

Freedom of Information Act 2000 (the Act)

Decision notice

Date: 26 January 2012

Public Authority: Nottingham City Council
Address: Loxley House
Station Street
Nottingham
NG2 3NG

Decision

The Commissioner's decision is that Nottingham City Council has correctly applied the exemption in 36(2)(b)(ii) of the Act to the requested information. However, he also finds that the council breached section 10 of the Act by taking more than 20 working days to respond to the complainant's information request.

1. The complainant has requested:

'Could you please provide me with copies of all written communications in the last 12 months, including emails and any associated documents to and from' the following individuals 'relating to processes and procedures for Freedom of Information Requests':

- a. *'Carol Mills Evans'*¹
- b. *'Paul Martin'*²
- c. *'Council Corporate Directors'*.

2. The Commissioner's decision is that Nottingham City Council (the council) has correctly applied the exemption in 36(2)(b)(ii) of the Act to the requested information. However, he also finds that the council breached section 10 of the Act by taking more than 20 working days to respond to the complainant's information request.

¹ Deputy Chief Executive & Corporate Director for Resources

² I.T. Director

3. The Commissioner does not require the council to take any action in this case.
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Background

4. The information requested in this case, which has been withheld by the council under sections 36(2)(b)(i) and (ii) of the Act, consists of internal emails regarding the existing practices for dealing with freedom of information requests and the introduction of a new sign off sheet and procedure by the council's Deputy Chief Executive in October 2010.
5. The catalyst for the introduction of this new procedure was a complaint made to the council's Chief Executive and Deputy Chief Executive on behalf of the Deputy Leader of the council and others following a disclosure under the Act concerning the cost of refreshments for councillors. See the [council's disclosure log under reference 10-7496](#)³.
6. The details of the new sign off procedures are contained in an internal email from the council's Deputy Chief Executive dated 7 October 2010 which has been disclosed to the complainant. It states that with immediate effect the sign off sheet needs to be signed by the department providing the information, Communications and Information Governance. Thereafter, Communications need to have sight of the final proposed release before it is sent out by Information Governance.

Request and response

7. On 29 November 2010 the complainant wrote to Nottingham City Council (the council) and requested information in the following terms:

'Could you please provide me with copies of all written communications in the last 12 months, including emails and any associated documents to and from' the following individuals 'relating to processes and procedures for Freedom of Information Requests':

- a. *'Carol Mills Evans'*
- b. *'Paul Martin'*
- c. *'Council Corporate Directors'*.

³ <http://www.nottinghamcity.gov.uk/CHttpHandler.ashx?id=29523&p=0>

8. The council formally responded on 10 June 2011. It stated that all the information falling within the scope of the request had been located and exempted from disclosure in its entirety under sections 36(2)(b)(i) and 36(2)(b)(ii) of the Act.
9. On 12 June 2011 the complainant invited the council to reconsider its application of sections 36(2)(b)(i) and 36(2)(b)(ii) of the Act to the information requested.
10. Following an internal review the council wrote to the complainant on 1 July 2011. It reiterated the decision it made on 10 June 2011 and apologised for the delay in providing its initial response which it accepted was in breach of section 10 of FOIA.

Scope of the case

11. The complainant contacted the Commissioner to complain about the way his request for information had been handled. In particular he complained about the council's delay in responding to his request and its application of sections 36(2)(b)(i) and 36(2)(b)(ii) of the Act to the information requested.
12. On 7 July 2011 the Commissioner contacted the council and requested copies of the withheld information together with details of the opinion given by its qualified person in relation to the application of section 36(2)(b) of the Act.
13. The council responded on 8 July 2011 with copies of the withheld information together with a copy of the opinion from its qualified person whom it confirmed was also its Director of Legal and Democratic Services and Monitoring Officer.
14. As a result of further correspondence between the Commissioner and the council during July and August 2011 the Commissioner was able to determine that not all of the requested information had been provided. He also determined that some of it was outside the scope of the complainant's request and the majority of it did not engage sections 36(2)(b)(i) and 36(2)(b)(ii) of the Act.
15. On 25 August 2011 the council reconsidered its position in the matter and provided the Commissioner with a up to date schedule of all the information falling within the scope of the complainant's request and confirmed that, with the exception of five emails, to which it had applied the exemptions in sections 36(2)(b)(i) and 36(2)(b)(ii), and three to which it had made a small redaction under 40(2) of the Act, it was prepared to disclose the majority of the information requested which had previously been withheld.

16. On 9 September 2011 (at the Commissioner's request) the council issued a new Refusal Notice and provided the complainant with a schedule of the information falling within the scope of his request together with copies of the information listed to which it did not now intend to apply the exemptions under sections 36(2)(b) and 40(2) the Act.
17. On 11 September 2011 the complainant contacted the council and asked it to clarify whether its Monitoring Officer (the qualified person) had considered all of the five withheld emails when expressing his opinion that disclosure would engage section 36(2)(b) of the Act.
18. On 14 September 2011 the complainant contacted the Commissioner and said that he was satisfied with the redactions made by the council to three of the emails under section 40(2) of the Act and confirmed that he wanted the Commissioner to concentrate his investigation on the five emails still withheld under section 36(2)(b) of the Act.
19. On 19 September 2011 the council contacted the complainant and confirmed that its Monitoring Officer had considered all of the five emails about which he had expressed the opinion that disclosure would engage section 36(2)(b) of the Act.

The withheld information

20. The schedule of information shown below is an extract from the one disclosed to the complainant by the council on 9 September 2011 and describes the emails withheld by it under section 36(2)(b) of the Act.

From	Date	Subject	Disclose (Y or N) ⁴	Exemption/reason
6. Glen O'Connell ⁵	15/10/10 13:39:07	RE: FEEBACK FROM LEADERSHIP GROUP - FOI	N	S36(2)(b)(i) and (ii)
10. Stephanie Pearson ⁶	11/10/10 10:24	RE: FEEDBACK FROM LEADERSHIP GROUP - FOI	N	S36(2)(b)(i) and (ii)

⁴ Y=Yes and N=No

⁵ Director of Legal and Democratic Services

⁶ Information Governance Manager

11. Stephanie Pearson ²	11/10/10 08:36:00	FEEDBACK FROM LEADERSHIP GROUP - FOI	N	S36(2)(b)(i) and (ii)
24. Stephanie Pearson ²	01/10/10 11:08	FW: Freedom of Information Service	N	S36(2)(b)(i) and (ii)
25. Carole Mills-Evans ⁷	30/09/10 17:34:48	FW: freedom of information service (to include email from (name redacted) ⁸ dated 30/09/2010 10:46)	Y – email part 1, N email part 2	S36(2)(b)(i) and (ii)

21. The Commissioner's investigation is limited to the council's application of sections 36(2)(b)(i) and 36(2)(b)(ii) to the above listed information.

Reasons for decision

Section 36(2)(b) of FOIA

22. Section 36(2)(b) provides that 'information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-

(b) would, or would be likely to, inhibit—

- (i) the free and frank provision of advice, or
- (ii) the free and frank exchange of views for the purpose of deliberation'....

23. Section 36 is a qualified exemption and is therefore subject to the public interest test.

⁷ Deputy Chief Executive & Corporate Director for Resources

⁸ PA to Councillor Graham Chapman, Deputy Leader of the council

24. The Commissioner has considered the council's citing of section 36(2)(b) and has concluded that it is acceptable to apply subsections (i) and (ii) to the same withheld information providing arguments can be advanced to support the application of both subsections.
25. In relation to the degree of likelihood of inhibition in this case, the council did not specify the degree it was relying on. Instead it stated that in the opinion of its qualified person disclosure of the information would or would be likely to inhibit the free and frank provision of advice and the free and frank exchange of views for the purpose of deliberation. Where a public authority has not specified the level of inhibition or advanced any strong arguments as to why the higher level should apply the Commissioner applies the lower threshold of 'would be likely to'.
26. The Commissioner's view is that the term 'would be likely to' means that the chance of prejudice must be significant and weighty, and certainly more than hypothetical or remote. However, it does not have to be more likely than not that it would occur.
27. The term 'inhibit' is not explicitly defined in the Act. The Commissioner's view is that, in the context of section 36, it means to restrain, decrease or suppress the freedom with which opinions or options are expressed.

The opinion of the qualified person

28. The first condition to be satisfied before section 36(2) can be engaged by a public authority is that there must be a reasonable opinion from a qualified person. When assessing such an opinion the Commissioner considers the following:
 - a. Whether an opinion was given;
 - b. Whether the person who gave that opinion was the qualified person for the public authority in question;
 - c. When the opinion was given; and
 - d. Whether the opinion was reasonable.
29. In this case the opinion was given on 10 June 2011 by the council's Director of Legal and Democratic Services who is also its Monitoring Officer. This was at the same time as the initial response was provided and before the completion of the internal review on 1 July 2011 and the final refusal notice on 9 September 2011.

30. The Commissioner is satisfied that the council's Director of Legal and Democratic Services (who is also its Monitoring Officer) is a qualified person for the purpose of section 36(5) of the Act.

Was the opinion reasonable?

31. In order to engage section 36(2)(b) the qualified person must give an opinion that is reasonable in relation whether the disclosure of the requested information would be likely to inhibit the free and frank provision of advice and the free and frank exchange of views for the purpose of deliberation.
32. In deciding whether an opinion is reasonable the Commissioner will consider the plain meaning of the word rather than defining it in terms derived from other areas of law.
33. The Commissioner finds that the most relevant definition of 'reasonable' is the one in the Shorter Oxford English Dictionary which states; 'in accordance with reason; not irrational or absurd'. In other words if the opinion is in accordance with reason and not irrational or absurd and is therefore one that a reasonable person could hold then in the Commissioner's view it is reasonable. The opinion does not have to be the only reasonable opinion that could be held or indeed the most reasonable one. It only has to be a reasonable opinion.
34. In the case of Guardian Newspapers Limited and Heather Brooke v Information Commissioner and British Broadcasting Corporation [EA/2006/0011 and EA/2006/0013] the Information Tribunal stated at paragraph 60:

'We do not favour substituting for the phrase 'reasonable opinion' some different explanatory phrase, such as 'an opinion within the range of reasonable opinions'. The present context is not like the valuation of a building or other asset, where a range of reasonable values may be given by competent valuers acting carefully. The qualified person must take a view on whether there is or is not the requisite degree of likelihood of inhibition'.

35. When considering whether an opinion is reasonable the Commissioner will take into account a number of factors including the information and evidence considered by the qualified person and the likelihood that disclosure would be likely to inhibit the free and frank provision of advice and the free and frank exchange of views for the purpose of deliberation. He is not required to make an assessment as to the severity, extent and frequency of any inhibition that may occur as a result of disclosure. See Guardian Newspapers Limited and Heather

Brooke v Information Commissioner and British Broadcasting Corporation [EA/2006/0011 and EA/2006/0013] at paragraph 88.

The present case

36. During the course of his investigation the Commissioner contacted the council and requested details of the information and evidence considered by the qualified person in arriving at his opinion that disclosure of the requested information would be likely to inhibit the free and frank provision of advice and the free and frank exchange of views for the purpose of deliberation. He also requested a copy of the qualified person's opinion.
37. The council responded by providing the Commissioner with a copy of the qualified person's opinion which it subsequently quoted verbatim in its final refusal notice issued to the complainant on 9 September 2011.
38. Having clarified the position with the council, the Commissioner is satisfied that the qualified person considered all of the withheld information listed in the above table when arriving at his conclusion. He also considered evidence from the council's Information Governance Officer in relation to the emails she sent which are also listed in the table.
39. The Commissioner has considered the content of the qualified person's opinion and is satisfied that he only took into account relevant information and evidence in arriving at his opinion.
40. The Commissioner notes from the qualified person's opinion that he considered evidence as to how the process of providing free and frank advice and exchanging free and frank views for the purpose of deliberation in relation to proposed changes to the freedom of information processes would be inhibited by disclosure.
41. The qualified person notes in his opinion that the advice provided and views exchanged were expressed in a strong and forceful manner. He therefore concludes that if the officers concerned (including himself) knew that such advice and views could be made public there was a real likelihood that they would be inhibited from further participation in the debate which could be detrimental to the effective management of the council's functions.
42. The complainant does not agree with the qualified person's conclusion. He argues that by virtue of the council's [Disposal and Retention](#)

[Schedule V3 March 2009](#)⁹ council officers could not claim not to know that their emails relating to its business might be disclosed at some stage in the future. In particular, he refers to paragraph 12.2 which states that messages relating to or evidence of council business should be managed appropriately by employees as they may need to be disclosed at some future date e.g. for a Freedom of Information request.

43. The Commissioner does not accept the complainant's arguments expressed above are fatal to the reasonableness of the qualified person's opinion. In any event disclosure under the Act is always subject to the application of relevant exemptions. Council officers would be likely to know this.
44. The Commissioner finds that the qualified person's opinion was reasonable (in that it was in accordance with reason and not irrational or absurd) and accordingly that the exemptions in section 36(2)(b)(i) and (ii) were engaged in relation to all of the withheld information.

The public interest

45. The exemption in section 36(2)(b)(i) and (ii) is subject to the public interest test.
46. This means that even where, as in this case, the exemption is engaged, the public interest test must be applied in determining whether or not to disclose the withheld information. If the public interest in maintaining the exemption does not outweigh the public interest in disclosure, the information must be disclosed.
47. As the council has cited both subsection (i) and (ii) under section 36(2)(b) the Commissioner has considered the public interest test under each one separately. In doing so he notes that the council did not differentiate clearly between its arguments for each one.
48. The Commissioner has initially considered the public interest arguments in relation to section 36(2)(b)(ii) as this is the subsection he finds is engaged in relation to all of the withheld information based on the qualified person's opinion. (See paragraph 44 above.)

Public interest arguments in favour of disclosing the requested information under section 36(2)(b)(ii)

⁹ <http://www.nottinghamcity.gov.uk/CHttpHandler.ashx?id=8235&p=0>

49. The council accept that there is a clear public interest in it 'having transparent systems supporting decisions on the way its functions are delivered'.
50. The complainant believes that there is a public interest in knowing the advice provided and views exchanged by councillors and senior council officers regarding the development and implementation of new sign off processes and procedures for dealing with freedom of information requests. The complainant believes that by knowing this information the public would be able to understand why the council felt it necessary to introduce a new process and also form an opinion as to whether the changes would improve the previous one.
51. The complainant also believes that there is a public interest in knowing that all facets of the new process had been properly considered and any concerns considered and addressed.

Public interest arguments in favour of maintaining the exemption under section 36(2)(b)(ii)

52. In favour of maintaining the exemption the council has argued that it would be detrimental to the effective management of its functions if its staff were inhibited from addressing difficult issues and expressing the necessary and frank views in relation to them if they knew there was a real likelihood that their comments would be made public. The council has also argued that if staff knew their comments would be made public there was a real likelihood that they would be inhibited from further participation in debate which could also be detrimental to the effective management of the council's functions. In the present case the council has argued that the views expressed by its officers and councillors were clearly linked to proposed changes to the administrative arrangements for dealing with freedom of information requests. Furthermore, such comments were linked to the deliberations concerning the details of those arrangements.

Balance of the public interest arguments under section 36(2)(b)(ii)

53. Having accepted the reasonableness of the qualified person's opinion that disclosure would be likely to inhibit the free and frank exchange of views for the purposes of deliberation, the Commissioner is obliged to give weight to that opinion as an important piece of evidence in his assessment of the balance of the public interest.
54. The Commissioner accepts that there is merit in the argument that disclosure of the requested information in this case would provide transparency for the manner in which the council considers issues and

makes decisions regarding the changes to and implementation of freedom of information new procedures.

55. However, the Commissioner considers that there is a stronger need for views to be exchanged in a frank and free manner to assist with the deliberation of issues concerning changes to internal procedures and their consequences.
56. In this case the Commissioner notes that details of the new sign off process have been disclosed to the complainant in response to his information request in the form of an email from the Deputy Chief Executive.
57. The Commissioner does not consider that disclosure of the withheld information would add to the public's understanding of how the new procedures were developed and implemented.
58. Taking all the circumstances of the case into account the Commissioner finds that the public interest in avoiding the harm that disclosure would be likely to cause outweighs the desirability for openness and transparency in this instance. The Commissioner therefore concludes that the public interest in maintaining the exemption at section 36(2)(b)(ii) outweighs the public interest in disclosing the information.
59. As the Commissioner has come to the conclusion that the information falling within the scope of the complainant's request has been correctly withheld under section 36(2)(b)(ii) he has not gone on to consider the public interest in relation to section 36(2)(b)(i).
60. The Commissioner finds that the council breached section 10 of the Act by taking more than 20 working days to respond to the complainant's information request.

Right of appeal

61. 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

62. 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.
63. 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

Graham Smith
Deputy Commissioner
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SK9 5AF