

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 November 2012

Public Authority: Buckinghamshire County Council
Address: County Hall
Walton Street
Aylesbury
Buckinghamshire HP20 1UA

Decision (including any steps ordered)

1. The complainant has requested information connected with the licensed budget deficit at The Cottesloe School created in the first quarter of 2012. Buckinghamshire County Council ("BCC") refused to provide this citing exemptions at section 36 (Prejudice to the effective conduct of public affairs).
2. The Commissioner's decision is that BCC is entitled to rely on all three of the exemptions within section 36 that it cited (section 36(2)(b)(i) and (ii) and section 36(2)(c). However, in failing to respond to the request in a timely manner, it contravened the requirements of section 1(1) and section 10(1). No steps are required.

Request and response

3. On 22 March 2012, the complainant wrote to BCC and requested information in the following terms:

"I request that you provide any information recorded, in line with my original request, since 29th February. Treat this as a new request for information."

This referred to the terms of an earlier request of 29 February 2012 which was for information of the following description:

"Please can you supply me with the minutes, notes and any associated papers (such as budget projections or actuals) or discussions (such as Emails) created both within BCC and between

BCC and The Cottesloe School concerning the licensed deficit since 1st January 2012?"

4. On 27 March 2012 following an exchange of correspondence, he clarified that the information caught by the scope of his request should include the following:

"Bucks CC Policy mentions a monthly meeting to track the management of the deficit, a meeting occurring around the 23rd of every Month if memory serves me correctly. That means there should have now been three meetings (January, February, March 2012) that should have taken place. I would expect each meeting to be supported by an update to the financial plan and minutes (or meeting notes) documenting any issues raised or decisions taken. Should there be any issues raised that need escalating then I would expect the representative from Bucks CC at the meeting to either write another report or send some Email escalating any deviation from the agreed plan. Similarly, if the updated plan was not provided (as you told me it was not in February) then I would expect your FCST or SFMA team to escalate this issue, presumably by Email, to your S151 officer."

5. BCC provide a formal response to the request on 8 May 2012. It refused to provide the requested information citing the following FOIA exemptions as its basis for doing so:

Section 36(2)(b)(i) (Likely inhibition of free and frank provision of advice);

Section 36(2)(b)(ii) (Likely inhibition of free and frank provision of exchange of views);

and

Section 36(2)(c) (Likely prejudice to effective conduct of public affairs).

6. There was an exchange between the parties during which, on 8 May 2012, the complainant requested an internal review. BCC undertook to conduct an internal review. However, this was subject to a protracted delay.
7. The complainant asked the Commissioner to intervene on 7 June 2012 and, on 18 July 2012, the Commissioner wrote to BCC and explained that he was taking the complaint forward given the passage of time and the continued absence of an internal review. The Commissioner had first let BCC know of his intention to do so on 5 July 2012 and BCC had queried this by return.

Scope of the case

8. As noted above, the complainant contacted the Commissioner on 7 June 2012 to complain about the way his request for information had been handled in respect of delays and the use of exemptions.
9. The Commissioner has therefore considered the following two points:
 - whether BCC responded to the request within the timescales set in the FOIA; and
 - whether BCC was entitled to rely on the exemptions from disclosure that it cited as a basis for refusal.

Reasons for decision

Section 36 – Effective conduct of public affairs

10. BCC applied section 36(2)(b)(i) and (ii) and (2)(c) to some of the withheld information.
11. Section 36(2)(b)(i) and (ii) are engaged where, in the reasonable opinion of a qualified person, disclosure would, or would be likely to, inhibit the free and frank provision of advice or exchange of views for the purposes of deliberation.
12. Section 36(2)(c) is engaged where disclosure would otherwise prejudice, or be likely to prejudice, the effective conduct of public affairs.
13. In order to determine whether the provisions of section 36 has been correctly applied the Commissioner has:
 - (i) ascertained who the qualified person is for the public authority;
 - (ii) established that an opinion was given;
 - (iii) ascertained when the opinion was given; and
 - (iv) considered whether the opinion given was reasonable.
14. In support of the application of section 36, BCC has provided the Commissioner with a copy of its submissions to the qualified person, which identifies the information to which it is suggested that section 36 should be applied, and information which shows that the qualified person provided their opinion on 20 April 2012.

