

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 19 March 2013

Public Authority: Medway Council

Address: Gun Wharf
Dock Road
Chatham
Kent
ME4 4TR

Decision (including any steps ordered)

1. The complainant has requested information including emails and a briefing note relating to the way Medway Council (the council) had handled the Medway Test which took place in September 2011. The council withheld the information relying on section 36(2)(b), section 40(2) and section 41 as it considered some information would inhibit the future provision of advice and exchange of views, some was third party personal data and it had been provided in confidence. During the course of the investigation, the council provided some additional information to the complainant but continued to withhold the remainder.
2. The Commissioner's decision is that the council was correct to rely on section 36(2)(b) in respect of the majority of the withheld information, but with regard to the briefing note, the council incorrectly relied on section 36(2)(b), section 41 and section 40(2). Finally, the Commissioner has found that the council has breached section 10 of the FOIA as it did not comply with the request within the statutory time for compliance.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the briefing note.
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

pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 22 October 2011 the complainant made the following request for information to the council:
 1. *"A copy of all documentation issued to the Medway Review Panels, including 2011 procedure, together with any contextual advice or information on the problems with testing at several centres.*
 2. *A copy of all emails and documents relating to problems in the Medway tests from Saturday 24th to date, including the briefing note sent to Mr Christi [sic], MP on 27th September, and any email or other document sent to Medway Councillor Vaughan Hewett relating to the tests.*
 3. *A copy of all information provided for Councillor Wicks relating to his investigation into problems at Test Centres and any emails or documents he has sent arising from this."*
6. The complainant sent a number of chaser emails to the council including what he termed as a fresh request on 11 December 2011 which repeated only points 1 and 3 from the previous request outlined above.
7. The council then responded on 21 December 2011 and provided answers to all three points contained in the first request. It stated that it held information in response to points 2 and 3 but relied on section 36(2)(b), section 40(2) and section 41 to withhold it.
8. The complainant requested an internal review on 15 January 2012. The council provided the outcome of this on 2 March 2012 and maintained its position with regard to the majority of the requested information, but did provide some additional information relating to question 1.

Scope of the case

9. The complainant contacted the Commissioner on 7 April 2012 to complain about the way his request for information had been handled. Following the informal resolution of some parts of his request, the complainant confirmed that he considered the outstanding information to be the briefing note to councillors and any associated emails or other documents relating to the Medway Test which may be held. The

Commissioner therefore considers the scope of this case to be whether the council was correct to withhold this outstanding information.

Background

10. The Medway Test is the test taken every year by year 6 primary school children in the Medway area to determine whether they can apply to a grammar school in Medway for their secondary school education.
11. In 2011, the Medway Test was held on Saturday 24 September 2011 at 10 secondary schools which had been designated as test centres. All but one of these centres had been used in previous years. There was a short delay at one of the centres due to human error, however, there were more significant problems at the test centre which had not been used before. It is in this context that the complainant made his request for information.
12. The briefing note which the council is withholding was initially drafted for councillors and local MPs on 25 September 2011, the day after the Medway Test, to inform them of the situation and provide the council's initial point of view on some issues. It was provided with a cover note explaining that the advice contained in the briefing note was being provided to any parent who contacted the council, and so councillors and MPs were being given the same information in the event that they were contacted directly by local residents.
13. The council did not provide a specific briefing note to Mr Rehman Chishti MP on 27 September 2011 as the complainant suggested in part 2 of his request. However, Mr Chishti MP did issue a statement on the Medway Test on 28 September 2011. The Commissioner considers that it is important to highlight that the briefing note which is being withheld in this case is not a briefing note that was specifically issued for Mr Chishti MP on 27 September 2011, but that it is a more generic briefing note issued to local councillors and MPs on 25 September 2011. To avoid confusion, any reference to the briefing note in this decision notice refers to the briefing note of 25 September 2011 to local councillors and MPs.

Reasons for decision

Section 36

14. Section 36 concerns the prejudice to the effective conduct of public affairs. 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."

15. 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.
16. 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 Monitoring Officer.
17. The council explained that current Monitoring Officer, Mr Perry Holmes, took up his post on 1 March 2012. Prior to this another individual, Ms Deborah Upton, held the position of Monitoring Officer. Ms Upton gave the initial opinion upon which the refusal of 22 December 2011 was based. At internal review stage, Mr Holmes reconsidered the council's position. Having viewed all the information and the submissions put forward in support of and against disclosure of the information, he recorded his opinion on a proforma.
18. The council provided the proforma completed by Mr Holmes which described the factors and arguments which he had considered when reaching his decision that section 36 applied. The opinion was given on the date of the internal review on 2 March 2012. The Commissioner is satisfied that the opinion was given by the appropriately qualified person.
19. The qualified person's reasonable opinion initially applied to all the information the complainant had requested at points 2 and 3. However, following the informal resolution of some parts of the request, following the information being withheld under section 36:
 - The briefing note of 25 September 2011 to local councillors and MPs ("the briefing note"), and
 - The emails from 24 September 2011 to 22 October 2011 held by the council which relate to the Medway Test ("the emails").

