

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 11 June 2018

**Public Authority:** Warwickshire County Council

**Address:** Shire Hall  
Warwick  
Warwickshire  
CV34 4SA

#### Decision (including any steps ordered)

---

1. The complainant has requested information relating to Warwickshire County Council's Forestry Services Contracting audit and for information relating to his removal from the Council's Out of Hours Arboricultural Contractor List.
2. The Commissioner's decision is that Warwickshire County Council has correctly applied section 36(2)(b)(ii) to the audit report it has withheld from the complainant in respect of item (i) of his request. The Commissioner has also decided that the Council has complied with parts (ii) and (iii) of the complainant's request by informing the complainant that it holds no recorded information which meets the terms of those parts of his request.
3. The Commissioner requires the public authority to take no further action in this matter.

#### Request and response

---

4. On 24 October 2017, the complainant wrote to Warwickshire County Council and requested information in the following terms:

"As a Freedom of Information Act request to Warwickshire County Council,

- (i) I request details of all of the information contained in the Audit Report on Forestry Services Contracting completed in April 2017, including, but not exclusively, the scope of that review, the findings of the review and the recommendations made.

- (ii) In respect of the Out of Hours Arboricultural List I request all information held for the policies, procedures, written protocols and internal controls in place at the time I 'ceased to be on the list' (Please make clear the date you are applying).
  - (iii) All records relating to the decision process, reviews and meetings that led to my removal from the List of out of hours arboricultural contractors."
5. The Council acknowledged receipt of the complainant's request on 29 November 2017, advising him that, "I have passed on your latest information requests to those who are best placed to answer them. With respect to the other matters in your letter, I am aware that a number of officers have been dealing with your various communications and I am not prepared to start another investigation or begin more protracted correspondence on what are fundamentally the same issues".
  6. On 19 December 2017, the Council wrote to the complainant in response to his request. The Council confirmed that the audit report is not an investigation into the issues the complainant had raised concerning his individual experience. Rather, it concerns the general systems in place for contracting arrangements for dealing with the list of out of hours arboricultural contractors. Therefore most of the report is not pertinent to the issues the complainant had raised. The Council then informed the complainant that it intends to withhold the report in reliance on section 36(2)(b) of the FOIA.
  7. In respect of the second element of the complainant's request, the Council restated the advice given by its Legal Services Manager on 5 October 2017 that 'there was no written statement of procedure to be followed at the time you ceased to be on the list'.
  8. In respect of the third element of the complainant's request the Council claimed that it repeated the request made on 29 October (reference 2015630), where he had asked for:

"all data relating to myself, [name redacted] and my sole trader business [name redacted] for the period 01.01.2014 up to an including 29.11.2016. In particular I request all records of emails, memoranda and other computer and paper held information referring to myself and or my business either held or used by WCC during that period."
  9. The Council told the complainant that both of his requests had been responded to under the FOIA or the Data Protection Act 1998 and the Council considers that points (ii) and (iii) of his current request have already been dealt with.

10. On 25 January 2018, the complainant wrote to the Council to express his dissatisfaction with its response and to ask the Council to undertake an internal review.
11. Having conducted an internal review, the Council wrote to the complainant on 27 March 2018 to advise him of its final position. The Council upheld its decision to apply the exemption provided by section 36(2)(b) of the FOIA to the first element of his request and in respect of the second and third elements of his request, the Council reasserted its claim that they were previously dealt with and responded to.

### **Scope of the case**

---

12. The complainant contacted the Commissioner 12 April 2018 to complain about the way his request for information had been handled.
13. The Commissioner has investigated Warwickshire County Council's application of section 36(2)(b) in respect of its withholding of the audit report requested at part (i) of the complainant's request. She has also investigated whether the Council holds recorded information in respect of parts (ii) and (iii) of the complainant's request which is not considered to be his personal data.

### **Reasons for decision**

---

#### **Part (i) of the complainant's request**

##### **Section 36 – Prejudice to the conduct of public affairs**

14. Section 36 allows a public authority to withhold recorded information where its disclosure would prejudice the effective conduct of public affairs.
15. The Council has confirmed to the Commissioner that it is relying on section 36(2)(b)(ii) to withhold the Audit Report requested at item (1) of the complainant's request.
16. The Council has provided the Commissioner with a copy of the withheld information. This is entitled, "Forestry Services – Contracting".
17. The withheld information is a Risk and Assurance Services audit report which records the key findings in respect of work carried out to provide independent assurance on the Council's contracting arrangements within its forestry section.

18. The Council commissioned a review of its contracting arrangements following its receipt of a complainant relating to its "Approved Contractors" list used in connection with occasional out of hours arboricultural work within the county.
19. The Commissioner notes that the withheld report does not contain the Council's investigation of the issues raised by the complainant following his removal from the list. The withheld report is solely concerned with the identification and assessment of good practice and risks associated with the Council's management and contracting arrangements for work undertaken by the Council's Forestry Services.
20. Section 36(2) 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."*
21. 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.
22. The Commissioner asked the Council to provide her with evidence that the qualified person considered the application of section 36 personally. The Council did this by sending the Commissioner a record of the qualified person's opinion.
23. The Council's qualified person for the purpose of considering the application of section 36 of the FOIA is the Council's Head of Law and Governance and Interim Head of Human Resources and Organisational Development – the Council's Monitoring Officer, Ms Sarah Duxbury.
24. The withheld information was provided to Ms Duxbury on 14 December 2017 so that she could review it and consider the application of section 36.

25. The Council's record shows that Ms Duxbury approved the Council's application of section 36(2)(b)(ii) in respect of the withheld report. Her opinion is recorded as:

"It is my view that disclosure of the audit report would inhibit the free and frank exchange of views between managers and auditors in future about potential weaknesses in systems and processes that are being audited. This in my view would have a detrimental impact on the ability of the organisations to scrutinise and audit its internal systems of control and the ability of the Chief internal Auditor to provide the necessary governance assurances."
26. The record also shows that Ms Duxbury considered arguments which favour disclosure of the audit report as well as those which favour its continued withholding.
27. The Commissioner has noted the contents of the qualified person's opinion. She is satisfied that the qualified person has given an opinion and she must now consider whether that opinion is reasonable.
28. In considering whether the qualified person's opinion is "reasonable", the Commissioner adopts the plain meaning of that word. She has referred to the definition of "reasonable" given in the Shorter English Dictionary: The definition given is; "in accordance with reason; not irrational or absurd".
29. 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; she only needs to recognise that a reasonable person could hold the opinion given. In this case, the Commissioner is satisfied that a reasonable opinion has been given.
30. The Council believe that disclosure of the withheld report would prejudice the free and frank exchange of views for the purpose of deliberation, particularly between managers and auditors in respect of weaknesses in the systems and processes which were audited. In the opinion of the Council's qualified person, disclosure of the audit report would have a detrimental impact on the ability of the Council to scrutinise and audit its internal systems of control and the ability of the Chief Internal Auditor to provide the necessary governance assurances.
31. It is the Council's position that the effectiveness of its internal audit team is critical to the overall governance of the organisation. It exists to inform improvements to internal processes and facilitate good and effective governance by providing assurance in respect of the systems and controls in place and the effective use of resources.

32. In identifying this prejudice, the qualified person took into account the view that managers would not be fully open with auditors and would not share their views in a full and frank way, were they aware that audit reports would be disclosed publicly in their entirety. The Council argues that the audit process would be lengthier and more challenging to conduct and therefore this would not be in the Council's interests or the interests of the wider public as it would be detrimental to making swift improvements and protecting the public purse where weaknesses in its control system are identified.
33. The Commissioner has decided that section 36(2)(b)(ii) is engaged.