15. The Commissioner is satisfied that BCC has sought the opinion of the appropriate person, in this case, its Monitoring Officer and that this opinion was given on 20 April 2012.
16. The Commissioner's understanding of 'reasonable' is based on the plain meaning of the word. The definition in the Shorter Oxford English Dictionary is as follows: "*in accordance with reason; not irrational or absurd*".
17. When considering whether an opinion is reasonable the Commissioner looks at whether the opinion is one that a reasonable person could hold. It does not have to be the *only* reasonable opinion that could be held, or the 'most' reasonable opinion. Furthermore, the Commissioner is not obliged to agree with the opinion.
18. According to BCC's website:

*"The local authority operates a Policy for Supporting Good Financial Management in Schools. This provides a mechanism for providing support and challenge to those schools that find themselves in a deficit situation or which hold an excessive surplus balance. [Schools must demonstrate] within the rules of the Policy that they have clear plans for any potentially excessive surpluses and no balances have been clawed back. Any deficits are 'licensed' once a satisfactory recovery plan has been agreed."*¹
19. BCC set out the following points for the complainant regarding the application of the three section 36 exemptions that it had cited:
 - If any school believed that information provided by them as part of the on-going process may be subject to public scrutiny before a strategy for addressing the issues is agreed, then it would be likely that the information they provide might not be as complete or accurate as it would have been if disclosed in confidence.
 - Free and frank disclosure [by the school of relevant information] would be inhibited arising out of concern that the information disclosed may be taken out of the context of an overall plan and made public.
 - The adverse effect that disclosure of the requested information would have on the operation and management of Cottesloe School. It is believed that, if the information were to be disclosed, the school would be very likely to receive a high number of enquiries

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[http://www.buckscc.gov.uk/moderngov/Published/C00000461/M00004830/AI00020389/\\$SchoolsForumreport260612.docA.ps.pdf](http://www.buckscc.gov.uk/moderngov/Published/C00000461/M00004830/AI00020389/$SchoolsForumreport260612.docA.ps.pdf)

from parents, and possibly also the press, which would cause considerable disruption for the school trying to deliver its day to day education provision.

20. In BCC's submissions to the monitoring officer, it expanded on these points with specific reference to the withheld information. It also provided detailed arguments to the Commissioner which contained specific reference to the withheld information. The Commissioner is unable to reproduce these on the face of this Notice because this would, inevitably, lead to the disclosure of the withheld information itself.
21. Having considered the information itself and the correspondence to and from BCC's monitoring officer about the application of exemptions, the Commissioner agrees that all three exemptions within section 36 that have been cited are engaged. He is satisfied that the monitoring officer's opinion is a reasonable one: it is an opinion that a reasonable person could hold. In consequence, he is satisfied that disclosure of certain of the withheld information would be likely to inhibit the free and frank provision of advice and the free and frank exchange of views for the purposes of deliberation. He is also satisfied that disclosure of other parts of the withheld information, would otherwise be likely to prejudice the effective conduct of public affairs.

Section 36 – Balance of public interest

22. All the exemptions within section 36 are qualified by a balance of public interests test. The exemptions within section 36 can only be maintained where the public interest in maintaining them outweighs the public interest in disclosure.
23. Taking into account the comments of the Information Tribunal in *Guardian Newspapers & Brooke v Information Commissioner & BBC* (EA/2006/0011 & EA/2006/0013), the Commissioner agrees that *"when it comes to weighing the balance of public interest under [section] 2(2)(b) [of the FOIA], it is impossible to make the required judgement without forming a view on the likelihood of inhibition or prejudice'(paragraph 88).²*
24. In the Commissioner's opinion, whilst due weight should be given to the reasonable opinion of the qualified person when assessing the public interest, he can and should consider the severity, extent and frequency of inhibition claimed.

