

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 January 2013

Public Authority: London Borough of Sutton Council
Address: Civic Offices
St Nicholas Way
Sutton
Surrey
SM1 1EA

Decision (including any steps ordered)

1. The complainant requested correspondence between council officers and an organisation representing it and other councils regarding its contract with a charity which provides career advice in the area. The council's decision was that the information was exempt under section 42 of the Act (legal professional privilege). During the Commissioner's investigation the council also applied section 36(2)(b)(ii) and 36(2)(c) to the information. The Commissioner's decision is that the council was correct to apply section 36(2)(b)(ii). He has therefore not considered the application of the other exemptions by the council further.
2. The Commissioner does not require the council to take any steps.

Request and response

3. On 21 December 2012, the complainant wrote to Sutton Council and requested information in the following terms:

"Copies of all correspondence, emails, notes, Memoranda and similar documents passing between (1)[name redacted] Strategic Director-Children, Young People and Learning Services, and [name redacted], Connexions Manager and (2) the South London Connexions Sub Regional Unit during the period from 1 April 2011 to 12 July 2011"

4. The council responded on 2 May 2012. It stated that the information was exempt from disclosure under section 42 of the Act (legal professional privilege).
5. The council did not carry out an internal review of its decision until the Commissioner wrote to it following the complainant's complaint to him. The council then responded to the Commissioner on 9 October 2012 stating that the information was exempt under section 42 and section 36(2)(b)(ii) and (c).

Scope of the case

6. The complainant contacted the Commissioner to complain about the way his request for information had been handled.
7. The Commissioner considers that the complainant's complaint relates to whether the council was correct to apply the exemptions it did.

Reasons for decision

Section 36

Section 36(2)(b)(ii)

8. The council applied section 36(2)(b)(ii) and 36(2)(c) to the information (prejudice to the effective conduct of public affairs). Section 36(2) of the Act states that information will be exempt if

"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-

(b) 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."

9. Section 36(2)(b)(ii) requires that the qualified person at the council to consider, in their reasonable opinion, that a disclosure of the information would, or would be likely to inhibit the free and frank exchange of views

for the purposes of deliberation. With this in mind the Commissioner wrote to the council asking the qualified person to complete a form indicating his opinion and explaining why he believes that the exemption applies. The Commissioner received the completed form from the qualified person on 23 November 2012.

10. The qualified person argues that section 36(2)(b)(ii) applies. He applied both the criteria 'would' and 'would be likely to inhibit'. The Commissioner has therefore considered whether a disclosure 'would be likely' to inhibit as the lower threshold applied for the exemption to be engaged.
11. The information relates to discussions which the council had with other councils and the South London Sub Regional Unit which acts as the administrator for a consortium of London councils who provide shared services across the area. It refers to a termination of contract with the Centre for British Teachers' Education Trust (the CfBT), a charity contracted to run the connexions career advice service in the area. The discussions form part of a background discussion surrounding the negotiations which the consortium was having with CfBT at the time. They form part of the deliberations which the consortium was having as to how to avoid or to manage the termination of the contract.
12. The council argues that the exemption applies as the information would disclose its deliberations with other councils in the consortium. It would show deliberations resulting from legal advice which they had received from a barrister regarding its options as regards its contract with the CfBT. It argues that the disclosure of this information would prevent it having discussions of a similar nature in the future in such a full and frank manner because the disclosure would be likely to disclose details which would be relevant to litigation which the council was likely to become involved in.
13. The qualified person argues that the exemption is applicable as he considers that a disclosure of the information would prejudice the councils (and the consortium's position) if litigation occurred. He considered that the prospect of litigation was high given the situation.
14. Workers at some Connexions offices had effectively been told that there was no longer a job for them. The dispute between the CfTB and the consortium had left employees in a position where it was unclear whether the rules of TUPE should be applied and whether their jobs and the terms and conditions under which they worked should have transferred to individual councils forming part of the consortium.
15. Much as with legal advice, a disclosure of the information would effectively provide potential litigants with knowledge of the councils'

discussions through the period. It would also provide litigants with discussions surrounding the legal advice which the councils had obtained from a barrister regarding their legal standing in the situation, including in part some of the substance of that advice. A disclosure of this information could therefore potentially undermine or weaken its legal position in any litigation which followed.

16. The information is a discussion about options being put to it from CFTB and the councils' legal liabilities resulting from each option which was put forward. It includes advice as to how each option would affect the councils' individually and deliberations as to the best way forward. There is a strong possibility that its disclosure would therefore have a bearing on any litigation which took place and potentially undermine the level playing field. Potentially the councils' deliberations could be used against them during that litigation. The Commissioner therefore recognises that in similar scenarios in the future councils would feel constrained from full and frank discussions when deliberating their potential options should this information be disclosed.
17. The Commissioner therefore accepts that the qualified person was correct to consider section 36(2)(b)(ii) as a relevant part of section 36. He is also satisfied that the qualified person's opinion was reasonable under the circumstances. His decision is therefore that the exemption is engaged.
18. The Commissioner must therefore carry out a public interest test to determine whether the information should be disclosed in spite of the exemption applying. The test is whether the public interest in the information being disclosed is outweighed by the public interest in the exemption being maintained.

