

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 3 August 2016

Public Authority: Gloucestershire County Council

Address: Shire Hall
Westgate Street
Gloucester
GL1 2TR

Decision (including any steps ordered)

1. The complainant has made a request to Gloucestershire County Council ("the Council") for correspondence between the Council and a primary school. The Council withheld information under section 36, which provides an exemption where disclosure would prejudice the effective conduct of public affairs. The complainant contested the Council's application of this exemption.
2. The Commissioner's decision is that the Council has correctly applied section 36(2)(b)(ii) and demonstrated that the public interest favours maintaining the exemption. However in applying the exemption outside the time for compliance the Council breached section 17(1).
3. The Commissioner does not require any steps to be taken.

Request and response

4. On 16 June 2015 the complainant wrote to the Council and requested information in the following terms:

This is a request for all correspondence, whether by telephone, electronic message or letter, between Hempsted C of E Primary School and the SHE department and Strategic Finance Department of Gloucestershire County Council between June 2014 and January 2015.

5. The Council responded on 13 July 2015. It disclosed some information, and withheld the remainder under the exemptions provided by section 40(2) and section 42(1).

6. The complainant requested an internal review (specifically for the information withheld under section 42(1)) on 25 July 2015.
7. The Council provided the outcome of its internal review to the complainant on 18 August 2015. It maintained its application of section 42(1).

Scope of the case

8. The complainant initially contacted the Commissioner on 22 September 2015 to complain about the way their information request had been handled, and specifically that the Council had incorrectly withheld information under section 42(1).
9. The Information Commissioner's Office ("the ICO") wrote to the Council to request its submissions on this basis. The Council subsequently issued a revised response to the information request on 30 November 2015 in which it withdrew reliance on section 42(1) and applied the exemption provided by section 36(2)(b)(i), (ii) and (c).
10. The Council issued a further response to the complainant on 10 February 2016, in which it advised that some further relevant information had been identified in respect of the request, but which was already in the public domain. The Council applied the exemption provided by section 21 to this information, and advised the complainant where the information could be publically accessed. The complainant subsequently advised the Commissioner that this further information was not that sought by the information request. On this basis the Commissioner does not consider the further response to be relevant to this case.
11. The Commissioner therefore considers the scope of this case to be the determination of whether the Council has correctly withheld the information under section 36.

Reasons for decision

Section 36 – Prejudice to the effective conduct of public affairs

12. The information withheld under this exemption is correspondence between the Council and a primary school. The council is relying on the exemption provided by section 36(2)(b)(i), (ii), and (c), which 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

13. In deciding whether the Council has correctly engaged the exemption, the Commissioner has first considered who, within the Council, is the 'qualified person' for the purposes of the exemption.
14. The relevant qualified person for the purposes of this exemption is defined by section 36(5).
15. 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.
16. 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, and has continued 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?

17. The Council has provided evidence to the Commissioner that the qualified person's opinion was sought and obtained on 4 January 2016, and that the qualified person was provided with a copy of the withheld information as part of this. The Commissioner is therefore satisfied that the qualified person gave an opinion, and has continued to consider whether the opinion given was reasonable in the terms of the exemption.

Was the opinion reasonable?

18. The Commissioner has issued guidance on the application of section 36¹. 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.

19. In determining whether an opinion is reasonable in the context of section 36(2) and whether the exemption is engaged, the Commissioner must consider whether the inhibition or prejudice claimed relates to the specific subsection of section 36(2) that the Council is relying upon.
20. The Council has stated in correspondence that it is relying on section 36(2)(b)(i), (ii) and (c). However the Commissioner notes that the Council has focused its submissions on the application of section 36(2)(b)(ii) and (c), and specifically on the basis that the relevant inhibition and prejudice 'would be likely to' occur. The Commissioner has therefore continued to consider first whether the qualified person's opinion has demonstrated that section 36(2)(b)(ii) is engaged.

Section 36(2)(b)(ii)

21. The Commissioner's guidance on section 36 explains that information may be exempt under section 36(2)(b)(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 giving their views as part of the process of deliberation. The guidance explains that the rationale for this is that inhibiting the exchange of views may impair the quality of decision making by the public authority. The exemption is therefore about the processes that may be inhibited rather than what is necessarily contained within the information.
22. The Council has confirmed to the Commissioner that the qualified person's opinion is that the inhibition 'would be likely to' occur. This opinion is based on several factors, which are summarised thus:

¹ https://ico.org.uk/media/for-organisations/documents/1175/section_36_prejudice_to_effective_conduct_of_public_affairs.pdf

- The withheld information is correspondence between the Council and a primary school (for which the Council is the Local Authority). The content of the correspondence relates to a complaint and potential claim against the primary school for compensation for an alleged incident.
 - The correspondence represents council officers engaging with the primary school to exchange views and deliberate a response to the complaint. The Council provides such assistance as part of the wider professional services that it provides to schools. The purpose of such assistance is to ensure that schools are provided with correct advice at an early stage of any arising issue; as doing so may help prevent issues from escalating and placing otherwise avoidable burden on the public purse.
 - In the circumstances of this case, the information relates to a live and ongoing issue for which litigation remains a possibility. However, the public disclosure of the communications (i.e. under the terms of the FOIA, rather than controlled disclosure such as through a court direction) would also be likely to inhibit council officers and school staff from expressing themselves frankly and with candour when providing their views in the future. The expectation that such information could be routinely published would cause a 'chilling effect', which would consequently impair the quality of deliberation and resultant decisions.
23. The Commissioner, having carefully assessed the factors considered by the qualified person, has concluded that the qualified person's opinion is reasonable in all the circumstances, and accepts that disclosure would be likely to inhibit the exchange of views for the purposes of deliberation.

The public interest test

24. Having decided that the exemption under section 36(2)(b)(ii) is engaged, the Commissioner has continued to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information. In considering the competing public interest arguments in this case, the Commissioner has drawn heavily upon the Information Tribunal's decision in the case of *Guardian Newspapers Limited and Heather Brooke v Information Commissioner and British Broadcasting Corporation* (EA/2006/0011 and EA/2006/0013).
25. The Commissioner notes, and adopts in particular, the Tribunal's conclusions that, having accepted the reasonableness of the qualified person's opinion that disclosure of the information would, or would be

likely, to have the stated detrimental effect, the Commissioner must give weight to that opinion as an important 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), 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.

26. Applying this approach to the present case, the Commissioner recognises that there are public interest arguments which pull in competing directions, and he gives due weight to the qualified person's reasonable opinion that disclosure would be likely to inhibit the free and frank exchange of views for the purposes of deliberation.

Public interest arguments in favour of disclosure

27. There is a general presumption of openness running through the FOIA and the Commissioner accords strong weight to the public interest in general openness and transparency with regard to decisions made by public authorities.
28. The complainant proposes that the Council, as a public authority, should be transparent about the procedures that it follows so that resultant decisions and responsible officers can be held accountable for their actions.
29. The Council also accepts that there is public interest in ensuring that decision making by public authorities can be understood by the public.

Public interest arguments in favour of maintaining the exemption

30. The Council considers that the disclosure of the withheld information would be likely to inhibit the frankness and candour with which council officers exchange views with schools seeking professional assistance. This would in turn damage the decision making process and impede the Council from achieving the best outcome in a cost effective manner.
31. The Council has further explained to the Commissioner that it considers the withheld information, and the reason why it has been requested, relates to an intrinsically private rather than public interest. This has also been noted by the Commissioner, who is aware from the complainant's own submissions that the request has been made in relation to an alleged incident involving a family member.

Balance of the public interest test

32. The Commissioner recognises that the general disclosure of information held by public authorities aids both transparency and accountability.

33. However in the circumstances of this case it is evident that the request, and the information withheld in response to it, relates to a private interest rather than a wider public concern. It is also understood by the Commissioner that there are mechanisms by which the complainant can seek redress in relation to this private interest.
34. There is a strong public interest in ensuring that council officers are able to freely engage in the exchange of views for the purpose of deliberation. The expectation that such information may be routinely published may reasonably inhibit council officers from providing frank and candid views. Having noted that council officers need to exchange such views with schools in order to provide professional assistance in matters involving complaints and potential claims for compensation, it is reasonable for the Commissioner to conclude that such inhibition may result in severe detriment for these parties, and particularly in relation to their ability to consider issues of liability.
35. For these reasons, the Commissioner has concluded that in this instance the disclosure of the information would be likely to inhibit the Council's ability to undertake the free and frank exchange of views for the purposes of deliberation, and the public interest in maintaining the exemption outweighs that in disclosure. On this basis the information has been correctly withheld under section 36(2)(b)(ii), and the Commissioner does not need to further consider the information under section 36(2)(b)(i) or (c).

Section 17(1) – refusal of request

36. Section 17(1) specifies that a refusal notice must be provided no later than 20 working days after the date on which the request was received.
37. In this case the Council issued its refusal notice outside 20 working days, and therefore breached section 17(1).

Right of appeal

38. 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

39. 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.
40. 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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