

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 23 February 2012

Public Authority: East Lindsey District Council

Address: Tedder Hall
Manby Park
Louch
Lincolnshire
LN11 8UP

Decision (including any steps ordered)

1. The complainant has requested the names of the members of a Standards Committee Local Assessment Review Panel and the Chairman whose signature is on a specific decision notice.
2. The Commissioner's decision is that East Lindsey District Council has incorrectly applied the exemption where disclosure would, or would be likely to, inhibit the free and frank exchange of views for the purposes of deliberation and the exemption where disclosure would otherwise prejudice the effective conduct of public affairs as the public interest in maintaining the exemption does not outweigh the public interest in disclosing the information.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the requested information.
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 FOIA and may be dealt with as a contempt of court.

Request and response

5. On 28 October 2010 the complainant wrote to Lincolnshire County Council and requested information in the following terms:

“Received decision of above case today, under the “Freedom of Information Act” I believe I am entitled to know the names of the members of the Review Panel of the Standards Committee Committee [sic], and the Chairman whose signature is on the Decision Notice Ref ELDC004/2010-11.”
6. Lincolnshire County Council informed the complainant on 29 October 2010 that the request had been passed to East Lindsey District Council ('the council') who will respond directly.
7. The council responded on 1 November 2010. It explained that the request related to proceedings of an East Lindsey District Council member body rather than information held by Lincolnshire County Council. It stated that the council do hold the information requested but, on the advice of the qualified person the information is considered exempt under section 36(2)(b)(ii) and section 36(2)(c) of the Freedom of Information Act 2000. It explained that disclosure of the information would prejudice the future confidence of participants in Standards Committee Local Assessment Review Panels to take part in proceedings of those meetings if they believed that information was open to disclosure to third parties and therefore it is in the public interest to maintain the exemption.
8. There were then numerous pieces of correspondence between the complainant and the council as the complainant was seeking to establish why disclosure of committee member names would prejudice the future confidence of participants when names are already published on the council's web site and why he would be entitled to know the names of the Sub Committee of the Standards Board but not the members of the Standards Committee Local Assessment Review Panel.
9. Following the complainants letter to the Chief Executive on 5 April 2011, the council carried out an internal review and wrote to complainant on 26 May 2011. It upheld the application of the exemptions at section 36(2)(b)(ii) and section 36(2)(c) and stated that as the reasons for withholding the information have already been clearly explained they would not be repeated again.

Scope of the case

10. The complainant contacted the Commissioner to complain that the requested information had not been disclosed.
11. The Commissioner considers whether the council are correct to apply the exemption at section 36(2)(b)(ii) where disclosure would, or would be likely to, inhibit the free and frank exchange of views for the purposes of deliberation and the exemption at section 36(2)(c) where disclosure would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

Reasons for decision

12. Section 36 states that information is exempt from disclosure where, in the reasonable opinion of a qualified person, disclosure would or would be likely to prejudice the effective conduct of public affairs. Section 36 operates in a slightly different way to the other prejudice based exemptions in the FOIA. For section 36 to be engaged, information is exempt only if, in the reasonable opinion of a qualified person, disclosure of the information in question would, or would be likely to, prejudice any of the activities set out in sub-sections of 36(2).
13. In this case the council is applying the exemptions at both section 36(2)(b)(ii) and 36(2)(c).
14. Section 36(2)(b)(ii) provides an exemption where disclosure would, or would be likely to, inhibit the free and frank exchange of views for the purposes of deliberation.
15. 36(2)(c) provides an exemption where disclosure would, or would be likely to, otherwise prejudice the effective conduct of public affairs.

Is the exemption engaged?

16. In order to establish whether the exemption has been applied correctly the Commissioner has:
 - o Ascertained who is the qualified person or persons for public authority in question;
 - o Established that an opinion was given;
 - o Ascertained when the opinion was given; and
 - o Considered whether the opinion given was reasonable.

17. With regard to the first two criteria, the Commissioner has established that the reasonable opinion was given by Eleanor Hoggart, Assistant Director of Legal Services for Lincolnshire County Council. The council has explained that all district councils within Lincolnshire fund a shared Legal Services department and that the Assistant Director of this shared Legal Services department is the appointed Monitoring Officer for the council. The Commissioner is satisfied that Ms Hoggart, being the council's Monitoring Officer, is a qualified person for the purposes of section 36(5) of the FOIA.
18. In relation to the third criterion, the council has provided a copy of the opinion and the Commissioner is satisfied that the opinion was provided after the receipt of the request and before the response.
19. With regards to the fourth criterion, in deciding whether an opinion is reasonable the Commissioner will consider the plain meaning of that word, that being, not irrational or absurd. 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.
20. The Commissioner has also been guided by the Tribunal's indication, in the case *Guardian Newspapers & Brooke v Information Commissioner & BBC*¹, that the 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' (paragraph 91). Therefore, when assessing the reasonableness of an opinion the Commissioner is restricted to focussing 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.
21. With regard to the degrees of likelihood of prejudice the Commissioner has been guided on the interpretation of the phrase 'would, or would be

¹ Appeal numbers EA/2006/0011 & EA/2006/0013

likely to' by a number of Information Tribunal decisions. In terms of 'likely to' prejudice, the Tribunal in *John Connor Press Associates Limited v The Information Commissioner*² confirmed that 'the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk' (paragraph 15). With regard to the alternative limb of 'would prejudice', the Tribunal in *Hogan v Oxford City Council & The Information Commissioner*³ commented that 'clearly this second limb of the test places a stronger evidential burden on the public authority to discharge' (paragraph 36).

22. In its response to the complainant the council stated that disclosure of the information *would, or would be likely to*, inhibit the free and frank exchange of views for the purposes of deliberation or otherwise prejudice the effective conduct of public affairs. In the same correspondence the council also stated that disclosure *would* prejudice the future confidence of participants in Standards Committee Local Assessment Review Panels to take part in proceedings of those meetings if they believed that information was open to disclosure to third parties. In its submission to the Commissioner, it was stated that the qualified person came to the conclusion that disclosure of the information *would* prejudice the effective conduct of public affairs. Therefore, the Commissioner considers that it is appropriate to apply the stronger evidential test.
23. As the request was made directly to the qualified person, the council did not make a submission for an opinion to the qualified person as her opinion was communicated to the council when she directed the request to it for a response. The Commissioner was informed that the qualified person had access to all the withheld information and was also present at the meeting of the Review Panel that decided the specific complaint referred to in the request.
24. The council explained that the qualified person considered that the proceedings of review panels are administrative functions not put into the public domain either by pre-publication of agenda or the publication of minutes and that disclosure would prejudice the future confidence of participants in Standards Committee Local Assessment Review Panels to take part in proceedings of those meetings if they believed that information was open to disclosure to third parties.

² Appeal number EA/2005/0005

³ Appeal number EA/2005/0026 & 0030

25. The council further explained that Standards Committee Local Assessment Panel Review meetings are not held in public forum in accordance with the requirements of Part 5 of the Local Government Act 1972 and as such no information relating to the specific complaint reference can be found in the public domain.
26. In relation to the exemption at section 36(2)(b)(ii), the council has not specifically stated that disclosure would inhibit the free and frank exchange of views for the purposes of deliberation, rather it has stated that disclosure would prejudice the confidence of participants to take part in the proceedings. However, on the basis that the qualified person's opinion is only unreasonable if it is an opinion that no reasonable person in the qualified person's position could hold, the Commissioner considers that it is a reasonable opinion that if the names of participants in Standards Committee Local Assessment Review Panels were disclosed it would cause participants to be less candid in future. Whilst the Commissioner does not accept that participants will be put off exchanging views in full, it is not unreasonable to conclude that information would be less descriptive and couched in a more cautious manner. This would then have a harmful effect on the deliberation process of reaching a decision relating to the Councillors Code of Conduct. He therefore finds that the opinion of the qualified person is a reasonable one in this instance and therefore finds that section 36(2)(b)(ii) is engaged.
27. In relation to the exemption at section 36(2)(c), the Commissioner considers that it is feasible for the effective conduct of public affairs to be prejudiced by participants lacking confidence to take part in Standards Committee Local Assessment Panel Reviews if the names of participants in specific panels were to be disclosed. The Commissioner has also taken into consideration the fact that, by virtue of the council's constitution, the Chairman of the Standards Committee will be a lay member. He considers that it is not unreasonable to conclude that lay members would not participate, and therefore the Standards Committee would not have a chairman, if names of participants in specific panels were to be disclosed. He therefore finds that section 36(2)(c) is correctly engaged.

Public interest test under section 36

28. Section 36(2) is a qualified exemption and therefore the Commissioner must consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure of the information. The

Tribunal in *Guardian Newspapers & Brooke v Information Commissioner & BBC*⁴ indicated the distinction between the consideration of the public interest under section 36 and consideration of the public interest under the other qualified exemptions contained within the FOIA:

“The application of the public interest test to the s36(2) exemption involves a particular conundrum. Since under s36(2) the existence of the exemption depends upon the reasonable opinion of the qualified person it is not for the Commissioner or the Tribunal to form an independent view on the likelihood of inhibition under s36(2)(b), or indeed of prejudice under s36(2)(a) or (c). But when it comes to weighing the balance of public interest under s2(2)(b), it is impossible to make the required judgment without forming a view on the likelihood of inhibition or prejudice.” (Paragraph 88)

29. As noted above, the Tribunal indicated that the 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’ (paragraph 91). Therefore, the Commissioner’s view is that whilst due weight should be given to reasonable opinion of the qualified person when assessing the public interest, the Commissioner can and should consider the severity, extent and frequency of prejudice or inhibition to the subject of the effective conduct of public affairs.

Public interest arguments in favour of disclosing the requested information

30. The council did not submit any arguments in favour of disclosing the requested information.
31. The complainant has argued that disclosure of the requested information would prove that the members of the Standards Committee Local Assessment Review Panel had authority to make the decision and were independent.
32. He also argued that Chairmen of previous Standards Committee Local Assessment Review Panels have been identified by their name being printed underneath the signature on two previous decision notices and that in June 2010 a letter informing him of the decision of a pre-

⁴ Appeal numbers EA/2006/0011 & EA/2006/0013

consideration Committee listed all the names of the Committee members. The Commissioner has seen one example of the Chairman being identified on a decision notice.

33. The complainant also submitted that the names of the Standards Committee members are available on the council's website.
34. The Commissioner considers that the 'default setting' of the FOIA is in favour of disclosure. This is based on the underlying assumption that disclosure of information held by public authorities is in itself of value because it promotes better government through transparency, accountability, public debate, better public understanding of decisions and informed and meaningful participation of the public in the democratic process.

Public interest arguments in favour of maintaining the exemption

35. The council have stated that the publication of the names of the panel in this case is not in the public interest as disclosure would prejudice the future confidence of participants in Standards Committee Local Assessment Review Panels to take part in proceedings of those meetings if they believed that information was open to disclosure to third parties.

Balance of the public interest arguments

36. Where, as with this case, a qualified exemption is engaged the information must still be disclosed unless, in all circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing it.
37. The council have not stated why it considers that on balance the public interest in maintaining the exemption outweighs that in disclosing the withheld information in this case or provided details of any particular weighting exercise that may have been carried out.
38. Having seen the withheld information, the Commissioner will consider where the balance of the public interest lies.
39. In relation to the exemption at section 36(2)(b)(ii), the Commissioner has considered the argument that the public interest in maintaining the exemption lies in securing the continued cooperation of participants in the Standards Committee Local Assessment Review Panels. He acknowledges that disclosure of information attributed to individuals may dissuade participants from being free and frank in the future which would be detrimental on the ability of the Standards Committee Local Assessment Review Panel to make a decision relating to the Councillors Code of Conduct. However, the Commissioner considers that Standards Committee members have a duty to be open and honest in Local

Assessment Review Panels, and that this extends to lay members as well as council officers and councillors.

40. However, when considering the public interest, the Commissioner should give such 'chilling effect' arguments appropriate weight according to the circumstances of the case and the information in question. As stated in the case *Department for Education and Skills v the Information Commissioner*⁵ and endorsed as a statement of principle in the *Export Credits Guarantee Department High Court case*⁶ ;

"The central question in every case is the content of the particular information in question. Every decision is specific to the particular facts and circumstances under consideration. Whether there may be significant indirect and wider consequences from the particular disclosure must be considered case by case."

41. Having viewed the withheld information, the Commissioner couldn't identify any content that is so candid it would hinder the free and frank exchange of views for the purposes of deliberation so severely or so frequently or extensively that would outweigh the public interest in disclosure.
42. The Commissioner also considers that far from producing a 'chilling effect' leading to poorer quality advice and decision making, knowing that advice might be subject to future disclosure under FOIA could actually lead to better quality advice being provided. In this case, being aware that the membership of a particular Standards Committee Local Assessment Review Panel could be disclosed in response to a Freedom of Information request would ensure that decisions are robust which in turn would contribute to ensuring that the Councillors Code of Conduct is adhered to.
43. In relation to the exemption at section 36(2)(c), given that the Standards Committee is constituted by councillors, council members and lay members who have put themselves forward for the position, the Commissioner does not accept that the prejudice to the future confidence of participants to take part in proceedings would be severe, extensive or frequent enough to outweigh the public interest in being transparent about which members of the Standards Committee have made a decision in relation to the Councillors Code of Conduct. The

⁵ Appeal number EA/2006/0006

⁶ 2008 EWHC 638

Commissioner has taken into consideration that, as stated above in relation to section 36(2)(b)(ii), there is no content in the decision notice in question that is so candid it would deter Standard Committee members from participating.

Conclusion on the public interest test

44. The Commissioner has considered the public interest arguments taking into account the severity, frequency and extent of the claimed prejudice. He has given due weight to the opinion of the qualified person but has concluded that in the circumstances of this case the public interest in maintaining the exemption does not outweigh the public interest in disclosure of the requested information in relation to both the exemption at section 36(2)(b)(ii) and the exemption at section 36(2)(c).

Other matters

Internal review

45. Paragraph 39 of the Code of Practice issued under section 45 of the Act (the 'Code') recommends that complaints procedures should:

"...provide a fair and thorough review of handling issues and of decisions taken pursuant to the Act, including decisions taken about where the public interest lies in respect of exempt information. It should enable a fresh decision to be taken on a reconsideration of all the factors relevant to the issue."

46. Paragraph 40 of the Code states that in carrying out reviews:

"The public authority should in any event undertake a full re-evaluation of the case, taking into account the matters raised by the investigation of the complaint."

47. As he has made clear in his published guidance on internal reviews, the Commissioner considers that internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner's view of a reasonable time for completing an internal review is 20 working days from the date of the request for review. In this case the Commissioner notes that complainant first expressed his dissatisfaction with the response to his request on 2 November 2010 but the council did not provide an internal review response until 26 May 2011. The council should ensure that internal reviews are carried out promptly in future.

Right of appeal

48. 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

49. 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.
50. 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

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