The public interest in the information being disclosed

19. The central public interest in the information being disclosed revolves around providing greater transparency on the council's decision making, and on its financial decision making.
20. There are also questions which the CFTB and Unison, the union representing some of the workers, have over the legality of the councils' actions under the circumstances. Media reports reporting statements from the CFTB, and Unison statements argue that the councils were under a duty to transfer the employees from Connexions to the councils under TUPE (The Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006/246)). The councils say that that is not the case.

21. Employees were left in a position where they had no employment, there was no clarity as to their legal rights, and who any legal claims for unfair dismissal or redundancy payments should be made against.
22. There is a public interest in clarifying this situation, however the Commissioner notes that this would be one of the central considerations addressed by the court or tribunal in any litigation. Therefore the councils' deliberations and the legal advice it had received would be likely to be relevant to that litigation. A disclosure of those deliberations could therefore set out any weaknesses to its arguments that it discussed and provide litigants with details of the council's legal defence prior to the case or cases being heard before the court or employment tribunal.
23. There is also a public interest in the public being informed of how the decisions were reached by the council. Careers advice formerly provided by Connexions was no longer being offered as the offices had closed as a result of the contract termination. This may have potentially left some of the community unable to obtain careers advice. There is a legal requirement on local authorities to provide advice and guidance to 13–19 year olds. The Commissioner understands however that the way in which careers advice and guidance is provided is intended to change under the Education Bill.
24. There is therefore clearly a public interest in the council explaining the situation, both to employees and to the community as a whole in order that the public can assure itself that the council has acted appropriately and that its decisions were legally sound.

The public interest in the exemption being maintained

25. The central public interest in the exemption being maintained relates to creating a 'safe space' for senior council staff to deliberate, formulate their policies and make decisions. There is clearly a strong public interest in allowing public authorities to take legal advice and to discuss and deliberate their options to ensure that their decisions are legally robust and appropriate.
26. The situation which the council found itself in was legally unclear. Negotiations were on-going as to how the contract termination was to take place. Legal advice had been received and the key officers at the council needed to discuss the advice, the options being proposed by the CFTB and deliberate a way forward to achieve their aims.
27. There is a strong public interest in allowing senior public officials to consider and to discuss matters freely and frankly without fear that their discussions would subsequently be disclosed to their potential

adversaries in litigation. As legal advice had been received, the discussions take into account the advice. Some of the discussions would be protected by legal professional privilege because they provide the substance of the advice received from the barrister. Senior officers of the councils' legal teams were also copied into the discussions in order to have an overview of the discussions and the plans as they were formulated so that they could take part in any decisions required fully informed of the background circumstances. The council has also argued that the information would therefore be subject to legal professional privilege because of this.

28. Although the council's decisions had been taken at the time of the request (and so thinking space was no longer required), in this case there was still a very strong public interest in the maintenance of the exemption as a disclosure of the information would provide parties who were likely to enter into litigation with the council with details which would be relevant to the councils' defence. A disclosure of the information, discussing the legal advice they had received from the barrister would potentially provide potential litigants with an upper hand during any litigation that followed.
29. The Commissioner recognises that these discussions would also be likely to be relevant to any future discussions which the council may need to have when preparing their legal defence against any claims made against them. In that sense, although the decision as regards the contract termination may have been taken the discussions and deliberations surrounding this situation are likely to be ongoing.
30. The Commissioner considers that if deliberations over the council's legal liabilities were to be disclosed in this case there would be a strong possibility that information of this sort would not be recorded within correspondence in the future but would be carried out verbally. A chilling effect would be likely as matters of legal contention were being deliberated upon which could undermine the councils' legal position were it to be disclosed. This would not be a case of officers being reluctant to record their discussions because of a personal fear that they may be held to account for their actions or suggestions. It would be a real concern that making a record of the discussions could undermine its position in any future litigation.
31. The Commissioner is therefore satisfied that the public interest in maintaining the exemption outweighs the public interest in the information being disclosed in this instance.
32. The Commissioner considers that the council was therefore correct to apply section 36(2)(b)(ii).

Regulation 36(2)(c)

33. As the Commissioner has found that section 36(2)(b)(ii) applies he has not considered the application of section 36(2)(c) further

Section 42

34. As the Commissioner has found that section 36(2)(b)(ii) is applicable he has not considered the application of section 42 further.

Other matters

35. Although they do not form part of this notice the Commissioner would like to note the following matters of concern.
36. The code of practice issued under section 45 of the FOIA (the "code") recommends that complaints procedures provided by public authorities in relation to requests for information ('internal reviews') should encourage a "...prompt determination of the complaint." Paragraph 39 of the code, is published online at:
<http://www.justice.gov.uk/downloads/information-access-rights/foi/foi-section45-code-of-practice.pdf>.
37. The Commissioner's guidance interprets promptness as a standard target of 20 working days (40 working days in exceptional cases) for the completion of internal reviews. In this case, the Commissioner notes that the council's internal review took well in excess of the recommended timescales. In its future handling of internal reviews the Commissioner expects that the council will have regard for the recommendations of the code and his own guidance and will ensure that responses are issued promptly.
38. Guidance on the Commissioner's expectations as regards the time to carry out reviews is available at:
http://www.ico.gov.uk/upload/documents/library/freedom_of_information/practical_application/internal%20reviewsv1.pdf

Right of appeal

39. 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

40. 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.
41. 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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