

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 4 February 2014

Public Authority: Leicester City Council

Address: New Walk Centre
Welford Place
LE1 6ZG

Decision (including any steps ordered)

1. The complainant has requested information relating to an Aylestone Community Meeting including copies of draft minutes and notes taken by attendees. Leicester City Council provided some information, confirmed that information generated by councillors attending the meeting was not held and withheld information generated by a council officer under the exemption for prejudice to the effective conduct of public affairs (section 36 of the FOIA).
2. The Commissioner has concluded that:
 - in relation to information created by councillors attending the meeting, the council complied with section 1 of the FOIA and correctly confirmed that the information was not held;
 - correctly applied section 36(2)(c) and demonstrated that the public interest favours maintaining the exemption.
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. On 7 May 2013, the complainant wrote to Leicester City Council (the "council") and requested information in the following terms:

"Aylestone Community Meeting Thursday 14 March 2013

Could you please provide a copy of the draft minutes from the above meeting.

Please could you also provide a copy of any notes taken during the meeting, handwritten or otherwise by any of the councillors and any of the staff. A transcript by email will be fine, or scanned PDFs..."

5. The council responded on 5 June 2013. It provided notes from the official minute taker of the meeting, with some personal data redacted under section 40(2) of the FOIA. The council also disclosed handwritten notes made by one attending council officer but refused to provide handwritten notes made by another officer. This information was withheld under the exemption for prejudice to the effective conduct of public affairs (section 36 of the FOIA).
6. Following internal reviews on 8 July and 11 July the council wrote to the complainant. It stated that it was maintaining its reliance on section 36 to withhold the outstanding information.

Scope of the case

7. On 30 July 2013 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
8. The Commissioner has considered whether the council has provided all the requested information it holds and whether it has correctly applied section 36 to withhold some of the information.

Reasons for decision

Section 1 – duty to provide information held

This part of the complaint relates to the request for "notes" taken by councillors who attended the meeting.

9. Section 1 of FOIA states that:

"Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him."

10. The complainant has argued that the council has failed to provide any information which was created by councillors who attended the meeting in question. The complainant provided the Commissioner with personal reasons why he wished to access information generated by councillors attending the meeting. The request specifically asked for any notes, etc., generated by councillors who attended the meeting. The complainant, a councillor himself, has confirmed that he handed information to council officers at the meeting so, at the very least, the council should have confirmed that this information is held.

11. Section 3(2) of FOIA provides that:

"For the purposes of this Act, information is held by a public authority if-

(a) it is held by the authority, otherwise than on behalf of another person, or

(b) it is held by another person on behalf of the authority"

12. The Commissioner considers that information created by a councillor but held on a local authority's premises or computer systems will be covered by the FOIA if it is held by the authority on its own behalf and for its own purposes. However, it will not be covered by FOIA if it was produced by the councillor only for private or party political purposes and the authority is just providing storage, office space or computing facilities. In such situations, the local authority is not holding the information to any extent for its own purposes.

13. In this case, the council has explicitly confirmed to the Commissioner that information generated by the other councillor attending the meeting was held solely by them and the council does not hold a copy. It explained that it has absolutely no control over the information and has no access to, use for, or interest in the information. Access to the information is controlled by the councillor, and the council does not provide any direct assistance at its own discretion in creating, recording, filing or removing the information. No clerical and administrative support for the other person was given in relation to the making of the private notes. The council does not decide what information is retained, altered or deleted; the councillor does. The council does not deal with enquiries about the information, and costs arising from holding the information are not included in the authority's overall budget.
14. In relation to information provided by the complainant to the council, the council has explained that it has no idea why he handed it to them as there is absolutely no requirement at all for any councillor to do this at the end of a ward meeting. The council confirmed that it considers that, even if the complainant handed in his own notes, all of the arguments it has applied in relation to notes generated by the other attending councillor would apply. Under the FOIA, anyone making a request for this information would receive the same response, namely that the information is not held by the council for the purposes defined by the FOIA.
15. Whilst being mindful that the complainant may have valid personal reasons for wishing to access the requested information, the Commissioner does not consider that this is a relevant consideration. FOIA rights are available equally to any member of the public. There are other rules governing access to council information for elected members of that council, but these are not provided by the FOIA and are not enforced by the Commissioner. In view of the arguments provided by the council and, having referred to his own guidance, the Commissioner has concluded that the council does not hold the information requested for the purposes of the FOIA. In confirming that the information is not held, the council complied with section 1 of the FOIA.

Section 36 – prejudice to effective conduct of public affairs

This part of the complaint relates to the request for notes taken by council officers who attended the meeting.

16. In refusing to provide the meeting notes made by a council officer who attended the meeting, the council is relying on the exemptions contained section 36(2)(b)(i) and (ii) and section 36(2)(c). These state:

“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.”

The qualified person

17. In deciding whether the council has correctly engaged the exemption, the Commissioner has first considered who, at the council, is the ‘qualified person’, for the purposes of the exemption.
18. The ability of the qualified person to determine whether information is exempt cannot be delegated to another person. The reason for asking who gave the opinion is to ensure that the decision was taken by the correct person. If the person who gives the opinion is not the qualified person, then information cannot be exempt.
19. In this case, the council has confirmed that the qualified person for the purposes of the exemption is the monitoring officer. The Commissioner accepts that the council has identified the appropriate person for the purpose of providing a reasonable opinion. He has gone on to consider whether the qualified person has provided an opinion and when the opinion was provided.

Did the qualified person give an opinion and when was it given?

20. The council provided the Commissioner with evidence that the qualified person’s opinion was sought and was given prior to the response to the request being issued. He is, therefore, satisfied that the qualified

person gave an opinion. He has gone on to consider whether the opinion given was reasonable in the terms of the exemption.

Was the opinion reasonable?

21. The Commissioner has issued guidance on section 36 of the FOIA. With regard to what can be considered a 'reasonable opinion' 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."*¹

22. In determining whether an opinion is reasonable in the context of section 36(2) and whether the exemption is engaged, the Commissioner must then go on to consider whether the prejudice or inhibition claimed relates to the specific subsection of section 36(2) that the council is relying upon.
23. The council has stated in correspondence that it is relying on section 36(2)(b)(i) and (ii) and section 36(2)(c) in refusing the request. The Commissioner does not consider that the Council has made a case that either limb of section 36(2)(b) is applicable to the withheld information. He has carefully considered whether the qualified person's opinion has demonstrated that section 36(2)(c) is engaged.

Section 36(2)(c)

24. As noted above, section 36(2)(c) of the FOIA states:

"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-

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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.ashx

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

25. The Commissioner considers that prejudice to the effective conduct of public affairs could refer to an adverse effect on a public authority's ability to offer an effective public service or to meet its wider objectives or purpose but the effect does not have to be on the authority in question; it could be an effect on other bodies or the wider public sector.
26. Section 36(2)(c) is concerned with the effects of making information public and the Commissioner considers that it is intended to apply to cases not covered by another specific exemption. Where it is used in conjunction with another exemption, the prejudice envisaged must be different to that covered by the other exemption.
27. Having viewed the council's submission to the qualified person, this seeks their view on whether "section 36" is applicable to the officer's handwritten note, a copy of which was provided to the qualified person.
28. The qualified person's opinion states that the information should be withheld as, should officers' notes become generally disclosable under the FOIA, then no meeting could proceed to discuss things in a free and frank manner.
29. Having considered the relevant correspondence the Commissioner wishes to express his concern about the informal nature of the council's submission to the qualified person and the qualified person's response. It lacks any reference to the specific exemptions provided by section 36(2) and fails to relate the withheld information to any of them. Whilst he has no wish to add unnecessary bureaucracy to the handling of requests, his guidance directs public authorities to a sample form which clearly indicates how he expects the obtaining of the qualified person's opinion for the purposes of section 36 to be approached.²
30. In its submissions to the Commissioner, the council has provided further arguments in support of its application of section 36(2)(c) which build upon the qualified person's scant, but not unreasonable, opinion.
31. In this case the council has argued that disclosure of the information *could* result in officials no longer keeping records of meetings which, in

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http://ico.org.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/section_36_record_of_the_qualified_persons_opinion.doc

turn, *could* result in adverse effect to the council's ability to offer an effective service or to meet its wider objectives or purpose. The Commissioner understands, therefore, that in applying the exemption, the council is relying on the "would be likely to prejudice" limb. This means that the likelihood of disclosure resulting in prejudice is more than hypothetical but not more likely than not.

32. The council has argued that notes made by officers attending meetings who are not there in their capacity as official minute taker act solely as a personal reminder of salient points or to prompt or assist them in any actions they may need to take as a result of the meeting.
33. The council has confirmed that, in this case, the officer whose notes are being withheld was not attending the meeting as official minute taker, that the notes were taken for the purposes of a personal aide memoir and that they did not have an expectation that their notes would be published.
34. The council has argued that, were the information to be disclosed, it is likely that officers attending meetings would be less likely to take notes, resulting in their inability to act on any specific points raised during the meeting or to otherwise carry out their duties effectively. This, in turn, would be likely to prejudice the council's ability to effectively conduct its public affairs.
35. In spite of his serious misgivings about the council's process for obtaining the qualified person's opinion, the Commissioner accepts that the arguments provided by the qualified person and subsequently developed by the council sufficiently demonstrate that disclosure of the withheld information would be likely to prejudice the effective conduct of public affairs.
36. As the Commissioner has concluded that the exemption is engaged he has gone on to consider the public interest test.

Public interest in disclosing the information

37. The Commissioner recognises that there is a general public interest in the disclosure of information which relates to the decision-making processes of public authorities. Disclosure of the information would serve to promote the general principles of transparency and accountability.
38. In this specific instance, the disclosure of contemporaneous notes of a meeting would allow the public to ascertain whether the official, published minutes accurately reflect what was discussed and/or agreed at the meeting, further promoting accountability.

39. The complainant has also provided the Commissioner with personal reasons for being provided with the information which the Commissioner has factored into the weighing of the public interest.

Public interest in maintaining the exemption

40. The council has argued that, should public authority officials refrain from making notes of meetings and keeping records there is a strong likelihood that this will prejudice the authority's ability to offer an effective public service or meet its wider objectives or purpose.
41. In this specific instance, the council confirmed that queries were raised about potential discrepancies between the official minutes and the recollections of those attending the meeting. It has argued that the public interest in addressing this matter has already been served by the publication of the formal minutes of the meeting and its disclosure (in response to this request) of the notes made by the formal minute-taker.
42. More generally, the Commissioner acknowledges that public authorities are entitled to a "safe space" within which decisions can be made without unnecessary intrusion or interference. Whilst it is entirely proper that public authorities' decisions or processes should be held up to scrutiny, the publication of minutes which set out the official version provide a reference for this scrutiny to be applied. The council has argued that an officer's personal notes may contain inaccuracies or misrepresentations which will only serve to distract from or undermine what has been formally agreed. The Commissioner acknowledges the reality of the situation in practice.

Balance of the public interest

43. Whilst the Commissioner accepts the general principle that the disclosure of information can aid transparency and accountability, he has not been provided with and is not aware of, in this case, any specific reason why disclosure of a contemporaneous note would achieve these ends. He accepts that the publication of the official meeting minutes and the disclosure of the official minute taker's handwritten notes do, however, achieve these ends. Indeed, he welcomes the positive approach taken by the Council to the disclosure of those handwritten notes.
44. The Commissioner appreciates that the requester might have valid reasons for accessing the information which are founded on genuine concerns, but in his view these are more in the nature of a personal or private interest. In considering where the balance of the public interest lies the Commissioner does not take into account the motivation of

requesters except where this reflects a broader public interest. In this instance, the Commissioner is not aware of any broader public interest which would be served by the disclosure of the information, certainly not an interest which would counteract the public interest in the council's ability to conduct its affairs effectively.

45. The Commissioner considers that, in this case, the safe space argument provided by the council attracts considerable weight. There are (or there should be) mechanisms in place for challenging official decisions without speculating about what was, might or should have been discussed.
46. Having considered the public interest arguments, the Commissioner finds that the disclosure of the information would be likely to introduce confusion or paralysis into the decision-making process and would, in turn, be likely to result in officers no longer taking personal notes of meetings.
47. For these reasons, the Commissioner has concluded, that, in this instance, disclosure of the information would be likely to result in prejudice to the council's ability to conduct its public affairs effectively and the public interest in maintaining the exemption outweighs that in the disclosure of the withheld information.

Right of appeal

48. 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: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

49. 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.
50. 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

Graham Smith
Deputy Commissioner
Information Commissioner's Office
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Water Lane
Wilmslow
Cheshire
SK9 5AF