

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 30 January 2012

**Public Authority:** Salford City Council  
**Address:** Civic Centre  
Chorley Road  
Swinton  
Salford  
M27 5FJ

#### Decision (including any steps ordered)

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1. The complainant has requested information relating to the way in which decisions were made in respect of claims to housing benefit or council tax benefit.
2. The Commissioner's decision is that Salford City Council (the "Council") has incorrectly applied sections 14(1) (vexatious requests) and 36(2)(c) (prejudice to the effective conduct of public affairs) to the requested information. The Commissioner has also found that the Council breached section 17(1)(b) by its handling of the request.
3. The Commissioner requires the public authority to disclose the requested information to ensure compliance with the legislation.
4. The public authority 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 (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

#### Request and response

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5. On 29 January 2011, the complainant wrote to the Council and requested information in the following terms:

*"Please provide me with a copy of all manuals, books of procedures, FAQs, worksheets, etc used by Salford Council for the purpose of deciding, or in any way dealing with (including by appeal) claims to*

*Housing Benefit or Council Tax Benefit. I am not referring to the manuals produced by the DWP...as this has already been released under the FOI act, and is thus exempt under section 21. So, my request is really for internal manuals etc (including but in no way limited to, treatment of self-employed claimants), and any external manuals that are not exempt under section 21."*

6. The Council responded on 25 February 2011 by stating that it was unable to comply with the request.
7. The Council explained that the request was a broad one and would encompass a significant amount of information, all of which would need to be checked in case it was exempt information under FOIA and therefore should be redacted. The Council further advised that the time needed to collate the information would exceed the appropriate limit of 18 hours (presumably relying on section 12(1) (appropriate limit) although this was not cited). The Council also said that, in any event, the information would likely be exempt under section 40(2) (third party personal data) of FOIA.
8. The complainant wrote to the Council on 13 March 2011 to ask the Council to review its refusal. In so doing, the complainant highlighted that any time associated with the process of redaction should not be included for the purposes of section 12(1). They also clarified that by making the request they were not seeking details of individual claimants but only required templates of claim worksheets.
9. Following an internal review the Council wrote to the complainant on 25 July 2011. It confirmed that the original application of section 12(1) had not included the time associated with redaction. However, taking into account the clarification provided by the complainant, it had found that the requested information could be easily located and therefore dropped its reliance on section 12(1). Instead, the Council claimed that the requested information was exempt information under section 36(2) of FOIA, finding that the public interest favoured maintaining the exemption.

### **Scope of the case**

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10. The complainant contacted the Commissioner to complain about the way his request for information had been handled.
11. During the course of the Commissioner's investigation the Council has clarified that the relevant part of section 36(2) being claimed is section 36(2)(c) of FOIA. It has also introduced the possibility that section 14(1) (vexatious request) would apply in the alternative.

12. The Commissioner has therefore considered the application of section 36(2)(c) before going on to test whether section 14(1) is engaged.

## **Reasons for decision**

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### **Section 36(2)(c) – prejudice to the effective conduct of public affairs**

13. Section 36(2)(c) of FOIA provides that information is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.
14. Recalling the comments of the Information Tribunal in *McIntyre* (EA/2007/0068)<sup>1</sup>, the Commissioner considers that section 36(2)(c) will cover information where its disclosure would prejudice the public authority's ability to offer an effective public service or otherwise divert the public authority from meeting its wider objectives because of the disruption caused by disclosure.
15. Where any part of section 36(2) is found to be engaged, the Commissioner will then go on to consider the public interest in disclosure.
16. The Commissioner feels it appropriate to point out that each complaint will be dealt with on a case-by-case basis. For this reason, a decision will not act as a precedent by which the response to any future requests of a similar nature must necessarily be constrained. Instead, the decision of the Commissioner will, to a greater part, derive from the strength of the particular submissions provided by a public authority.

### **The opinion of the qualified person**

17. The Commissioner will decide that an exemption set out at section 36(2) is engaged where he can confirm:
  - who was the qualified person or persons;
  - that an opinion was given by the qualified person;
  - when the opinion was given; and

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<sup>1</sup> <http://www.informationtribunal.gov.uk/DBFiles/Decision/i99/McIntyre.pdf>