Was the qualified person's opinion reasonable

20. The Commissioner bases his understanding of the word "reasonable" on its plain meaning. The definition in the Shorter English Dictionary is "in accordance with reason; not irrational or absurd". For clarity, while an opinion that is absurd is not reasonable, that is not the same as saying that any opinion that is not absurd is reasonable. The opinion only has to be a reasonable one and this part of the exemption is therefore not a high hurdle. An opinion that a reasonable person could hold is a reasonable opinion. It does not have to be the only reasonable opinion that could be held, or the most reasonable opinion. For clarity, the Commissioner does not have to agree with the opinion he only has to recognise that a reasonable person could be of that opinion.
21. In the initial refusal notice of 21 December 2011, the council stated that it was the qualified person's reasonable opinion that releasing the information would inhibit the provision of advice and exchange of views. It explained that when the council provides advice and assistance to parents, and councillors acting on behalf of parents, it requires its staff to discuss any appropriate steps to be taken, freely and without inhibition. It stated that such communications between officers and with councillors assesses the issues and provides emerging thoughts about how best to respond and remedy matters.
22. Further to this the council explained that it considered that releasing the information would have a detrimental effect on the council's decision making ability in the future. The reason given for this is that if members of staff were aware that the information they provide in communications about the 11 plus exams would be released, this would restrict or inhibit future advice and therefore significantly reduce the service offered by the council. The council explained that it must consider all options and opinions, including extreme ones, in order to make effective decisions. It stated that "*Disclosure of this information would result in less candid and robust discussions, hard choices being avoided and ultimately the quality of the local authority's services being undermined.*" As the council did not specify in its initial opinion given in the refusal notice, the Commissioner considers that these comments apply equally to the emails exchanged between officers when discussing the Medway Test and to the briefing note to councillors.
23. At the time of giving his opinion for the internal review, Mr Holmes had seen all of the withheld information and considers that he offered a fresh perspective on the response for the internal review. He stated that it was his opinion that section 36(2)(b)(i) and (ii) applied to the information and he recorded the following arguments on the proforma:

"Release of councillors' briefing note would lead to officers being reticent to include sensitive information in briefing councillors. The briefing note was an early attempt to explain to members what had happened and was not the final investigation report, it therefore contains some thoughts later proved not to be accurate, but were at the time made in good faith. Release of such documents (when a final investigation report has been made public) would inhibit officers from offering views at an early stage and detrimentally affect communications between officers and members".

24. Mr Holmes stated that he considered that disclosure of the requested information would be likely to inhibit the free and frank exchange of views and provision of advice because of *"future reticence [of officers] to provide early sensitive advice"*.
25. During the Commissioner's investigation, Mr Holmes also explained that the council considered that communication between officers and members would be detrimentally affected if officers believed that information provided in early attempts to explain incidents would be released. He stated that the information was not the final investigation report which was released at a later date, and as such, it is possible that information provided might not have been entirely accurate or complete. The council believes that it is highly likely that free and frank discussion would be inhibited as a result of concerns officers would have that the information they provide at early stages may be taken out of context.
26. The Commissioner considered the withheld information and the arguments presented by the qualified person in this case. He was satisfied that the qualified person's opinion was a reasonable one in view of the nature of the information and the context in which the initial advice was provided. He is also satisfied that the combination of opinions given both on 21 December 2011 in the initial response and on 2 March 2012 in the internal review apply to all the information within the scope of the complainant's request. He was satisfied that because of these matters, it was reasonable for the qualified person to conclude that disclosure of the information may have hindered the council's ability to effectively handle any future problems which the council may experience in future Medway Tests because officials would be likely to be inhibited in the free and frank exchange of views and provision of advice. The Commissioner therefore accepts that sections 36(2)(b)(i) and (ii) were engaged in this case.

Public interest

27. Having concluded that sections 36(2)(b)(i) and (ii) were engaged, the Commissioner went on to consider the public interest test. Section 36 is a qualified exemption and therefore the Commissioner must consider

whether in all the circumstances of the case the public interest in maintaining the exemption outweighed the public interest in disclosing the information.

