

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 19 April 2012

**Public Authority:** Kent County Council  
**Address:** Sessions House  
County Road  
Maidstone  
ME14 1XQ

#### Decision (including any steps ordered)

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1. The complainant has requested details of a proposal that was provided to conservative councillors relating to plans for local libraries in the county in the future. The council refused the request on the grounds that section 36 of the Act applied. It said that a disclosure of the information would prejudice the effective conduct of public affairs.
2. The Commissioner's decision is that Kent County Council was correct to apply section 36 to the withheld information.

#### Request and response

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3. On 23 June 2011 the complainant wrote to Kent County Council and requested information in the following terms:

*"I would like to make a Freedom of Information request for the following:*

*1. Any instructions that have been distributed in terms of the use of promotional materials to promote library events.*

*2. Any emails referring to Bearsted Library in the past six months, specifically any sent by [names of officers redacted]*

*3. A copy of the library closure proposals put before the Conservative group meeting w/c 20th June 2011. Including any*

*presentation materials or similar relevant materials used at the meeting.*

*4. A copy of the agenda for the countywide library staff meeting scheduled on 10th June and copies of scripts to be used at said meetings, any communications to staff from senior management about the meeting and its subsequent cancellation and any communications amongst senior management about the cancellation of the meeting.*

*5. A copy of any instructions/briefing notes distributed to Kent library staff advising on communications with the media or library campaigning group Voices for the Library."*

4. The council responded on 22 July 2011. It provided the complainant with copies of the information it held in respect of questions 1, 4 and 5 but stated that it did not hold information in respect of question 2. As regards question 3 it withheld information on the grounds that section 36 of the Act applied.
5. Following an internal review about its response to question 3, the council wrote to the complainant on 1 September 2011 confirming that it was withholding the information on the grounds that section 36 of the Act applied.

### **Scope of the case**

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6. The complainant contacted the Commissioner to complain about the way his request for information had been handled. His complaint was about the council's response to question 3.
7. The Commissioner therefore considers that his investigation needs to consider the council's response to question 3, and the application of section 36 to the withheld information.
8. In its discussions with the Commissioner the council stated that as time has passed since the request was made the sensitivity of some of the information which was withheld at the time of the request has waned.
9. The council stated to the Commissioner that it was now prepared to disclose some of the information to the complainant. These include slides 1 – 11, slide 19 and slide 24 from the presentation to councillors.
10. The Commissioner welcomes the council's agreement to disclose this information. He therefore asks the council to disclose this information to

the complainant and has not considered these slides further within this decision notice.

## Reasons for decision

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11. The council applied 3 sections of the exemption to the information. It applies section 36(2)(b)(i) and (ii), and 36(2)(c).
12. Section 36(2)(b) provides that –
  - (b) “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- 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 purposes of deliberation, or
  - (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.”
13. The application of section 36 requires that the “qualified person” within the authority considers the information and applies the exemption personally. This task cannot be delegated to another person within the authority.
14. The Commissioner therefore asked the council to provide him with evidence that section 36 was applied by the qualified person, which it did. The qualified person within the council is the Deputy Monitoring Officer. The council provided a proforma completed by the qualified person describing the factors and arguments which he had considered when reaching his decision that section 36 applied.
15. The Commissioner must next consider whether the qualified person reached a reasonable opinion, based upon all of the relevant facts of the case.
16. The information relates to a discussion about forward planning for libraries in Kent. It provides proposals to councillors from the leading party within the council suggesting changes to the library service in the county which would meet the financial needs of the council whilst also meeting the current and future needs of the community. The councillors considered the advice and made a decision to consult more closely with communities following the localism agenda. The proposed changes have not therefore been implemented in the form presented at this time. The

council states that no final decisions have been made on the issue, and that it is currently in the process of consulting with local communities to ask for their input into the future shape of libraries in the county.

17. The qualified person considers that the information provided to councillors was a full and frank consideration of the facts, and a suggested a solution which sought to meet needs of the community, balance against the overall cost of the service to it, and to taxpayers. His argument is that if this information were to be disclosed, some proposals may not be presented and discussed in such a full and frank manner in the future. His point was that controversial proposals, issues or solutions may not be recorded because there would be a fear that that information may be disclosed.
18. He also considered that this would be detrimental to good decision making as decisions made end up without all options being considered. Radical or potentially unpopular suggestions may be withheld for fear of a future disclosure. Effectively his argument is that the council would lose its 'safe space' to provide and receive advice and to discuss policy issues, and this would therefore be prejudicial to good government and decision taking.
19. The qualified person also argued that if this occurred information such as this may not be able to be shared and discussed at such an early stage in the development of policy in the future. The concern that it may end up being disclosed would lead to a situation where controversial issues are not discussed and members would not be as well briefed.
20. The qualified person said that the council is currently in consultation with various sections of the community regarding its options for the library service in the future. This follows the conservative government's localism agenda for decisions being made at a local level, with community involvement. A disclosure of these initial proposals would inevitably be controversial, and may harden attitudes within communities. This would be detrimental to open discussion with communities on the future of libraries. Lobby groups would form to protect local libraries based on a proposal which has not been taken forward and where no formal decisions had been taken. He suggested that local communities however may form an opinion that decisions had already been taken by the council, and react on this basis.
21. These are not all of the arguments submitted by the qualified person, however they cover the central arguments which he considered to engaged the exemption.

22. The Commissioner has considered the arguments together with a copy of the withheld information. He considers that the qualified person's opinion is reasonable. The exemption is therefore engaged.

#### The public interest test

23. Section 36 is a qualified exemption in the Act. Where the exemption is engaged the Commissioner needs to carry out a public interest test to determine whether the information should be disclosed in spite of the fact that the exemption is engaged.
24. The Act states that the test to be applied is whether the public interest in disclosing the information is outweighed by the public interest in the exemption being maintained.

#### The public interest in the exemption being maintained

25. The central arguments surround the reasons behind the exemption in the first instance. These include:
26. There is a strong public interest in allowing policy decisions to be taken by councillors from a fully informed point of view. If councillors are unable to obtain full and frank advice then their judgement may be impaired and their decisions detrimentally affected.
27. There are also strong arguments that debates and discussions which occur during the policy creation process should not be disclosed whilst the policy is still under consideration. This is because the media may and groups critical of the proposal may challenge nor criticise the proposals and in so doing impede and delay the decision making process. In this case final decisions on the future of library services are still being considered and a disclosure at the time of the request would ultimately have made agreements and decisions much harder to reach.
28. If sensitive information of this sort was disclosed at such a key time within the decision making process then members and officers would become reticent in recording such sensitive discussions in the future – a chilling effect would occur. This would be detrimental to the decision making process.
29. The council is seeking engagement with the community over the future of the library service. The council argues that if this information is disclosed then the attitudes of those affected by the plans outlined in these proposals would harden. It would then be more difficult to seek agreement or even to have a constructive debate with some sections of the community as their central issue would become saving their local services rather than a wider consideration of how to offer the services as a whole.

30. The council therefore argues that a disclosure would cause disengagement with the process of consultation, defeating the council's attempts to bring the local community into the decision making process for local issues.
31. It further argues that a fear of disclosure due to the potential for subsequent criticism would lead to a 'safety first' approach being adopted. Council staff would be fear discussing more radical or experimental approaches in case that information is subsequently disclosed. The Commissioner is not convinced by this argument however. There will always be some situations where the Act may require such information to be disclosed. Officers and members must therefore already recognise that the Act does not provide a 'blanket' exemption to the exempt information of this sort when formulating their proposals.
32. Early discussions of proposals may be detrimentally effected if councillor's or officers fear disclosure at too early a stage during the policy development stage. There is a public interest in information on intended proposals being shared with councillors at an early point in time so that they are fully informed of proposals which may be on the horizon and can have input into the development of the proposal. They can also intervene at an early stage if they believe that the intended proposal is unlikely to be agreed and prevent unnecessary work from being carried out by officers by developing the proposal further.

#### The public interest in the information being disclosed

33. The central argument for the disclosure of the information rests in creating greater transparency on a potential decision which will greatly affect library services throughout the county. Pressures on finances within local authorities have led library services to be affected in large sections of the country and legal challenges have apparently occurred to plans against some local authorities.
34. The council has indicated its wish to involve communities more with decision making on this issue. There is a public interest in those communities knowing one of the alternative approaches which had initially been considered by the council.
35. The communities trust in the council may be enhanced if it was fully open with the plans which it had considered. The community would see what issues the council considered, what solutions had been suggested and how the proposal sought to meet its current needs. This may ultimately increase trust as it would inform public debate and clarify some of the issues which had been reported upon in the media.

36. Public trust could increase in the council's financial management, and a greater understanding of the issues faced by libraries may be enhanced by a disclosure of the information. Some of the suggestions within the information may be taken forward by the community as a suggested way forward.

### Conclusions

37. The Commissioner is satisfied that the public interest in maintaining the exemption outweigh the public interest in disclosing the information in this case.
38. The Commissioner recognises a very strong public interest in the council being as open and transparent about its plans as is possible under the circumstances. Involving local communities with the decisions to be taken best meets that public interest. With some reservations, the Commissioner accepts the council's argument that a disclosure of this information could harden attitudes and be detrimental to local engagement. Lobby groups within that community would harden their attitudes to community engagement seeking to protect their local services above all else.
39. The council has also argued that legal challenges may follow if this information were disclosed. The Commissioner has not placed a significant weight on this however as legal challenges would be unlikely prior to formal decisions or proposals being outlined. The withheld information is neither of these.
40. The Commissioner also accepts that a disclosure of the information prior to a final policy being formulated would be likely deter full and frank discussions occurring in the future, and that this would be detrimental to good decision making. If less information is shared with councillors during the early stages of policy development then members will be less informed and less able to contribute to the debate and the direction which the plans take. In such circumstance work may continue on proposals which are ultimately decided against by the full council. This may waste public funds and resources as 'dead ends' are not recognised earlier in the process.
41. Finally the Commissioner accepts that there is a strong public interest in protecting the safe space in which such matters can be discussed until such time as a final policy is formulated and agreed.
42. The Commissioner's decision is therefore that the public interest in maintaining the exemption outweighs the public interest in disclosing the withheld information in this instance.

## Right of appeal

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43. 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)

44. 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.
45. 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 .....**

**Andrew White**  
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