- that the opinion was objectively reasonable in substance.
18. The grounds for the claim that the exemption is engaged can be divided into: (A) the original arguments provided at the time of the internal review; and (B) a separate argument that was only introduced during the Commissioner's investigation.
  19. In respect of A, the Commissioner has been provided with a pro forma that in effect set out the qualified person's opinion. This confirmed that the qualified person, the Monitoring Officer in this case, had signed off the application of section 36 on 25 July 2011, the date that the Council had written to the complainant with the outcome of its internal review.
  20. Accepting that the first three conditions listed above have therefore been met, the Commissioner has addressed the question of whether the opinion referred to at A was reasonable in substance.
  21. Having analysed the submissions included in the pro forma, the Commissioner has observed that A rests on an exercise carried out by the Council to estimate the resources required to comply with the request. This found that the requested information consisted of 39 benefit manuals and 568 staff notes, running to some 4205 pages.
  22. The Council estimated that it would take an officer an average of 3 minutes to review and scan each page, which would include the time required to make any redactions. Based on the estimate that 210 hours work would be required to comply with the request, the qualified person agreed that the task would be a clear diversion of resources.
  23. The Commissioner has some sympathy with the concerns raised by the Council. However, the Commissioner considers that the opinion of the qualified person has fundamentally misunderstood the exemption and what it covers. On this point, it is important to observe that section 36(2)(c) solely relates to the prejudice to the effective conduct of public affairs that would arise as a result of disclosure. It plainly does not, as the Council suggests, concern the process of collating and scrutinising information in the lead up to a decision regarding what, if any, information should be disclosed in response to a request.
  24. To find otherwise, the Commissioner considers, would be to allow the Council to refuse to comply with a request on the basis of arguments more properly suited to, and considered under, section 12 of FOIA. In this context, the Commissioner has previously decided that the time associated with the redaction of information is not a relevant consideration.
  25. The Commissioner has not therefore been persuaded that the opinion of the qualified person in respect of A is objectively reasonable.

Consequently, he finds that the exemption is not engaged on this basis, turning instead to the argument set out at B.

26. It is the Commissioner's view that, because the argument was only introduced during the course of his investigation, by rights it does not form part of the opinion upon which the application of section 36 was based. However, even if it was the case that the argument formed part of the original opinion given by the qualified person, the Commissioner does not consider the substance of the opinion to be objectively reasonable for the purposes of section 36.
27. The opinion offered at B concerns the consequences of disclosing the information and, particularly, the "high likelihood that releasing information will result in the council being inundated with further requests and queries from [the complainant]."
28. The Commissioner is not aware that the qualified person has explicitly stated whether disclosure would or would be likely to result in the prejudice stated in the exemption. The Commissioner has therefore found it appropriate to apply the lesser test, namely that the exemption will be engaged if disclosure would be likely to cause the prejudice described at section 36(2)(c) of FOIA.
29. The prejudice test is not a weak test and "likely to prejudice" means that the possibility of prejudice should be real and significant. An evidential burden rests with a decision maker to be able to show that some causal relationship exists between the potential disclosure and the prejudice.
30. Unlike other exemptions, however, any part of section 36(2) will be found to be engaged where the Commissioner can satisfy himself that the qualified person's opinion is objectively reasonable. This does not mean that the Commissioner must consider that the qualified person is correct to think that the prejudice would occur in the way portrayed; only that the Commissioner is satisfied that a reasonable person could hold that view.
31. When considering the opinion of the qualified person in the context of section 36(2)(c), the Commissioner has again returned to then approach endorsed by the Information Tribunal in *McIntyre* –  
  
*"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** (the Commissioner's emphasis)..."* (paragraph 25)
32. The Commissioner has observed that the Council's argument for section 36(2)(c), namely the likelihood that disclosure would result in further

requests being made by the complainant, mirrors the argument put forward for its claim of vexatiousness. This is seen in the fact that the argument regarding the potential consequence of disclosure arises from the Council's knowledge of the context and history of the request; considerations that feature uniquely in the application of section 14(1).

33. Taking the lead from Tribunal's findings in *McIntyre*, the Commissioner considers that section 36(2)(c) should be reserved for situations where there is some prejudice not covered by another specific exemption. So, to the extent that section 14(1) is an exemption, albeit not an exemption contained in Part II of FOIA, then section 36(2)(c) should not be available to refuse vexatious requests. That job should ultimately be left to section 14(1) alone.
34. The Commissioner believes the misapplication of the arguments provided in support of section 36(2)(c) weakens the possibility that the qualified person's opinion may be read as objectively reasonable. He has, nonetheless, gone on to analyse whether the Council has demonstrated a causal link between disclosure and the prejudice described. This is on the basis that the strength of the Council's arguments could still effectively confirm that the opinion was in fact reasonable.
35. The Commissioner has, though, decided that the Council has not provided sufficient evidence to support a finding that, despite the above, the qualified person's opinion was objectively reasonable. More specifically, the Council has failed to show why at the time the request was received it was objectively reasonable for the qualified person to conclude that disclosure of the information would be likely to lead to requests, either in number or nature, that were more disruptive than normal and at a level likely to prejudice the effective conduct of public affairs.
36. The Commissioner is aware that the result of a disclosure of information under FOIA will frequently invite further speculation and the submitting of further requests based on this speculation. In essence, FOIA was enacted to encourage greater public engagement with, and understanding of, public authorities. As such, the Commissioner recognises that there will often be a certain amount of extra work generated off the back of the release of information, which he would expect a public authority to anticipate.
37. The Commissioner would express his surprise in this situation that the Council has sought to refuse a request under section 36(2)(c) due to the possibility that disclosure could lead to further requests and queries being made specifically by the complainant. The Commissioner has not been presented with any evidence that, at the time the request was made, such an inference could reasonably be made. Instead, the

Council's arguments appear to hinge on the receipt of requests dated some time after the request featured here and are therefore not material to the Commissioner's decision.