² <http://www.informationtribunal.gov.uk/DBFiles/Decision/i81/Guardian%20Brooke.pdf>

Favouring disclosure - the complainant's arguments

25. The complainant set out the following arguments in favour of disclosure

- The request coincided with an important time of year when parents/carers have to make key decisions regarding school selection for Key Stage 3, 4 and 5 education that will have a long term impact on children. He queried whether, in not disclosing information to the public at large, BCC was acting in the best interests of prospective and current students.
- There is a public interest in allowing parents/carers to make a fully informed decision concerning their selection of schools. Failure to disclose may have a material impact upon their education for future key stages.
- There is a public interest in knowing that BCC has created a realistic and achievable plan and that it robustly challenges school proposals.
- There is an unsatisfactory complaints process currently in place. Without the information, there is no avenue for seeking resolution of these concerns.
- The public interest favoured earlier intervention from Ofsted (before performance problems arise). Earlier intervention would be more likely to take place following disclosure.
- Potential school governors are entitled to a full picture of the school's financial position. If the potential school governor's profession relates to accountancy or financial services, negative financial developments at the school could have an adverse impact on them as individuals in their profession.
- Local businesses need to be aware of dealing with the school. Budget information will be critical in account planning and delivering services to the school.
- The school receives substantial charitable donations. Donors should be aware of overall school financial health.
- Local taxpayers need to know how their money is being spent.
- All the School Governors should be presented with the formal position of these meetings that occur with BCC. If they are not then they should be able to use the FOIA to access this information.

- Other schools need to know that their financial position is one of public record and not something that they nor the local authority will prevent disclosure of.

Favouring disclosure - the public authority's arguments

26. The public authority identified the following arguments in favour of disclosure:

- ICO guidance is that when a request for information is received, responding as fully as possible to the request is the favoured approach.
- More transparency in the financial handling of schools may lead to more confidence in the system.
- Better informing the general public as to the working of committees within the school and with the County Council is in the public interest.
- Explaining the decision making process to members of the public, to increase awareness.
- In quite a turbulent period for those schools in the secondary sector, there is a public interest in learning more about such schools and their finances.
- Disclosure would potentially encourage more involvement by the public in school affairs if they have the facts.

Maintaining the exemption – the public authority's arguments

27. In support of its position on section 36(2)(b)(i), BCC was concerned that its officers would be less likely to express themselves openly and honestly following disclosure. It argued that this was contrary to the public interest. BCC commented to the Commissioner that it recognised that its arguments around section 36(2)(b)(i) were “part of the family of ‘chilling effect’ arguments. It said that although it would not discount these arguments, it would concentrate more on the other two limbs of section 36(2) that it also sought to rely on.
28. BCC’s arguments as to section 36(2)(b)(ii) focus on its concerns that the school in this case (and schools in similar situations) would be less likely to be forthcoming in dialogue with it. It argued that there was a strong public interest in avoiding this. It expanded on this point with specific reference to the withheld information. The

Commissioner is unable to set out the detail out on the face of this notice without disclosing the withheld information.

29. BCC's arguments as to section 36(2)(c) centre on the public interest in avoiding a likely diversion of resources following disclosure. Again it expanded on this point with specific reference to the withheld information.
30. It also drew the Commissioner's attention to one of his previous decisions where he had not upheld a complaint about access to information that was far less detailed than the information described in this case (FS5032293) but of a similar nature.³

The Commissioner's view

31. As regards section 36(2)(b)(i), the Commissioner notes that the matter under review remains a live subject. Although he is somewhat sceptical, in general terms, as to likelihood that public officials would not provide comprehensive advice following disclosure of information requested under FOIA, he recognises that this argument can carry weight while the subject matter in question remains live, as is the case here.
32. He also recognises that there is a public interest in allowing the wider community to participate in a debate over an important live issue by giving greater access to comprehensive information on a given subject.
33. As regards maintaining the exemption at section 36(2)(b)(ii), the Commissioner thinks that the "live issue" factor is more compelling. He agrees that there is strong public interest in greater transparency about licenced budget deficit management. The complainant has advanced a number of strong arguments which focus on the rights of parents and the wider community to be well informed in a timely manner about developments at the school. However, he thinks there is a more compelling public interest in the school and BCC being able to communicate with each other on a live issue without the inhibition that would inevitably arise should that communication be played out in public. It is in the public interest that deficit management is conducted with open dialogue between the parties where the detail remains confidential, particularly where the matter is still live.
34. BCC argued that disclosure would distract all parties from its core business of education service delivery because it would be required to manage their dialogue on the deficit in public. The Commissioner notes that any number of unpredictable factors might distract a local

³ http://www.ico.gov.uk/~media/documents/decisionnotices/2011/fs_50302293.ashx

council or a school from its core business but he accepts that such a distraction would be likely to arise in this case following disclosure. He also agrees that the public interest would be best served by avoiding it although by a narrow margin.

35. He notes the complainant's particular concern about being unable to pursue a complaint effectively without access to the withheld information. He recognises that the complainant appears to have encountered a number of obstacles to taking forward his concerns. While the Commissioner accepts that this must give rise to considerable frustration for the complainant, he does not agree that, in the circumstances of this case, this amounts to an overwhelming argument in favour of disclosure.
36. The Commissioner also notes the complainant's other compelling arguments as to why the public interest favours disclosure. He agrees that a considerable amount of transparency is required to maintain public confidence in a process which affects a large number of people (including school students). However, he takes the view that a line should be drawn to protect a safe space around detailed discussions of the matter so that all parties can take part without inhibition.

Section 36(2)(b)(i) and (ii) and Section 36(2)(c) - Conclusion

37. The Commissioner has considered the severity, extent and likely frequency of inhibition to the provision of advice and the free and frank exchange of views for the purposes of deliberation which disclosure of the withheld information would be likely to pose. He is satisfied that BCC is entitled to protect a safe space for discussion about the licensed budget deficit, particularly while that process is ongoing. He therefore finds BCC's arguments for maintaining section 36(2)(b)(ii) to be the most compelling.
38. The Commissioner is less convinced as to inhibition to the free and frank provision of advice. However, given that the issue remains live, he agrees that there is a real risk that disclosure of the withheld information would affect the openness and candour within BCC in relation to future exchanges of view on this subject. He thinks that the consequences of inhibition are likely to be severe in that the management of the deficit is likely to be impeded. In his view, the public interest in avoiding this is also compelling.
39. The Commissioner also considers that the public interest in maintaining the exemption under section 36(2)(c) outweighs the public interest in disclosure in the circumstances of this case. He entirely accepts that parents and carers of current and future students of the school are entitled to have as clear a picture as

possible as financial developments at the school. However, there is a more compelling public interest in avoiding distraction from the delivery of educational services. The Commissioner accepts that this distraction is likely to arise where the school needs to manage managing its discussions with BCC in public.

40. In reaching this view as to the balance of public interest in relation to all three exemptions, the Commissioner has given particular weight to the fact that the licensed budget deficit is a live issue.

Procedural matters – Delayed response

41. BCC disputes which date constitutes the date of receipt of the request. There was an exchange of correspondence between the parties which, in its view, means that the date of receipt was 27 March 2012 and not 22 March 2012. However, it has conceded that, regardless of whether the request was dated 22 March or 27 March, it exceeded the time for compliance by failing to respond within 20 working days.

42. Section 10(1) provides that –

"Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."

43. In failing to respond to the request within 20 working days, BCC contravened the requirements of section 1(1)(a) (Right of access) and section 10(1) (Time for compliance).

Other matters

Delay at internal review

44. Although it is not a specific requirement of the FOIA, the Commissioner recommends that internal reviews are conducted within 20 working days (40 working days in exceptional circumstances). Although BCC has explained some difficulties it has had due to staff availability at the relevant time, the Commissioner does not agree that these constitute exceptional circumstances. BCC has also argued that it was involved with ongoing correspondence with the complainant. However, it failed to make any arguments as to why, under the FOIA, this point was relevant.

Right of appeal

45. 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

46. 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.
47. 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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