

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 August 2013

Public Authority: Shropshire Council
Address: Shirehall
Abbey Foregate
Shrewsbury
SY2 6ND

Decision (including any steps ordered)

1. The complainant requested information relating to an internal audit. Shropshire Council (the Council) provided some information but refused to disclose the remainder citing the exemptions provided by sections 36, 40, 42 and 43. The Commissioner has investigated the Council's application of section 36(2)(b)(ii) (inhibition to the free and frank exchange of views) of the FOIA.
2. The Commissioner's decision is that the Council cited the exemption correctly. The Commissioner does not require the Council to take any steps as a result of this decision notice.

Request and response

3. The complainant wrote to the Council on 16 November 2012 and requested information in the following terms:

"Can you please provide me with the all the information related to your audit of the EDRMS selection process and the information related to your response received by us on 15 November to my letter of 12 November 2012. This should include meeting notes, emails and copies of any draft reports and will cover the period 19 September 2012 to 15 November 2012".
4. The Council responded on 30 January 2013. It provided some information within the scope of the request but refused to provide the remainder. It cited the following exemptions as its basis for doing so:
 - section 36 (prejudice to effective conduct of public affairs);

- section 40(2) (personal information);
 - section 42 (legal professional privilege); and
 - section 43 (commercial interests).
5. On 31 January 2013 the complainant requested an internal review of the Council's handling of his request. He asked the Council to review both the timeliness with which it responded to his request and its application of the section 36 and 40(2) exemptions on the following pages of the audit file:
- section 36 – pages 23, 205, 285, 340 and 352
 - section 40(2) – pages 162, 343, 344 and 418.
6. The Council responded on 15 February 2013 about the time taken to respond to the request. It sent the complainant the outcome of its internal review into its application of exemptions on 1 March 2013. It revised its position with respect to section 40(2) as follows:
- pages 162, 418 – information disclosed;
 - pages 343, 344 – section 36 applied in place of section 40(2).

Scope of the case

7. On 22 March 2013, the complainant provided the Commissioner with the information he required to commence his investigation into the way his request for information had been handled. In bringing his complaint to the Commissioner's attention, the complainant raised the following issues:

"Shropshire Council's failure to provide all the information requested and the delay in responding to my request".

8. By way of background, the complainant explained that concerns had been raised about a tendering exercise carried out by the Council for the provision of a replacement records management system. The Council's Internal Audit investigated those concerns.
9. The complainant told the Commissioner:

"We consider the council's response to be inadequate and are therefore complaining to the Information Commissioner about the council's explanation as to why the council took so long to provide the information after making commitments to provide it much

earlier and requesting that the information the council has exempted from disclosure is disclosed to us”.

10. The complainant also referred to the way that the Council had applied section 36 in place of section 40 with respect to some of the withheld information. He quoted from the Council’s internal review correspondence:

“whilst I can see why the section 40 exemption has been applied to this document, in my opinion, the primary reason why it should not be disclosed to you is because to do so is likely to prejudice the effective conduct of public affairs.”

11. The complainant told the Commissioner:

“We challenge whether [council employee]’s opinions regarding this matter are relevant. [council employee] is not a qualified person under the meaning of the Act, and he has personally applied Section 36....”.

12. With the agreement of the complainant, the Commissioner considers the scope of his investigation to be the Council’s application of section 36. He has also considered the timeliness with which the Council handled the request.

Reasons for decision

Section 36 prejudice to effective conduct of public affairs

13. Section 36 is the only exemption in the FOIA that requires a determination by a ‘qualified person’. The exemption will only apply if the reasonable opinion of a qualified person is that one of the forms of adverse effect specified in subsection 2 would follow from disclosing the information.

14. Section 36(2)(b) and (c) states that:

“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.

(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs."

15. The term 'inhibit' is not defined in the FOIA. The Commissioner's view is that, in the context of section 36, it means to restrain, decrease or suppress the freedom with which opinions or options are expressed.
16. The Council told the complainant that information within the scope of the request includes '*correspondence between officers in relation to internal decision making and advice*'. It told him that:

"If such information was disclosed to the public it would be likely to inhibit the free and frank exchange of views or otherwise prejudice the effective conduct of public affairs when deliberating future issues of a similar nature".
17. On that basis, the Commissioner understands that the Council considers that sections 36(2)(b)(ii) and (c) apply in this case.

The opinion of the qualified person

18. In addressing the complainant's concern about the Council's application of section 36 to some of the withheld information initially withheld by virtue of section 40(2), the Commissioner accepts that errors in applying an exemption can be corrected at the internal review stage.
19. He would also take the opportunity to confirm that it is the qualified person who is required to give a reasonable opinion about the likelihood of prejudice or inhibition under section 36(2). The qualified person's opinion is crucial in order to engage the exemption: if the opinion is not given by the appropriate person, then the exemption cannot apply.
20. In this case, in support of its reliance on section 36, the Council provided the Commissioner with copies of the submissions that were provided to the qualified person.
21. Those submissions describe the job title of the individual who gave the opinion as 'Head of Legal and Democratic Services'. The Commissioner notes that the Council told the complainant that the withheld information had been granted an exemption:

"by the Council's Monitoring Officer".
22. The Commissioner is satisfied that the Head of Legal and Democratic Services is the Council's Monitoring Office, and that the Monitoring Officer is the relevant qualified person.

23. The Commissioner is satisfied that the Monitoring Officer was provided with a submission in relation to the initial request and that a further opinion was sought at the internal review stage.
24. Notwithstanding the wording of the Council's internal review response to the complainant, the Commissioner is satisfied that the qualified person's opinion was sought at the internal review stage. He is also satisfied, having viewed the submission, that it reflected the information that the Council initially considered to engage section 40(2).
25. In the Commissioner's view, although the specific limbs of the exemption are not explicitly stated, the text of the submissions presented to the qualified person suggest that both section 36(2)(b)(ii) and (c) are to be considered.
26. The response of the qualified person agrees to the application of "section 36(2)".
27. Section 36(2) is expressed in broad terms, and in order for the opinion to be reasonable, it must be clear as to precisely how the prejudice or inhibition may arise.
28. The Commissioner has referred to his guidance on the exemption at section 36 of the FOIA¹ which says:

"... if section 36(2)(c) is used in conjunction with any another exemption in Part II of the Act, the prejudice envisaged must be different to that covered by the other exemption. Furthermore, the fact that section 36(2)(c) uses the phrase "otherwise prejudice" means that it relates to prejudice not covered by section 36(2)(a) or (b). This means that information may be exempt under both 36(2)(b) and (c) but the prejudice claimed under (c) must be different to that claimed under (b)."
29. In the Commissioner's view, section 36(2)(c) is intended to apply to those cases where it would be necessary, in the interests of good government, to withhold information which is not covered by another specific exemption. In this case, having considered the submissions, the Commissioner notes that while the Council advanced arguments that

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http://www.ico.org.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/section_36_prejudice_to_effective_conduct_of_public_affairs.pdf

relate to prejudice to the interests stated in section 36(2)(b)(ii), it has not advanced arguments that relate to prejudice not covered by another specific exemption. Accordingly, the Commissioner has not considered the Council's application of section 36(2)(c).

30. Furthermore, in the Commissioner's view, the submissions fall short of what he would expect to see demonstrated regarding the likelihood of inhibition or harm occurring as a result of disclosure. For example, he does not consider that they give a clear indication of whether the risk of any inhibition occurring was considered to be one that "would be likely to" occur, or whether the risk met the higher test of "would" occur. Instead the first submission variously refers to "could inhibit" and "could have an impact" while the second submission refers to "is likely to be....".
31. The Commissioner accepts, however, that the Council has cited the lower threshold of "would be likely" in its correspondence with the complainant.
32. Notwithstanding the fact that the quality of the submissions in this case make it harder to decide whether the opinion given was reasonable, focussing on that opinion the Commissioner is satisfied that it is not unreasonable to reach such an opinion in the circumstances of the case. It follows that he finds the exemption engaged with respect to the Council's citing of the exemption in section 36(2)(b)(ii) - the free and frank exchange of views for the purposes of deliberation.
33. In the circumstances of this case, the Commissioner has carried the lower level of likelihood - that inhibition would be likely to occur - through to the public interest test.

The public interest

34. Even where the qualified person has concluded that the exemption applies, the public interest test must be applied to the decision whether or not to disclose the withheld information.
35. Despite being invited to do so, the Council did not provide the Commissioner with any further public interest arguments in support of the section 36 exemption during the course of his investigation.

Public interest arguments in favour of disclosing the requested information

36. In favour of disclosure, the complainant told the Council:

"The FOI request relates to an audit of a procurement project the council undertook in late 2011/ early 2012. If there is information relevant to that procurement project collected as part of the audit then it should be disclosed and we cannot see how any information

so collected could be prejudicial to the conduct of public affairs. If the information was relevant to the procurement, which by definition it must be as it has been collected as part of that audit of a completed procurement project then it should be disclosed. As the council is obligated to act transparently in any procurement process there can be no information subject to exemption S36 related to historical procurement projects”.

Public interest arguments in favour of maintaining the exemption

37. The Council told the complainant:

“There is a clear public interest in keeping confidential such information so that officers within the Council can operate in a frank and robust manner without the need to avoid controversial issues for fear of their deliberations becoming public”.

Balance of the public interest arguments

38. In weighing the public interest factors, the Commissioner must take into account the likelihood of disclosure restraining, decreasing or suppressing the freedom with which views are exchanged. In doing so, the Commissioner has considered the content and sensitivity of the information and timing of the request as well as the arguments put forward by the complainant and the Council.
39. The Commissioner understands that the internal audit is complete and that the final version of the audit report has been disclosed, albeit in a redacted form. The information at issue in this case comprises a small amount of information from the associated audit file and relates to risk logs and internal decision making in the context of the investigatory process.
40. The Commissioner accepts that there is merit in the argument that disclosure in this case would promote transparency. There is clearly a public interest in the public being assured that the Council acted appropriately in respect of its internal audit into a procurement process.
41. The Commissioner also acknowledges the strength of feeling of the complainant in relation to the procurement process – the subject matter of the internal audit.
42. The Commissioner considers that, having accepted the reasonableness of the qualified person’s opinion that disclosure of the information would be likely to have the stated detrimental effect, he must give weight to that opinion as an important piece of evidence in his assessment of the balance of the public interest.

43. The Commissioner has also given due consideration to protecting what is inherent in this exemption. With regard to section 36(2)(b)(ii) this includes the avoidance of unwarranted inhibition to the free and frank exchange of views for the purposes of deliberation.
44. In that respect the Commissioner considers that, in the context of an internal audit, Council officers need time and space for free and frank discussions regarding the subject matter without fear of the investigatory process being likely to be undermined.
45. Given the current context of pressure on local authority funding, the Commissioner's view is that the severity and extent of the inhibition that he has accepted would be likely to occur as a result of disclosure would be considerable. The regularity of the inhibition in relation to other similar situations, and the extent and severity of the impact of this inhibition, add weight to the public interest in the maintenance of the exemption.
46. Although there is a strong public interest in transparency and accountability in public authorities, the Commissioner considers this has been satisfied to some extent by the disclosure of information relating to the internal audit.
47. While the Commissioner has recognised public interest arguments in favour of disclosure, in this case he considers that the arguments in favour of maintaining section 36(2)(b)(ii) are stronger.
48. As the Commissioner's conclusion is that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in favour of disclosing the requested information the Council is not required to disclose the information in question.

Section 1 general right of access

Section 10 time for compliance

49. Section 1(1)(a) of the FOIA requires a public authority to inform the complainant in writing whether or not recorded information is held that is relevant to the request. Section 1(1)(b) requires that if the requested information is held by the public authority it must be disclosed to the complainant unless a valid refusal notice has been issued.
50. Section 10(1) requires the public authority to comply with section 1 promptly and in any event no later than twenty working days after the date of receipt of the request.
51. The Commissioner notes that the complainant made his request for information on 16 November 2012 but that the Council did not issue its response until 30 January 2013.

52. Addressing that delay, the Council explained to the complainant:

"Managers are aware of the pressures facing the Information Governance Team and are taking steps to address the issues".

53. The Council provided further explanation during the Commissioner's investigation, stating that the disclosure of the audit report and supporting papers:

"took longer than anticipated to review and redact and the Information Governance Team were dealing with a number of concurrent complex cases which resulted in the response to the applicant being delayed".

54. The Commissioner finds that, by responding outside of the statutory limit, the Council breached section 10(1).

Right of appeal

55. 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

56. 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.
57. 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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