

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 3 July 2013

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

#### Decision (including any steps ordered)

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1. The complainant has requested information relating to Kent County Council's ("the Council") consideration of a proposed grammar school annexe in West Kent. The Council confirmed it held relevant information but considered it exempt from disclosure on the basis of section 36(2)(b)(ii) of the FOIA.
2. The Commissioner's decision is that the Council correctly applied the section 36(2)(b)(ii) exemption and the public interest favours withholding the information.

#### Request and response

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3. On 17 August 2012, the complainant wrote to the Council and requested information in the following terms:

*"The information I am requesting relates to the authority's consideration of a grammar school annexe in West Kent.*

*What written representations and/or comments has KCC received from schools in i) Sevenoaks and ii) the wider Kent area regarding its proposals iii) any other out of county schools? Please include private/independent schools.*

*Please provide information contained in any form of correspondence, such as letters, emails, faxes etc. Please provide a schedule of documents held."*

4. The Council responded on 14 November 2012. It stated that after seeking the opinion of the qualified person the Council had established that sections 36(2)(b) and (c) applied particularly considering the timing of the request, at a point when discussions were ongoing.
5. The complainant requested an internal review on 29 November 2012. The Council confirmed that it did not consider it had a member of staff in an appropriately senior position to be able to review the decision made by the qualified person. As such the Council advised the complainant on 3 January 2013 that he could refer the matter directly to the Commissioner.

### **Scope of the case**

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6. The complainant contacted the Commissioner on 12 November 2012 to complain about the lack of response to his request for information. He subsequently, after receiving confirmation no internal review would be conducted, contacted the Commissioner on 30 January 2013 to complaint about the way his request had been handled.
7. The Commissioner considers the scope of his investigation to be to determine if the any of the limbs of the section 36(2) exemption are engaged and if so, where the balance of the public interest lies.

### **Reasons for decision**

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8. Section 36(2) of the FOIA states that

*"Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information –*

*(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. The exemptions listed in section 36(2) are qualified exemptions so are subject to public interest tests. However, before considering the public interest the Commissioner must first consider whether any of the exemptions are engaged.
10. For any of the exemptions listed in section 36(2) to apply the qualified person for the public authority must give their reasonable opinion that the exemption is engaged. The qualified person is the Director of Governance and Law and Monitoring Office for the Council. The Council has provided the Commissioner with evidence to demonstrate that the opinion has been sought and provided. The Commissioner has next gone on to consider whether the opinion of the qualified person was a reasonable one.
11. The Commissioner has recently issued guidance on section 36 of the FOIA. It states the following: "*The most relevant definition of 'reasonable' in the Shorter Oxford English Dictionary is 'In accordance with reason; not irrational or absurd'. If the opinion is in accordance with reason and not irrational or absurd – in short, if it is an opinion that a reasonable person could hold – then it is reasonable.*"<sup>1</sup>
12. In order to determine whether any of the subsections of 36(2) is engaged the Commissioner will consider:
  - whether the prejudice claimed relates to the specific subsection of section 36(2) that the Council is relying upon;
  - the nature of the information and the timing of the request; and
  - the qualified person's knowledge of or involvement in the issue.
13. The withheld information consists of correspondence, primarily by email, between the Council and head teachers at existing schools, emails from local reporters to Schools gathering views, emails from parental groups and emails from various interested groups in the local area. The purpose of all of these emails is to gather opinions, express views and contribute to the debate on the proposed grammar school annexe.

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<sup>1</sup> Information Commissioner's section 36 FOIA guidance, [http://www.ico.gov.uk/for\\_organisations/guidance\\_index/~media/documents/library/Freedom\\_of\\_Information/Detailed\\_specialist\\_guides/section\\_36\\_prejudice\\_to\\_effective\\_conduct\\_of\\_public\\_affairs.ashx](http://www.ico.gov.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/section_36_prejudice_to_effective_conduct_of_public_affairs.ashx), November 2011, page 6.

14. The Council has stated that in order to ensure that the right decision was made it decided to open up a dialogue with as many interested parties in the education sector as possible. The Council has argued that the withheld information consists of the early stages of these discussions and due to the sensitivity surrounding the decision it was essential that contributors felt they could provide their opinions and potential partners could express interest on an informal basis without their involvement or input being known to the general public. In some instances the Council has stated that some individuals and organisations were reluctant to discuss their views and interest in writing for fear of adverse publicity in the event of the correspondence become public.
15. It is therefore implied that the early stages of this process relied on the free and frank exchange of views in order to establish potential partners and gather views on the viability of the proposal. Confidentiality was inherent in this process in order to engage meaningful debate and discussion and there would not have been any expectation of wider dissemination of this correspondence.
16. The Council expanded on this by explaining that disclosure of the correspondence at the time of the request would have been likely to have impacted on the willingness of individuals and organisations engaging with the Council. The Council acknowledges that the decision to build a grammar school annex was a controversial and politically sensitive decision. The Council has stated that some of the parties involved in the discussion changed their position during the process and the Council continued its negotiations whilst operating under the genuine belief that if the negotiations were made public some potential partners would either refuse to continue their involvement or would be guided in their actions by public criticism.
17. The Council considers the timing of the request to be important, coming at a time when discussions and negotiations to establish a preferred provider were ongoing and required free and frank exchanging of views. This required a safe space for the parties involved to thoroughly and fairly consider options and ideas at each stage of the process. The Council considers that to disclose the correspondence at the time of the request would have been likely to inhibit this process and the free and frank exchange of views.
18. The Commissioner is aware that the grammar school annex is controversial and has generated some media attention in the local area and his view is that disclosure of the correspondence at the time of the request would have been likely to have impacted on the free and frank exchange of views.

19. The Council has provided sufficient evidence to illustrate that the qualified person was provided with an explanation that he was required to form a reasonable opinion in relation to the application of section 36(2) of the FOIA to the information withheld by the Council in this case. It is clear having reviewed this information the qualified person formed the opinion that the disclosure of the withheld information would be likely to inhibit the free and frank exchange of views for the purposes of deliberation.
20. For the reasons outlined above the Commissioner is satisfied that the opinion of the qualified person is a reasonable one. Therefore, he considers that section 36(2)(b)(ii) is engaged. He will now go on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

*Public interest arguments in favour of disclosure*

21. The Commissioner recognises the general public interest argument that disclosure of information increases accountability within public authorities. He also considers it promotes transparency in the use of public funds to provide the best services and standards of education. The information in question may enable the public to better scrutinise the management of the Council.
22. The Commissioner also accepts the general public interest argument that disclosure of information increases transparency and this is particularly relevant in Councils where disclosure can help to promote public confidence in the providers of services and those who work within areas relating to education.
23. With more specific reference to the withheld information, the Council did recognise the genuine and legitimate public interest in the issue and was aware that disclosure would provide the public with an insight into the decision making process and workings of the Council and increase public debate on the issue.

*Public interest arguments in favour of maintaining the exemption*

24. The contents of the correspondence contain free and frank exchanges of views and expressions of opinions from a number of sources. Having viewed the withheld information the Commissioner notes it contains objections, concerns and suggestions as well as interest from proposed providers. The Commissioner recognises that disclosure of this correspondence, detailing the earlier stages of the process, at the time of the request could have inhibited the likelihood of open, frank discussions and exchanges throughout the remainder of the process for fear of public disclosure. Inhibition of this process would be likely to be

detrimental to the Council's ability to continue to pursue the best options as it may have reduced the number of potential partners willing to openly engage and lessen the likelihood of the Council being able to achieve the best possible outcome for pupils and tax payers.

25. The Council considers that whilst the grammar school annexe is a controversial and sensitive subject, generating attention in the local area and the local media, and this may be a factor in favour of disclosure, the Council is of the view that the sensitivity of the subject is actually a strong factor in favour of withholding the information. The ability of the Council to explore options and gather opinions to ensure the best solution can be obtained was reliant on the open and honest exchanges which took place at the beginning of the process without the diversion of public scrutiny.

*Balance of the public interest arguments*

26. The Commissioner considers the timing of the request to be significant in this case, coming at a time when negotiations were still ongoing. The Commissioner notes that the correspondence that has been withheld all relates to the opening stages of discussions and negotiations and he recognises that the Council needed the space to be able to gather frank views and opinions to negotiate the best possible option based on the educational needs in the area and the most cost effective solution for the taxpayer. The Commissioner is of the view that disclosure at the time would have been likely to inhibit the continuing frank exchange of views and therefore limiting the Council's options. He therefore accepts that this is an important factor and affords significant weight to it.
27. The Commissioner, having accepted that the exemption is engaged, recognises that the prejudice that would be likely to occur adds weight to the public interest in favour of maintaining the exemption. He does not consider it would be in the public interest for the Council to be unable to frankly deliberate to find solutions to the growing demand for educational services in Kent. Without these discussions taking place in a way in which contributors feel able to openly engage without public scrutiny and undue external influences the Commissioner accepts there may be an impact on the Council's ability to achieve best possible outcomes to the detriment of the public.
28. Both the complainant and the Council have argued that the sensitivity and controversy surrounding the decision to build a grammar school annexe is a strong public interest argument. The Commissioner accepts that it could be argued that this is a strong argument for disclosure as there is a keen interest on the outcome and the process in the local area and media and any disclosure would be likely to increase transparency and better inform those who want to engage in debate on the issue.

That being said, the Commissioner also recognises the Council's argument that the sensitivity of the subject enhanced the need for the Council to be able to debate and negotiate in a safe space away from public scrutiny and, in this case due to the early stages of the negotiations, he is minded to accept that this argument is stronger as an argument against disclosure.

29. Having taken into account the public interest factors outlined above, the Commissioner considers that on balance the public interest in maintaining the exemption outweighs the public interest in disclosing the information. The Council is therefore not obliged to disclose the information it identified as being within the scope of the request on the basis of section 36.

## Right of appeal

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30. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
LEICESTER,  
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: [informationtribunal@hmcts.gsi.gov.uk](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

31. 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.
32. 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 .....**

**Pamela Clements**  
**Group Manager, Complaints Resolution**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**