38. In the absence of compelling evidence, the Commissioner has found that the opinion of the qualified person could not be deemed reasonable in substance and so does not support the Council's position that the stated prejudice would be likely to occur. In coming to this conclusion, the Commissioner considers that adequate protection is already afforded by FOIA at section 12, and to an extent section 14, where a public authority considers that the number and nature of requests being made by an applicant have become overly burdensome.
39. In summary, the Commissioner has decided that the Council has failed to demonstrate, either at A or B, that the prejudice described by section 36(2)(c) would be likely to arise. As he has determined that the exemption is not engaged, the Commissioner has not been required to consider the public interest in disclosure. Instead, the Commissioner has gone on to assess the Council's claim that section 14 would apply in the alternative.

#### **Section 14 – vexatious requests**

40. The Commissioner takes the view that, while a public authority may be able to raise a new exemption during the course of his investigation, he has the discretion to decide whether or not to accept a late claim of section 14. The Commissioner has decided in the circumstances that he would address the particular arguments put forward by the Council, because although the Council did not rely upon section 14(1) initially, the arguments made under section 36(2)(c) were clearly relevant to this section.
41. Section 14(1) provides that a public authority does not have a duty to comply with a request where it may be considered vexatious. As a general principle, this section is designed to protect public authorities against those who do not use the right to seek information in the manner intended.
42. The Commissioner recognises that deciding whether a request is vexatious is essentially a balancing exercise. While he is not limited to these, the Commissioner has previously found the following questions instructive when carrying out this exercise:
  - Could the request fairly be seen as obsessive?
  - Is the request harassing the authority or causing distress to staff?
  - Would complying with the request impose a significant burden in terms of expense and distraction?

- Is the request designed to cause disruption or annoyance?
  - Does the request lack any serious purpose or value?
43. In accordance with the finding of the Information Tribunal in *Welsh* (EA/2007/0088)<sup>2</sup>, the Commissioner accepts that the vexatious nature of a request may only emerge after considering the request in its context and background.
44. The Council has explained that the request was the result of a challenge, made by the complainant on behalf of a client, of a benefit claim assessment. Having revisited the matter, the Council accepted a mistake had been made, reassessed the claim and demonstrated that a relevant procedures manual had been updated.
45. The Council has argued that the disclosure of the information would open up the possibility that the complainant would analyse the withheld information with the likely consequence that any perceived anomalies would be challenged. The Council recognises that its decision making processes should, in theory, be open to public scrutiny. However, it asserts that the practical reality of meeting such requests would be problematic.
46. To support this view, the Council has made reference to the pattern and nature of requests made by the complainant. This, it considered, showed that the Council would be inundated with queries and questions as a consequence of disclosure, causing significant disruption to the Council.
47. The Commissioner, however, places little weight on the arguments of the Council. In forming this opinion, the Commissioner has not perceived anything inherent in the wording of the request itself that indicates it had been submitted with the principal aim of vexing the Council. In contrast, the Commissioner believes that there are grounds for assuming that the complainant has a particular interest in the requested information given its previous close involvement with a benefit claim. Nor has the Council submitted any evidence to support the argument that the request: could be fairly seen as obsessive, harassed the public authority, or lacked serious purpose or value.
48. Further, as stated previously, the Commissioner observes that the Council's claim that it would be inundated with applications for information is to a greater degree based on a pattern of requests made
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<sup>2</sup> <http://www.informationtribunal.gov.uk/DBFiles/Decision/i125/Welsh.pdf>



by the complainant that post-date the request in question. The Commissioner, however, cannot include this particular element of the Council's argument in his considerations. This is because he is limited to exploring the circumstances of a request as they stood at the time the request was made.

49. Therefore, based on the arguments presented by the Council, the Commissioner believes he has had little choice but to decide that section 14(1) has been misapplied.

### **Procedural issues**

50. The Commissioner finds that the Council breached section 17(1)(b) by failing to confirm the relevant subsection of section 36(2)(c) it was seeking to rely on at the internal review stage.

## Right of appeal

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51. 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](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

52. 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.
53. 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**  
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