28. In *Guardian and Heather Brooke v the Information Commissioner and the BBC* (EA/2006/001 and EA/2006/0013), the Information Tribunal provided some general principles about the application of the public interest test in section 36 cases as follows:

- The lower the likelihood is shown to be that the free and frank exchange of views or provision of advice would be inhibited, the lower the chance that the balance of the public interest will favour the exemption.
- While the Commissioner cannot consider whether prejudice is likely (that is for the qualified person to decide), he is able to consider the severity, frequency or extent of any likely prejudice.
- Since the public interest in maintaining the exemption must be assessed in the circumstances of the case, the public authority is not permitted to maintain a blanket refusal in relation to the type of information sought.
- The passage of time since the creation of the information may have an important bearing on the balancing exercise. As a general rule, the public interest in maintaining the exemption will diminish over time.
- In considering factors against disclosure, the focus should be on the particular interest that the exemption is designed to protect, in this case the effective conduct of public affairs through the free and frank exchange of views and provision of advice.
- While the public interest considerations in the exemption from disclosure are narrowly conceived, the public interest considerations in favour of disclosure are broad ranging and operate at different levels of abstraction from the subject matter of the exemption. Disclosure of information serves the general public interest in promotion of 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 disclosing the requested information

29. In favour of disclosing the information in this case, the council recognises the public interest in openness and transparency regarding its handling of the Medway Test. The record of the qualified person's

opinion states that there is "*significant public interest in the failures at the test centres and the subsequent investigation*".

30. It is accepted that there were failings in the administration of the Medway Test at some of the test centres and there is therefore a public interest in the accountability of the council for the steps it took immediately after it was aware of the issues.
31. The Commissioner has found that at the time of the request there was coverage of the problems with the Medway Test in local press. It is clear from the volume and content of complaints the council received from parents about the incident that the public interest was strong at the time of the request in disclosing information which would show the way the council handled the problem internally.

Public interest arguments in favour of maintaining the exemption

32. The council argued that the public interest in maintaining the exemption outweighed the public interest in disclosing it in the circumstances of this case. As discussed, the Commissioner accepts that the qualified person's opinion was reasonable that disclosure of the information at the time of the request would have been likely to hinder the council's ability to effectively handle any future problems which the council may experience because officials would be likely to be inhibited in the free and frank exchange of views and provision of advice.
33. The Commissioner therefore recognises that there is a public interest in maintaining the exemption in order to ensure that officers are not inhibited from offering their full and frank advice and entering into candid exchanges of views at an early stage.

Balance of the public interest arguments

34. It is worth highlighting for clarity that although the Commissioner must give weight to the qualified person's opinion once he has accepted its reasonableness, he is open to consider the severity, frequency and extensiveness of any prejudice that would be likely to occur.
35. The Commissioner finds that the council's arguments can broadly be categorised as chilling effect arguments. These are directly concerned with the argued loss of frankness and candour in debate or advice which, it is said, would lead to poorer quality advice and less well formulated policy and decisions.
36. Timing is an important aspect of the chilling effect arguments. Both the Information Tribunal and the Commissioner consider that the chilling effect is strongest when it relates to an effect on the candour and frankness of advice and discussion on a live issue. The more general and

wide ranging the chilling effect argued, the less weight can be attributed to the argument. In any case, civil servants and other public officials charged with giving advice are expected to be impartial and robust in discharging their responsibilities and not be deterred from expressing their views by the possibility of future disclosure.

37. The Commissioner also considers that the public interest applies differently to the briefing note than it does to the emails. He notes that the briefing note was formulated as the council's official line at an early stage and it is the document on which many responses to the media and other interested parties were based. In contrast to this, the emails are of a much more informal nature and discuss possible lines and approaches to various issues such as media interaction. This means that the likely prejudice to the effective conduct of public affairs with regard to the provision of free and frank advice and the exchange of views is greater in respect of the emails as these were not presented as official council positions, but as the ruminations of officers on possible responses and positions. He will therefore consider the balance of the public interest separately with regard to the emails and the briefing note.

The briefing note

38. The request postdates both the briefing note, and Councillor Wicks' investigation summary note which was published in October 2011. A further investigation was carried out by the council's Director of Children and Adult Services who had also published a more detailed report on 6 December 2011 which examined the lessons learned and considered the options for the future. In this context, at the time of the request it would appear that the council was continuing to work on both understanding why the problems occurred and also to prevent the situation recurring, and was publishing information on an ongoing basis.
39. Whilst the 6 December 2011 report was published after the request, it was in existence at the time of the council's response of 21 December 2011. The Commissioner also notes that the qualified person's opinion given on 2 March 2012 at the internal review stage was three months after the 6 December 2011 report was published. The Commissioner is not persuaded that disclosure of the briefing note at the time of the request would be likely to inhibit officers from providing free and frank advice to councillors directly in relation to the September 2011 Medway Test. This is because it is clear that after disclosure of some information such as Councillor Wicks' report, officers were still providing advice to councillors and other officers for the further investigations.
40. The council argued that some of the requested information later proved to be inaccurate and that this will inhibit officers from giving advice at

such early stages where accuracy cannot be guaranteed. The FOIA only provides a right to information already held by the public authority and there is no requirement for this to be accurate, complete, up to date or easily comprehensible. In short, there is no exemption for misleading or inaccurate information. If information is inaccurate, the public authority can take steps to inform the public of this at the time of disclosure. Accordingly, the Commissioner considers such general arguments about inaccurate or misleading information to be irrelevant to the public interest test. Therefore, the council's arguments about the accuracy of the information in the briefing note and its concerns about it being taken out of context cannot add any weight to the public interest in maintaining the exemption.

41. The Commissioner notes that the briefing note was drafted for the purpose of providing councillors and MPs with the same information as was being given to any parent who contacted the council about the Medway Test. The Commissioner considers that this significantly diminishes the chilling effect argument as it demonstrates that the information contained in the briefing note was not solely for internal use and council officials would have been mindful of an external audience as the information was the same as that shared with parents.
42. He also finds that it contains very similar information to that within the moderator and invigilator reports which were disclosed during the Commissioner's investigation. In addition to this, the note is also very similar in content to Councillor Wicks' summary report which was publically available at the time of the request.
43. On the balance of the public interest regarding the briefing note, the Commissioner finds that there is a strong public interest in the accountability of council decision making in the way it handled what it has accepted to be "*significant failings*" in the Medway Test. He agrees that there is a public interest in limiting the chilling effect that council officers may experience in providing free and frank advice in the form of briefing councillors in similar situations, but in this specific case he considers that the chilling effect is diminished as the information was shared at the time with parents. He therefore finds that the public interest in disclosure outweighs the public interest in maintaining the exemption.

The emails

44. As noted in paragraph 26, the Commissioner has accepted the qualified person's opinion that officers are likely to be inhibited from providing such free and frank advice and exchanging views in such a candid manner as reasonable. Whilst it is his decision that with regard to the briefing note, the public interest favours disclosing the information, he

considers that due to the different nature of the email correspondence, the same public interest arguments do not necessarily apply.

45. In the first instance, the information in the email correspondence is not as similar in nature to the information that has been published by the council in the course of its investigation into the Medway Test problems. It is informal and represents the bare bones of the council's initial thoughts on issues as and when they arose. This is particularly true of the way the council corresponded with the media and the way its responses to media enquiries were discussed and shaped internally.
46. As the public interest in disclosure closely relates to the council's accountability for what have been acknowledged as significant failings, the Commissioner has considered the extent to which any of the emails and associated attachments could be considered to further that accountability. Given the amount of information already in the public domain at the time of the response to the request, the Commissioner is not persuaded that the internal emails will further the public interest in the council's accountability sufficiently to override what he has already acknowledged to be an inhibiting effect on officers in the free and frank exchange of views and provision of advice.
47. The Commissioner therefore finds that with regard to the internal emails and associated attachments, the public interest in withholding the information and preventing a chilling effect on the council's officers in resolving and addressing future Medway Test problems outweighs the public interest in disclosing the information. He therefore finds that section 36(2)(b)(i) and (ii) applies to the emails and that the council was correct to withhold this information.
48. As the Commissioner has found that section 36(2)(b) is not engaged with respect to the briefing note, he has gone on to consider the council's application of section 41.

Section 41

49. Section 41(1) of the FOIA states that:

"Information is exempt information if—

- a) it was obtained by the public authority from any other person (including another public authority), and*
- b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person."*

50. The council initially applied section 41 to all the withheld information. However, as the Commissioner has found that section 36(2)(b) was applied correctly to the emails falling within the scope of the request, his analysis of section 41 extends only to the briefing note.
51. The first test for information to pass in order for section 41 to apply is whether it has been obtained by the public authority by any other person.
52. It is clear in this case that the briefing note was not obtained by the council from another person as it was created by a council officer for the primary purpose of being provided to councillors and MPs. The Commissioner also finds that the information contained within the briefing note has not been obtained from a third party.
53. The Commissioner therefore finds that section 41 is not engaged.
54. As the Commissioner has found that the briefing note is not exempt under section 36(2)(b) and section 41, he has necessarily gone on to consider the application of section 40(2) to the personal data contained in the note.

