainant regarding the withheld information. The qualified person was given a detailed verbal submission and was already fully aware of the background to the matter through previous requests submitted by the complainant. She subsequently approved the use of section 36(2)(c) in relation to the withheld information.
28. The Council informed the Commissioner that the withheld information and the potential application of the section 36 exemption were discussed at a meeting during which the Chief Executive was fully briefed by the Council's Policy Development Officer, who was fully familiar with the matter. During that meeting, the public interest arguments, both in favour of maintaining the exemption and disclosing the withheld information, were also discussed.

Section 36(2)(c)

29 Prejudice to the effective conduct of public affairs could refer to an adverse effect on the public authority's ability to offer an effective public service or to meet its wider objectives or purpose.

30. In *Ian Edward McIntyre v Information Commissioner and the Ministry of Defence*⁴, 4 February 2008, the Information Tribunal said at paragraph 25:

"We take a similar view to the Commissioner that this category of exemption is intended to apply to those cases where it would be necessary in the interests of good government to withhold information, but which are not covered by another specific exemption, and where the disclosure would prejudice the public authority's ability to offer an effective public service or to meet its wider objectives or purposes due to the disruption caused by the disclosure or the diversion of resources in managing the impact of disclosure"

31. The Commissioner notes that Dr Donaldson has not explicitly said whether disclosure would **or** would be likely to cause the prejudice outlined in section 36(2)(c). Therefore the Commissioner, mindful of the findings of the Tribunal in the case of *McIntyre v Information Commissioner and MoD* in paragraph 31 above has decided that the lesser test should be applied. The Tribunal in *McIntyre* commented at paragraph 45 that:

'we consider that where the qualified person does not designate the level of prejudice, that Parliament still intended that the reasonableness of the opinion should be assessed by the Commissioner but in the absence of designation as to level of prejudice that the lower threshold of prejudice applies, unless there is other clear evidence that it should be at the higher level.'

32. The Council argued that disclosure of the information would be likely to prejudice its ability to offer an effective public leisure service due to disruption to services likely to be caused by the disclosure and a diversion of resources in putting the information into context and managing the impact of disclosure. The Council explained in detail why it believed this particular information would have this effect. However,

⁴ EA/2007/0068

the Commissioner is unable to repeat all the Council's arguments in the main body of the notice, as to do so would effectively reveal the content of the withheld information. He has therefore considered the arguments more fully in the confidential annex to this notice which has only been sent to the Council.

33. For the reasons set out in the confidential annex to this notice, the Commissioner finds that the opinion of the qualified person is a reasonable one. He therefore finds that section 36(2)(c) was correctly engaged in relation to the withheld information and has gone on to consider the public interest arguments.

The public interest test

34. Section 2 of FOIA sets out the circumstances under which a public authority may refuse a request for information. According to this section, where a public authority has identified a qualified exemption, it must consider whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs that in disclosing the information. This is often referred to as the "*public interest test*". When considering the public interest in relation to section 36, the Commissioner can consider the severity, extent and frequency of the prejudice or inhibition to the effective conduct of public affairs.

Public interest arguments in favour of disclosing the withheld information

35. The Council carefully considered the public interest factors in favour of disclosing the withheld information in this case. It analysed the strength of a public interest argument in favour of disclosure that was closely linked to the exact content of the withheld information. In order to avoid revealing the content of the withheld information the Commissioner has considered this argument more fully in the confidential annex to this notice.
36. The Council also accepts that there is a public interest in openness and transparency in the processes carried out by a public authority, which obviously affect the public. The Commissioner agrees that this is the case.

Public interest arguments in favour of maintaining the exemption

37. The Council has explained to the Commissioner that the withheld information is a letter which was written in 2007, prior to the Heaton Report being completed. It stated that the Heaton report was never given weight or adopted as a Council document and that its recommendations were therefore never implemented. It argued that it

would be time consuming for the Council to put the withheld information into context and that the disruption to services and diversion of resources resulting from disclosure would hinder the Council's ability to provide an effective public leisure service. The Council also provided more detailed reasoning in support of its conclusion that the public interest in maintaining the exemption outweighs that in favour of disclosure. In order to avoid revealing the content of the withheld information the Commissioner has considered these arguments more fully in the confidential annex to this notice.

Balance of public interest arguments

38. In this case the Commissioner believes that there is weight to the public interest arguments on both sides. The Commissioner appreciates that the arguments in favour of accountability and transparency have some weight in this case. He is of the view that it is important for a public authority to be as transparent as possible. He also finds that the availability of information regarding the matters discussed in the withheld information are in the public interest.
39. However, in the circumstances of this case he finds that the weight of public interest factors maintaining the exemption are greater than those that favour disclosure. He finds this because the withheld information dates back to 2007 and he has been persuaded that the specific issues raised in the withheld information are not current, which considerably reduces the public interest in their disclosure. However, other related matters are ongoing which means that the potential for prejudice to the effective conduct of public affairs remains current and relatively severe. Therefore, the Commissioner is of the view that, on balance, the potential damage which could be caused by disclosure outweighs any public interest factors in favour of disclosure.
40. In light of the above, the Commissioner finds that the public interest in maintaining the exemption, and therefore withholding the disputed information, outweighs the public interest in disclosure. Therefore the Commissioner is satisfied that the disputed information was correctly withheld by the public authority and upholds the application of section 36(2)(c).
41. As the Commissioner has found that section 36(2)(c) has been appropriately applied and is engaged in relation to the entirety of the withheld information, he has not gone on to consider the application of section 40(2).

Right of appeal

42. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

43. 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.
44. 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

Lisa Adshead
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF