

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 July 2015

Public Authority: Cheshire East Council
Address: Westfields
Middlewich Road
Sandbach
Cheshire
CW11 1HZ

Decision (including any steps ordered)

1. The complainant has requested copies of emails which relate to the Leader of the Council's Twitter account dating from 28 September 2014 to 11 January 2015.
2. The Commissioner's decision is that Cheshire East Council has correctly applied sections 36(2)(b) and 36(2)(c) to the emails which the complainant seeks and it is therefore entitled to withhold them.
3. The Commissioner does not require the public authority to take any further action in this matter.

Request and response

4. On 11 January 2015, the complainant wrote to Cheshire East Council ("the Council") and requested information in the following terms:

"I understand that the attached information was obtained by the BBC under an FOI request, but the emails are all dated September 2014 or earlier.

I would like to make a similar request to the BBC request, but for the period continuing on from the BBC request. I therefore request all emails relating to Michael Jones's Twitter account for the period 28/9/14 to today.

Ultimately I would like to know who drafted and who posted all Michael Jones's tweets."

5. On 9 February, the Council responded to the complainant's request by issuing a refusal notice under section 17 of the FOIA. The Council's qualified person advised the complainant that the Chief Executive has initiated an investigation into the management of the twitter account and that it was withholding all related documents under section 36 of the FOIA.
6. On 19 February, the complainant wrote to the Council and asked for a review of its refusal to disclose the information he has asked for.
7. On 16 April, having concluded its internal review, the Council wrote to the complainant to advise him of its final decision. The Council informed the complainant that the matter is still live and has yet to be concluded. The Council advised the complainant that supplying the requested information could adversely affect the course of the investigation and the decision making process following that investigation. The Council confirmed that it is withholding information relevant to the complainant's request in reliance of section 36 of the FOIA. The Council also provided the complainant with its rationale for its reliance on this exemption.

Scope of the case

8. The complainant contacted the Commissioner on 23 March 2015 to complain about the Councils refusal to disclose the information he had requested.
9. This notice is the Commissioner's decision in this matter: Whether the Council is entitled to withhold the requested information in reliance on sections 36(2)(b) and 36(2)(c) of the FOIA.

Reasons for decision

Background to the request

10. The request for information in this case has flowed from the revelation that Cheshire East Council staff composed and posted tweets in the name of the Conservative Leader of the Council. The Leader of the Council approved messages written by the Council's media team and Council's staff then posted them.

11. Local authorities – including their staff, are legally required to be neutral public bodies.
12. The tweets were published on the Leader of the Council's personal Twitter account. This carries a disclaimer stating that the opinions expressed are personal and not those of the council.

Section 36 – Prejudice to the conduct of public affairs

13. Section 36 allows a public authority to withhold recorded information if its disclosure would prejudice the effective conduct of public affairs.
14. The Council has confirmed to the Commissioner that it is relying on section 36(2), This section states:

"36 (2) 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 purpose of deliberation , or

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

15. The application of section 36 requires the public authority's "qualified person" to consider the withheld information and the exemption which applies to it. This consideration cannot be delegated to another person within the public authority.
16. The Commissioner asked the Council to provide him with evidence that the qualified person considered the application of section 36 personally. The Council did this by sending the Commissioner a signed and completed copy of his pro-forma record of the qualified person's opinion.
17. The Council's qualified person is Anita Bradley. Ms Bradley is the Council's Head of Legal Services and Monitoring Officer.
18. On 9 February 2015, Ms Bradley confirmed that she had seen the recorded information and that she considered subsections 36(2)(b)(ii) and 36(2)(c) apply to it. She also confirmed her consideration of the arguments that were advanced in favour of withholding the requested information as well as those which favour its disclosure.

19. The Commissioner is satisfied that the Council's qualified person has given an opinion in this case. He must now consider whether that opinion is reasonable.
20. The Commissioner adopts the plain meaning of the word "reasonable" as defined by the Shorter English Dictionary: The definition given is; "in accordance with reason; not irrational or absurd".
21. To engage section 36, the qualified person's opinion needs only to be reasonable: It needs to be an opinion reasonably held by a reasonable person. This is not a high hurdle. It is not necessary for the Commissioner to agree with the opinion given; he only needs to recognise that a reasonable person could hold the opinion given.
22. In the qualified person's opinion, the withheld information is material to a disciplinary investigation. Disclosure of the emails sought by the complainant would prejudice those disciplinary proceedings and the Council's ability to make decisions following the investigation. The qualified person considers that the Council should benefit from a 'safe space' in which the contents of the emails could be considered in the context of the disciplinary proceedings, particularly before they have been concluded and before the matter is given further publicity.
23. At the time when the qualified person gave her opinion, she makes clear that the investigation is still to be concluded and that no decisions have been made with regards to the disciplinary proceedings, or have any sanctions been considered should they be required.
24. The qualified person recorded that she is mindful that the requested information relates to the Leader of the Council and that he is a high profile local politician. She considers that further revelations would likely attract a large amount of political comment and press coverage. In the qualified person's opinion, whilst the focus of the information request is not a political target, disclosure of the emails sought by the complainant would affect the individual officer and prejudice the disciplinary process.
25. In the Commissioner's guidance to the section 36 exemption, paragraph 46 states – "The 'exchange of views' must be part of a process of deliberation", and "'deliberation' refers to the public authority's evaluation of competing arguments or considerations in order to make a decision".
26. In this case, in order to determine whether sections 36(2)(b)(ii) and 36(2)(c) is engaged it is necessary for the Commissioner to consider whether it is reasonable for the qualified person to conclude that disclosure of the withheld information would be likely to prejudice the

exchange of views, in the context of an investigation which is part of an on-going disciplinary proceeding.

27. The Commissioner has considered the nature of the information which the complainant seeks and has done so against the context of the on-going disciplinary proceeding. He accepts the qualified person's opinion that the disclosure of the withheld information would likely prejudice the exchange of views which would inevitably arise in the course of that proceeding. The Commissioner readily accepts that the Council requires a 'safe space' to consider the actions of one of its officers and it is for this reason the Commissioner has decided that sections 36(2)(b)(ii) and 36(2)(c) are engaged.

The Public Interest

28. The Council's application of sections 36(2)(b)(ii) and 36(2)(c) is subject to a consideration of the public interest. The Commissioner is required to consider whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
29. In *Guardian and Heather Brooke v the Information Commissioner and the BBC* (EA/2006/001 and EA/2006/0013), the 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.

- 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

30. The Commissioner considers that some weight must always be given to the general principle of achieving accountability and transparency through the disclosure of information held by public authorities. This assists the public in understanding the basis and how public authorities make their decisions and carry out their functions, and in turn fosters trust in public authorities. It may also allow greater participation by the public in the Council's decision making process.
31. In this case a member of the Council's staff is alleged to have allowed Council facilities to be used to communicate political content to the public. By doing this, the staff member may have compromised their position by undertaking activities which are not politically neutral and consequently he/she may have brought the Council into disrepute.
32. The Commissioner gives significant weight to the allegations made against the member of staff because of the potential compromising of the Council's political neutrality. It must surely be in the public interest for the Council to demonstrate that it is taking steps to ensure its political neutrality, especially in the light of the publicity which flowed from the BBC's information request and the ensuing publicity.
33. Having examined the withheld information, the Commissioner finds there is a clear public interest in the public having knowledge that the Council is acting properly, in all respects, concerning its investigation of the member of staff's actions. He recognises that the public should be properly assured that the Council is undertaking an appropriate investigation of allegations concerning its member of staff's actions.

Public interest arguments in favour of maintain the exemption

34. At the time the complainant made his request, an investigation into the Council staff's actions had already begun. An investigation was instigated by the Council's Chief Executive when information came to light following the receipt of a request for information made by the BBC and following the Council's disclosure of information to the BBC on 24 December 2014.
35. At the time of the Commissioner's investigation of this complaint, the action under Council's disciplinary procedure had not been completed. It is true that the investigating officer had submitted a draft report to the Council's Chief Operating Officer; nevertheless the Disciplinary Hearing had not been scheduled. Therefore the matter to which the withheld information relates can quite properly be said to be on-going.
36. The premature disclosure of the withheld information, at this stage, would pose a real risk that fairness of the Council's investigation and to its subject. It could result in a 'trial by the media' which is based on incomplete evidence and it could unjustly cause misplaced and misguided speculation as to the person's innocence or guilt.
37. The Council has provided the Commissioner with evidence of the publicity which followed the disclosure of information made to the BBC. This evidence substantiates the Council's fears that further publicity could flow from a premature disclosure of the information requested by the complainant. The evidence – primarily posts on Twitter – alert the Council to the potential of journalists door-stepping council staff and members.
38. The Council has provided the Commissioner with a document entitled 'Brief for Investigating Officer'. This document identifies the subject of the Council's investigation and describes the allegations which are to be decided. It outlines what is required of the investigation and also what the investigation report is required to contain.
39. The document also requires the report to: set out the methodology of the investigation; set out the facts in summary; outline any potential and/or actual further factors which need consideration; consideration whether action under any other procedure may be warranted; and make clear recommendations regarding the appropriateness of further formal action under the Council's disciplinary procedure.
40. The Investigating Officer's report is required to be marked 'Confidential' and 'Draft' until a final report has been agreed and all witnesses and staff participating in the process are required to treat the matter with the utmost sensitivity and strictest confidentiality.

The Commissioner's decision

41. Clearly the Commissioner must afford significant weight to the allegations made against the Council's employee and particularly to that which concerns the compromising of the Council's political neutrality – the issue which brought about the complainant's information request in the first place. This is something the Commissioner cannot ignore.
42. The Commissioner must also give some weight to the principles of accountability and transparency.
43. Nevertheless, the Commissioner has decided that greater weight must be given to the potential negative impact of disclosure on the Council's yet to be completed investigation and on the negative impact on the subject of that investigation.
44. The point in time when the complainant made his request, and the on-going nature of the Council's proceedings, is key to the Commissioner's decision. He has decided that greater weight must be given to the public interest in ensuring that the Council can undertake its investigation and disciplinary procedure in circumstances which allow proper, uninhibited scrutiny of evidence and fairness to the party concerned.
45. The Commissioner is satisfied that the Council is undertaking a proper investigation of the matter which relates to the complainant's request. This is evidenced by the 'Brief' document referred to above and by the Council's Disciplinary Procedure. While, at this point in time, the balance of the public interest favours the withholding of the requested information, this may not be the case when the investigation and disciplinary process have concluded.
46. The Commissioner finds that the public interest favours the continued withholding of the information requested by the complainant. He has therefore decided that the Council is entitled to rely on sections 36(2)(b) and 36(2)(c) to withhold that information.

Right of appeal

47. 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

48. 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.
49. 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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