Section 40(2)

55. This exemption provides that third party personal data is exempt if its disclosure would contravene any of the data protection principles set out in schedule 1 of the Data Protection Act 1998 ("the DPA").

Is the withheld information personal data?

56. Personal data is defined by the DPA as any information relating to a living and identifiable individual. The council has applied section 40(2) to the briefing note.
57. The Commissioner considered the briefing note and does not consider that the majority of the information relates to an identifiable individual. Whilst it discusses children's experiences of the Medway Test, it does not identify any specific individual and does so in a very broad and general manner. However, the Commissioner accepts that the author of the briefing note is identified, and that his name, work telephone number and email address and clearly relate to him.

Would disclosure breach the data protection principles?

58. The data protection principles are set out in schedule 1 of the DPA. The first principle, and the most relevant in this case, states that personal data should only be disclosed in fair and lawful circumstances. The Commissioner was satisfied that there is no evidence to suggest that the

disclosure would be unlawful and therefore his considerations below have focused on the issue of fairness. In considering fairness, the Commissioner finds it useful to balance the reasonable expectations of the individual and the potential consequences of the disclosure against the legitimate public interest in disclosing the information.

Reasonable expectations

59. In assessing what information third parties should expect to have disclosed about them, the Commissioner considers a distinction should be drawn as to whether the information relates to the third party's public or private life. Where the information relates to the individual's private life (i.e. their home, family, social life or finances) it will deserve more protection than information about them acting in an official or work capacity (i.e. their public life). The Commissioner considers that employees of public authorities should be open to scrutiny and accountability and should expect to have some personal data about them released because their jobs are funded by the public purse.
60. The Commissioner considers that the seniority of the individual acting in a public or official capacity should be taken into account when personal data about that person is being considered for disclosure under the FOIA. This is because the more senior a member of staff is, the more likely it is that they will be responsible for making influential policy decisions and/or decisions relating to the expenditure of public funds. In previous decision notices the Commissioner has stated that he considers that occupants of senior public posts are more likely to be exposed to greater levels of scrutiny and accountability and there should therefore be a greater expectation that some personal data may need to be disclosed in order to meet that need.
61. The individual who is identified in the briefing note is a manager. The Commissioner considers this to be senior position. In addition to this, the Commissioner notes that he is in public facing roles in that his name, work telephone number and email address is available on the council's website. The individual is also responsible for authoring reports to Cabinet and responding to parent's letters of complaint about the Medway Test. The Commissioner therefore considers that the individual will have a reasonable expectation that they will be accountable for the decisions they take, particularly in relation to the content of the briefing note.
62. The Commissioner has gone on to consider whether revealing the details of the officer's name and work contact details in the context of the briefing to councillors could expose them to unnecessary or unjustified damage or distress and therefore make disclosure unfair. The council has not provided any compelling argument to explain why revealing the

involvement of the particular individual in relation to the Medway Test information would cause unjustified distress or damage. In addition to this, as noted in paragraph 61, the officer had already responded to parents' complaints about the Medway Test, and so he is already known to be a key individual in dealing with the Medway Test incident. The Commissioner therefore does not consider that disclosure of his name and work contact details would be unfair.

The balance of the legitimate interests of the public against the individual's right to privacy

63. The Commissioner has considered whether disclosure of the information is necessary to meet the legitimate interests of the public. He considers that disclosure of the names and contact details of the individual would promote openness and transparency of the actions of the council following the Medway Test. Disclosure of the name of the officer is necessary to meet this need. Given the limited impact of disclosure on the individual, the Commissioner concludes that disclosure of his name and work contact details in association with the briefing note would be both fair and lawful. The Commissioner therefore finds that section 40(2) does not apply. He therefore concludes that the council is not entitled to withhold any part of the briefing note.

Section 10

64. Section 10(1) of the FOIA provides:

"...a public authority must comply with section 1(1) promptly and in any event no later than the twentieth working day following the date of receipt."

65. The request was submitted on 22 October 2011. The council did not respond until 21 December 2011, 43 working days after the request had been received. In addition to this, the council provided the complainant with further information falling within the scope of his request at the internal review dated 2 March 2012, over four months after the request, and during the course of the Commissioner's investigation.

66. The Commissioner has therefore recorded a breach of section 10(1) of the FOIA.

Right of appeal

67. 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

68. 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.
69. 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
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF