

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 05 December 2016

Public Authority: Cardiff Council

Address: County Hall
Atlantic Wharf
Cardiff
CF10 4UW

Decision (including any steps ordered)

1. The complainant requested information about a re-shaping base budget exercise undertaken by Cardiff Council ('the Council'). The Council ('the Council') provided some information but the complainant considered it had not provided all of the information he had requested. During the course of the Commissioner's investigation, the Council acknowledged that it held additional information relevant to the request, but it considered the information to be exempt under sections 36(2)(b)(ii) and 36(2)(c). The Commissioner's decision is that the Council has failed to demonstrate that either of these exemptions are engaged.
2. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the working papers relating to the reshaping base budget exercise which have been withheld under sections 36(2)(b)(ii) and 36(2)(c).
3. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

4. On 7 December 2015 the complainant wrote to the Council to make a follow up request to an earlier request he had made in July 2015. The Council had provided some information in relation to the earlier request and also applied section 22 of the FOIA – information intended for future publication - to other information held. In his request of 7 December 2015 he asked for information in the following terms:

"This is a follow up to FOI07092, which you refused on the grounds of public interest, stating that 'the outcome of the re-shaping budget exercise that you have requested will be available as background information to the Cabinet report which approves the budget proposals for public consultation'.

I have been unable to find such material in the recently published documents associated with the agenda item to be considered at the forthcoming Cabinet meeting. Either I am looking in the wrong place or the background document(s) I requested have not been published yet. Please can you advise me how best to proceed?"

5. In the absence of receiving a response to his request, on 20 January 2016 the complainant requested an internal review of his request.
6. The Council responded on 15 February 2016 and provided the information requested. The Council also apologised that the information in question (which was initially withheld under section 22 of the FOIA) was not made publicly available at an earlier date.
7. The complainant wrote back to the Council on 16 February 2016 and expressed concern that the information provided represented "the complete narrative behind the 'Reshaping Base Budget' exercise".
8. The Council responded on 25 February 2016 and confirmed that it had completed its internal review and it was satisfied that all recorded information held by the Council had been provided.

Scope of the case

9. The complainant contacted the Commissioner on 11 February 2016 to complain about the way his request for information had been handled.
10. During the course of the Commissioner's investigation the Council acknowledged that it had misunderstood what information fell within the scope of the request when it was initially considered. The Council

confirmed that it did hold additional information relevant to the request but it considered it to be exempt under sections 36(2)(b)(ii) and 36(2)(c) of the FOIA. The Council wrote to the complainant to confirm its revised stance.

11. The scope of the Commissioner's investigation is to consider whether the Council should disclose the additional information it has identified or whether it was correct in relying on section 36 of the FOIA.

Reasons for decision

Section 36 – prejudice to the effective conduct of public affairs

12. Section 36 of the FOIA states that information is exempt where, in the reasonable opinion of a qualified person, disclosure would or would be likely to prejudice the effective conduct of public affairs. Section 36 operates in a slightly different way to the other prejudice based exemptions in the FOIA. Section 36 is engaged, only if, in the reasonable opinion of a qualified person, disclosure of the information in question would, or would be likely to, prejudice any of the activities set out in sub-sections of 36(2).
13. In this case the Commissioner is considering the application of the exemptions at sections 36(2)(b)(ii) and 36(2)(c).
14. Section 36(2)(b)(ii) provides an exemption where disclosure would, or would be likely to, inhibit the free and frank exchange of views for the purposes of deliberation. Section 36(2)(c) provides an exemption where disclosure would, or would be likely to, otherwise prejudice the effective conduct of public affairs.

Are the exemptions engaged?

15. In order to establish whether the exemptions have been applied correctly the Commissioner has:
 - Ascertained who is the qualified person or persons for the public authority in question;
 - Established that an opinion was given;
 - Ascertained when the opinion was given; and
 - Considered whether the opinion given was reasonable.
16. With regard to the first two criteria, the Commissioner has established that the opinion was given by Mr David Marr, the Council's Interim

Monitoring Officer. The Commissioner is satisfied that David Marr, as the Council's interim Monitoring Officer is authorised as the qualified person under section 36(5)(h) of the FOIA.

17. In relation to the third criterion, as stated earlier in this notice, the Council introduced its reliance on section 36 during the course of the Commissioner's investigation after it had identified that it held additional information relevant to the request. It is therefore clear that the opinion of the qualified person was not sought when the Council initially responded to the request or at the internal review stage. The Council provided the Commissioner with a copy of the submission put to the qualified person and confirmation that he agreed the engagement of section 36 on 2 June 2016. Therefore the Commissioner has taken this to be the date on which the exemption was first applied.
18. With regard to the fourth criterion, in deciding whether an opinion is reasonable the Commissioner will consider the plain meaning of that word; namely in accordance with reason, not irrational or absurd. If it is an opinion that a reasonable person could hold, then it is reasonable for these purposes. This is not the same as saying that it is the *only* reasonable opinion that could be held on the matter. 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 not reasonable for these purposes if it is an opinion that *no* reasonable person in the qualified person's position could hold. The qualified person's opinion does not even have to be the *most* reasonable opinion that could be held; it only has to be a reasonable opinion.
19. The Commissioner has also been guided by the Tribunal's indication, in the case *Guardian Newspapers & Brooke v Information Commissioner & BBC*¹, that the reasonable opinion is limited to the degree of likelihood that inhibition or prejudice may occur and thus 'does not necessarily imply any particular view as to the *severity* or *extent* of such inhibition [or prejudice] or the *frequency* with which it will or may occur, save that it will not be so trivial, minor or occasional as to be insignificant' (paragraph 91). Therefore, when assessing the reasonableness of an opinion the Commissioner is restricted to focussing on the likelihood of that inhibition or harm occurring, rather than making an assessment as to the severity, extent and frequency of prejudice or inhibition of any disclosure.

¹ Appeal numbers EA/2006/0011 & EA/2006/0013

20. The Commissioner notes that the qualified person signed his agreement to the submission which indicated that the level of prejudice claimed was the higher threshold of "would" prejudice in respect of both section 36(2)(b)(ii) and 36(2)(c). The Commissioner also notes that the qualified person was provided with all the information within the scope of the request, was informed which specific limbs of the exemptions his opinions were being sought on and was provided with reasons for those exemptions being engaged.
21. The submission to the qualified person explained that the re-shaping base budget exercise ('the exercise') was a recognition that the traditional approach of applying percentage targets to directorates was no longer appropriate. The exercise considered the impact of varying degrees of budget cuts with an estimation of their impact. The submission pointed out that it would not have been appropriate for the background information produced in the exercise to have been disclosed prior to issuing budget proposals for consultation. Premature disclosure would have implied that the exercise had produced budget proposals rather than considered the impact of a number of scenarios. Disclosure would not enable the Council to effectively consider options and allow for a safe space for the free and frank exchange of views.
22. The submission also put forward the view that disclosure would lead to employees seeing "information relating to that cohort which were provided on the basis for further deliberation rather than decision". In addition, the submission contends that staff viewing options in which they could be identified "would result in a negative impact on Council service delivery and cause distress to individuals where it is not necessary". The submission also pointed out that formal consultation on budget proposals takes place each year in an open environment, but this takes place once the proposals have been agreed.
23. The Commissioner's approach to section 36(2)(c) is that it should only be cited where none of the other exemptions in part II of the FOIA are relevant. Because section 36(2)(c) uses the phrase "otherwise prejudice", it means that it relates to prejudice not covered by sections 36(2)(a) or (b). In other words, 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).
24. In light of the above, the Commissioner expects a public authority to submit separate representations in relation to each limb of section 36(2) it considers applicable. However, in this case, the record of the qualified person's opinion for the engagement of section 36(2)(b)(ii) and section 36(2)(c) are exactly the same.

25. Because the qualified person has not submitted separate arguments for section 36(2)(b)(ii) and 36(2)(c) the Commissioner has considered the arguments pertinent to the inhibition inherent within each exemption separately.

Section 36(2)(b)(ii) – inhibit the free and frank exchange of views for the purposes of deliberation

26. 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.

27. The Commissioner notes that the qualified person considers that the higher threshold of prejudice applies to the application of 36(2)(b)(ii) ie that disclosure "would" inhibit the free and frank exchange of views for the purpose of deliberation.

28. With regard to the degrees of likelihood of prejudice the Commissioner has been guided on the interpretation of the phrase 'would, or would be likely to' by a number of Information Tribunal decisions. In terms of the 'would prejudice' limb the Tribunal in Hogan v Oxford City Council & The Information Commissioner² commented that 'clearly this second limb of the test places a stronger evidential burden on the public authority to discharge' (paragraph 36). The Tribunal in Hogan said at paragraph 33:

"there are two possible limbs on which a prejudice-based exemption might be engaged. Firstly, the occurrence of prejudice to the specified interest is more probable than not, and secondly there is a real and significant risk of prejudice, even if it cannot be said that the occurrence of prejudice is more probable than not."

The first limb referred to relates to 'would' and the second to 'would be likely'. 'Would' therefore means 'more probable than not'; in other words, there is a more than 50% chance of the disclosure causing the prejudice, even though it is not absolutely certain that it would do so.

² Appeal number EA/2005/0026 & 0030

29. If an authority claims that prejudice would occur they need to establish that either
- the chain of events is so convincing that prejudice is clearly more likely than not to arise. This could be the case even if prejudice would occur on only one occasion or affect one person or situation; or
 - given the potential for prejudice to arise in certain circumstances, and the frequency with which such circumstances arise (ie the number of people, cases or situations in which the prejudice would occur) the likelihood of prejudice is more probable than not.
30. In relation to section 36(2)(b)(ii), the record of the qualified person's opinion states that disclosure would prejudice the Council's ability to consider and develop all potential budget opinions in a safe environment without fear of external comment and/misinterpretation. The exercise took place before budget proposals were set and was designed to help inform Directors and Cabinet in determining how targets could be set for each directorate before final budget targets and proposals for consultation were set. As part of the exercise, directors submitted various options, in confidence. It also states that the working papers and views were still live at the time of the request and are still live now as the working papers not only refer to the current financial year but also the next two financial years
31. In this case, the Council advised the Commissioner that the exercise involved Directors working back from their current budget to estimate how much of their budgets could be reduced before reaching statutory minimum levels of service. Directors were asked to identify how this fit with the Council's target operating model, across one and three years. Directors were provided with a template to complete; completed templates were then discussed with elected members to moderate and consider service priorities. The Council confirmed that the spreadsheets that it disclosed to the complainant on 15 February 2016 are the outcome of the process and represented its plan to reshape the Base Budget as set out in the Budget Strategy Report.
32. In the Commissioner's view the qualified person's opinion does not adequately explain exactly how disclosure "would" prejudice its ability to consider and develop budget options and merely asserts that it would have this effect. In addition, the qualified person states that the working papers and views were still live at the time of the request and are still live now as they refer to the current financial year and the next two financial years. However, the Council has confirmed that the exercise was completed in its entirety by the first week of July 2015 to meet timescales for Cabinet Report preparation.

33. The Commissioner recognises that, whilst decision-making is in train and conclusions have not been reached, an argument can be made that a safe space is needed for public officials to consider options and negotiate outcomes. However, she considers that, in this case, the Council has failed to demonstrate that these conditions apply or explained how disclosure of the specific information *would* result in the inhibition described in section 36(2)(b)(ii). The Commissioner understands that the Council was still carrying out work on its budget strategy at the time of the request. For example the Council issued the consultation of its budget proposals for 2016/2016 on 11 December 2016, with a deadline for responses of 12 January 2016. As such, the Commissioner accepts that the issue of the Council's overall budget strategy was on-going at the time of the request and that the exercise looked at the following two budget years. However, in view of the fact that the exercise for 2015/16 had been completed five months prior to the request the Commissioner considers that, in effect, this particular stage in the budget strategy in terms of exchanging of views about the exercise had come to an end.
34. Having considered all the available evidence, the Commissioner considers that the Council has failed to provide sufficient details of the alleged prejudice and failed to demonstrate the likelihood of the inhibition occurring as a result of disclosure ie that there is more than a 50% change of the prejudice claimed occurring. It follows, therefore, that the Commissioner does not therefore consider that the opinion of the qualified person is a reasonable one and therefore does not therefore consider that section 36(2)(b)(ii) is engaged in this case.

Section 36(2)(c) - otherwise prejudice the effective conduct of public affairs

35. The record of the qualified person's opinion stated that disclosure of the working papers would:
- "have a real and negative impact upon the Council's ability to effectively plans its services and discharge its obligations. Due to the severe effect that some of the options considered would have on services and posts disclosure **would** lead to the possibility of harm and distress caused to members of staff and members of the public, with adverse impact on the morale of both. This would be completely unnecessary in the case of proposals not taken forward for formal public consultation in an open environment".
36. The Commissioner considers that the qualified person has again failed to provide sufficient explanation as to *how* disclosure of the actual withheld information in this case would have a negative impact on its ability plan

its services and discharge its obligations. The opinion has also failed to explain what the "severe effect" of some of the options considered would have on services and posts and *how* disclosure would lead to harm or distress to members of the public and have an adverse effect on the morale of both. The Commissioner considers that in light of the current climate of austerity staff and members of the public would expect an authority to *consider* all proposals and ways to save money, regardless of their impact on staff and processes.

37. Further, as stated earlier in this notice, the Commissioner notes that, at the time of the request, the exercise had concluded, as evidenced by the fact that the Council disclosed the spreadsheets representing the outcome of the exercise in response to the request which is the subject of this notice.
38. In summary, the Commissioner considers that the Council's response failed to provide sufficient detail and explanation as to why it considers disclosure in this case *would* otherwise prejudice the conduct of public affairs. The Council has also failed to demonstrate the likelihood of the prejudice occurring as a result of disclosure ie that there is more than a 50% change of the prejudice claimed occurring. It follows that the Commissioner is not satisfied that the qualified person's opinion about the likelihood of prejudice under section 36(2)(c) is reasonable. Therefore she does not find section 36(2)(c) engaged.

Right of appeal

39. 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

40. 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.
41. 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
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF