

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 15 February 2016

**Public Authority:** Somerset County Council  
**Address:** County Hall  
Taunton  
Somerset  
TA1 4DY

#### Decision (including any steps ordered)

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1. The complainant has requested a copy of correspondence between Somerset County Council ("the Council") and others in relation to the termination of the contract for the services of its interim Director of Children's Services.
2. The Commissioner's decision is that the Council correctly relied on section 36(2)(c) of the Freedom of Information Act 2000 (FOIA) to withhold the requested information.

#### Background

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3. In October 2014, Somerset County Council announced that it had terminated its contract for the services of the interim Director of Children's Services, Peter Lewis.

#### Request and response

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4. On 26 October 2014, the complainant requested information of the following description:  
  
"Q1. Please disclose all correspondence (incl emails, letters, memos, minutes, file & meeting notes etc) between the former Interim DCS Peter Lewis and the CEO Pat Flaherty between 1<sup>st</sup> September 2014 and Friday 24th October 2014.

Q2. Please disclose all correspondence (incl emails, letters, memos, minutes, file & meeting notes etc) between the former Interim DCS Peter Lewis and the Leader John Osman between 1st September 2014 and Friday 24th October 2014.

Q3. Please disclose all correspondence (incl emails, letters, memos, minutes, file & meeting notes etc) between the former Interim DCS Peter Lewis and the Cabinet Lead for Children's Services Frances Nicholson between 1st September 2014 and Friday 24<sup>th</sup> October 2014."

5. The Council's substantive position is that it holds the requested information but considers it exempt from disclosure by virtue of section 36(2)(c) of the FOIA. This position was conveyed by the Council to the complainant in correspondence dated 25 November 2014.
6. Following an internal review the Council wrote to the complainant on 7 April 2015. It upheld its original position.

### Scope of the case

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7. The complainant contacted the Commissioner on 16 April 2015 to complain about the Council's decision to withhold the information requested on the basis of section 36(2) FOIA.
8. As part of his investigation the Commissioner has viewed a copy of the withheld information.

### Reasons for decision

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9. Section 1 of the FOIA provides two distinct but related rights of access to information that impose corresponding duties on public authorities. These are:
  - the duty to inform the applicant whether or not requested information is held and, if so,
  - the duty to communicate that information to the applicant.
10. Section 36 FOIA provides 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-

(2)(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
- (2)(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.”
11. The Council has applied section 36(2)(c) to the withheld information.
  12. Unlike other exemptions in FOIA, an exemption in section 36(2) can only be engaged where a public authority has consulted with a qualified person defined in the legislation and it is the qualified person’s opinion that the harm stated in the exemption would, or would be likely to, arise through disclosure.
  13. To find that an exemption in section 36(2) is engaged, the Commissioner must be satisfied not only that the qualified person gave an opinion on the likelihood of prejudice occurring but also that the opinion was reasonable in the circumstances. That is, the qualified person must have reasonably concluded that there is a link between disclosure and a real and significant risk of the prejudice that the relevant exemption is designed to protect against. A public authority may rely on more than one exemption in section 36(2) as long as the qualified person has offered a view on each of the exemptions cited and the arguments advanced correspond with the particular exemption. If a link is not made, the Commissioner will be unable to find that the opinion was a reasonable with regard to that exemption.
  14. The Commissioner’s guidance on section 36 explains that information may be exempt under section 36(2)(b)(i) or (ii) if its disclosure would, or would be likely to, inhibit the ability of public authority staff and others to express themselves openly, honestly and completely, or to explore extreme options, when providing advice or giving their views as part of the process of deliberation. The guidance says that the rationale for this is that inhibiting the provision of advice or the exchange of views may impair the quality of decision making by the public authority. The exemptions are therefore about the processes that may be inhibited rather than what is necessarily in the information itself.
  15. Section 36(2)(c), on the other hand, refers to the prejudice that may otherwise arise from disclosure, although the legislation does not define what is meant by the use of the term ‘otherwise’. The Commissioner considers, however, that the prejudice envisaged must be different to that covered by any other exemption relied upon in section 36(2).

*Qualified person*

16. The Council has informed the Commissioner that the person consulted in his role as the qualified person was the monitoring officer.
17. Section 36(5) of FOIA describes what is meant by a 'qualified person' in the legislation. For further guidance, the Ministry of Justice also previously produced a list of qualified persons by type of authority<sup>1</sup>. This confirms that a monitoring officer is a qualified person for a local authority within the meaning of the Local Government Act 1972 in England, which includes the Council.
18. The Commissioner is therefore satisfied that the person consulted about the request was a qualified person according to this description. Furthermore, the Council has provided sufficient evidence for the Commissioner to accept that the qualified person had approved the application of the section 36(2) exemptions.

*Reasonable*

19. The Commissioner has therefore next had to consider whether the qualified person's opinion with regard to sections 36(2)(c) was reasonable.
20. When deciding on the reasonableness of the qualified person's opinion, the test to be applied is whether the opinion is one that a reasonable person could hold and not whether it is the most reasonable opinion. The critical issue is that the arguments being advanced by the qualified person not only correspond with the factors described in the exemption but also correspond with the information to which the exemption has been applied.

*The Council's submissions*

21. The withheld material was discussed verbally on 7 November 2014 after the request had been received and on 11 January 2015 when the Council was carrying out an internal review.
22. The discussions with the qualified person were not recorded in detail and therefore the Council has retrospectively completed the section 36 template form produced by the Commissioner for this purpose. The

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<http://webarchive.nationalarchives.gov.uk/20100512160448/http://www.foi.gov.uk/guidance/exguide/sec36/annex-d.htm>

monitoring officer certified that the record was an accurate representation of his views. The monitoring officer's opinion was that disclosure 'would' prejudice the effective conduct of public affairs.

23. The nature of the prejudice to effective conduct of public affairs is the following:

- The content of the emails cannot be properly understood in isolation because it refers to (and presumes knowledge of) other, non-recorded, oral communications between the concerned individuals. Public disclosure of these emails would lead to confusion and/or misinterpretation regarding the context and meaning of this content.
- It would not be possible to provide any explanatory context to assist the understanding of the emails since this is not information which is held by the Council.
- Managing the follow-up communications and further questions arising from such disclosure would demand an unreasonable effort which would divert crucial resources from more important public functions.
- At the time of this request, the Council was facing adverse media attention and controversy in the wake of the departure of its Director of Children's Services, Peter Lewis. Mr Lewis was publically contesting information provided by the Council concerning both the reason and the circumstances of his departure.
- This followed "disappointing" and "inadequate" findings from Ofsted inspections of the Council's children's homes, and closure of two of these homes due to failings in the standards of care, poor management and safeguarding issues.
- During this very challenging time the resources of its senior management were critically needed to re-establish stability and leadership, as well as public confidence, in the Council's core public service function of managing children's social care.
- In this context, disclosure of the email correspondence between the Council's CEO and Peter Lewis would only have led to further public interest, FOI requests and media questioning of the Council's account of Mr Lewis' departure, fuelling public uncertainty and undermining confidence in the Council's management of children's services.

- Dealing with this media 'fall-out' and the threat to the Council's reputation would have been detrimental to the Council's ability to address an urgent public service priority. It would have diverted the attention and time of both the CEO and senior managers who needed to be concentrating their efforts on resolving the significant challenges facing children's social care.
24. In determining whether the opinion is a reasonable one, the Commissioner takes the approach that 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. The qualified person's opinion is not rendered unreasonable simply because other people may have come to a different (and equally reasonable) conclusion. It is only unreasonable if it is an opinion that no reasonable person in the qualified person's position could hold. The qualified person's opinion does not have to be the most reasonable opinion that could be held; it only has to be a reasonable opinion.
25. The Commissioner considers that it was reasonable to hold the opinion that disclosure of the withheld information would be likely otherwise to prejudice the effective conduct of public affairs in respect of the Council.

#### Public interest test

26. The exemption at section 36(2)(c) is subject to a public interest test. Therefore, the Commissioner has to consider whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the disputed information.
27. Having accepted the reasonableness of the qualified person's opinion that disclosure of the information would have the stated detrimental effect, the Commissioner must give weight to that opinion as a significant piece of evidence in his assessment of the balance of the public interest. However, in order to form the balancing judgment required by section 2(2)(b) FOIA, the Commissioner is entitled, and will need, to form his own view as to the severity of, and the extent and frequency with which, any such detrimental effect might occur.
28. The Commissioner and the parties identified the following public interest factors in releasing the withheld information:
- Facilitating the transparency and accountability of the Council's decision-making regarding the spending of public money, and the management of the performance of senior level appointments.

- Assisting the public in determining the appropriateness of engaging interim staff at a senior level who are paid large sums of money.
29. The Commissioner and/or the Council identified the following public interest factors in maintaining the exemption:
- The content of the emails cannot be properly understood in isolation because it refers to (and presumes knowledge of) other, non-recorded, oral communications between the concerned individuals.
  - Public disclosure of these emails would therefore only lead to confusion and/or misinterpretation regarding the meaning of this content.
  - The Council believes that responding to further communications / questions arising from such disclosure would demand an unreasonable effort and would divert crucial resources from more important public functions.
  - The Council would, in all likelihood, have had to divert time and resources to deal with any issues from releasing the information.
30. On the facts of this matter the Commissioner is satisfied that (by a small margin) the public interest favours the maintenance of the exemption notwithstanding the factors that (as laid out above) favour releasing the information.
31. A central issue here is the timing of the request. It was made on or about 26 October 2014 which is a very short period of time after the termination of the agreement which appears to have happened on or about 21 October 2014<sup>2</sup>. This saw the departure of the then Director of Children's Services. The said termination generated a significant amount of media attention both locally and nationally. These interests were doubt particularly exacerbated by the fact that the Council had previously been the subject of a critical report regarding its provision of children's service.
32. The Commissioner therefore accepts the assertion of the Council that the request, if met, would have generated further enquires at a moment when contextual matters were still fluid and on-going. The Council
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<sup>2</sup> <http://www.bbc.co.uk/news/uk-england-somerset-29706386>

would, in all likelihood, have had to divert time and resources to deal with any issues from releasing the information. The public interest was best served, at the time of the refusal, by the Council being able to focus on more immediate matters generated by the departure of its Director of Children's Services and indeed to concentrate on its crucial function in respect of the welfare of the children for whom it has responsibility.

33. The Commissioner re-emphasises that the timing of the request, in the circumstances of this matter, was particularly crucial. It is quite likely that if the request had been made not much later that the Commissioner would have reached a different decision than he has currently made.



## Right of appeal

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34. 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 123 4504

Fax: 0870 739 5836

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

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

35. 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.
36. 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** .....

**Alexander Ganotis**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
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**SK9 5AF**