*The Public Interest*

34. The Council's application of sections 36(2)(b)(ii) 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.
35. 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*

36. 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.
37. Disclosure of publicly held information generally assists the public to understand how public authorities make their decisions and carry out their functions. Disclosure therefore promotes the better understanding of the decisions made by public authorities.
38. In this case the Commissioner and the Council recognise the public interest inherent in the Council being open and transparent in how it deals with concerns raised by members of the public. The Council recognises that it is important for the public to know there are robust systems of internal control in place and there are appropriate and rigorous checks made of its systems through its audit process.
39. Disclosure may foster trust in public authorities and may also allow greater public participation in the Council's decision making processes.
40. The Commissioner gives some weight to the apparent purpose behind the complainant's request, which she acknowledges has flowed from his removal from the Council's Out of Hours Contractors list. This weight is somewhat limited by virtue of the complainant's purpose being restricted to gaining information which relates to his own complaint and circumstances, and the fact that the withheld report does not contain the Council's investigation of the issues raised by the complainant.
41. Having examined the withheld information, the Commissioner finds there is some public interest knowing that the Council has identified areas of weakness in its systems for operating its out of hours arboricultural contractors list. She acknowledges that the risks identified in the report appear to be appropriate and that each risk has been associated with a 'recommended action', a priority level and a target date for implementation.



*Public interest arguments in favour of maintaining the exemption*

42. The Council asserts that the role of its internal audit team is critical to the overall governance of the organisation. The audit team exists to inform improvements to the Council's internal processes and to facilitate good effective governance. This work allows the Council to be assured that it has systems in place which promote the effective use of resources.
43. It is the opinion of the Council's Chief Auditor that disclosure of the withheld report would result in a lengthier audit process due to the detrimental impact it would have on the free exchange of views. Audits would become more challenging if participants in that process believed that their contributions would be made public. This would not be in the Council's interests, nor would it be in the public's interest as disclosure would impede the Council in learning lessons and making swift improvements to protect the public purse.
44. Here, the report which the complainant seeks, is focussed on the management of the Council's approved contractor list in relation to out of hours arboricultural work on the county's road network. This work is undoubtedly important particularly during adverse weather conditions. The emergency nature of this work makes it equally important for the Council to have confidence in the Council's selection process and contracting arrangements for providers of this work.
45. The Council argues that disclosing the report at this stage could negatively impact its existing contractor relationships and any loss of confidence could impact on their willingness to provide this service in the future. This would clearly reduce service availability at peak times and particularly following severe weather.

*The Commissioner's decision*

46. Whilst the contents of the withheld information are important for considering where the balance of the public interest lies, the primary reason for the Council's application of section 36 is the processes that may be inhibited, rather than the contents of the information<sup>1</sup>.
47. The Commissioner accepts that releasing the audit report at this time would likely result in a chilling effect. She acknowledges that disclosure of the audit report would lead to officers being reticent to discuss

---

<sup>1</sup> [https://ico.org.uk/media/for-organisations/documents/1175/section\\_36\\_prejudice\\_to\\_effective\\_conduct\\_of\\_public\\_affairs.pdf](https://ico.org.uk/media/for-organisations/documents/1175/section_36_prejudice_to_effective_conduct_of_public_affairs.pdf)



matters candidly and to provide opinions and/or have them recorded. It is apparent to the Commissioner that this reticence would be real and it would result in detriment to the Council's decision making process.

48. The audit report is dated 11 April 2017 and the complainant's request was made on 24 October, as such the withheld information is still very recent. The Commissioner must acknowledge this in determining where the balance of the public interest lies and also to what information has been made public which promotes transparency and provides the public with appropriate assurances that the Council has robust process in place. With that in mind, the Council drew the Commissioner's attention is a letter sent to the complainant on 5 October 2017, in which the Council confirmed a finding of the audit review which is relevant to the way in which contractors are added to or removed from the out of hours list. That letter states:
49. The Commissioner considers that the information disclosed to complainant (above) achieves a degree of transparency about the findings of the internal audit without prejudicing the process that led to the outcome and therefore the public interest in releasing the full report is somewhat reduced.
50. In the Commissioner's opinion there is insufficient weight of public interest in favour the disclosing the withheld report to counter the detriment that disclosure would have in respect of the Council's need for 'safe space'.
51. The Commissioner considers that disclosure of the withheld report would have a significant negative impact on the Council's decision making process: She agrees with the Council that, in the circumstances of this case, it is necessary to have a 'safe space' to receive candid advice from its officers and to discuss that advice without the threat of disclosure.
52. The Commissioner is content that the public interest in this case has been served to some extent by the disclosure of the information outlined above at paragraph 48.
53. The Commissioner's decision is that the public interest favours the continued withholding of the information requested by the complainant. The Commissioner has decided that the Council is entitled to rely on sections 36(2)(b)(ii) to withhold all the audit report.

#### **Part (ii) of the complainant's request**

54. Part (ii) of the complainant's request concerns "all information held for the policies, procedures, written protocols and internal controls in place at the time I 'ceased to be on the list'.

55. The audit report referred to above, makes clear that the Council followed no formal procedure when the complainant was removed from the out of hours contractor list. Therefore the Council's response to this part of the complainant's request is accurate, i.e. "there was no written statement of procedure to be followed at the time you [the complainant] ceased to be on the list".
56. The complainant drew the Commissioner's attention to the contents of a letter he had received from an officer the Council on 16 December 2016. That letter contained references to a number of meetings and reviews having taken place which included the following:
- Liaison meetings where the out of hours list is reviewed. These meetings are between County Highways and Forestry, and they are chaired by the Highways and Transportation Manager with the Group Manager for Heritage and Environment attending.
  - The out of hours contractor list is reviewed annually by Area Managers in County Highways in conjunction with the Council's tree managers from the Forestry Section; and,
  - The decisions to include or remove contractors from the list are taken jointly by senior officers or managers within the County Highways and Forestry Section".
57. The above references suggest that they are formal and would be subject to some form of policy, procedure and/or protocol.
58. The Council has advised the Commissioner that, "The meetings referred to in the correspondence [...] were general review meetings that covered a multitude of issues in relation to the management of highway trees and not specifically the 'out of hours list'. Such meetings would take place annually in the autumn but further meetings were sometimes held in spring, if required. The council did not consider such meetings to be relevant to the requestor's request for a formal procedure in relation to his removal from the list...", and, "As the meetings are in effect informal review meetings to share information across the team, there is no formal procedure in respect of how decisions are made and recorded."
59. The Council advised the Commissioner that it holds informal minutes for these meetings and that it has identified two sets of minutes that refer to the requestor. These minutes are dated 11 October 2016 and 14 February 2017 and as such they post-date the complainant's removal from the out of hours contractors list.
60. If these minutes were to be considered as being relevant to the complainant's request in terms of them being a relevant procedure, they did not "lead" to his removal from the list and thus would fall outside of

the scope of his request. The first set of minutes refers to the issuing of a booklet which does not contain the requestor's name. This in effect confirms the decision rather than the procedure for making that decision. The second set of minutes record the fact that an audit investigation was being carried out at that time. This minute does not record what led to the removal of the complainant from the list.

61. The Council informed the Commissioner that it does not consider it necessary for it to have a formal procedure for informal team review meetings. Nevertheless, following the internal audit report [part (i) of this request], the Council recognises the need for it to have a specific process for determining the approval or removal of contractors from the out of hours contractors list. To that end, a draft procedure has been produced, which the Council has shared with the complainant. At the time of writing this notice the draft procedure had not been finalised and approved.
62. The Council has assured the Commissioner that it has carried out extensive searches for information relating to the complainant. These searches have been detailed for the Commissioner's consideration. The Council's position is that no information relevant to the complainant's request has been found other than the two sets of minutes which are not within its scope.
63. To substantiate its position, the Council referred the Commissioner to the audit report which noted the absence of a written procedure for compiling the list of out of hours contractors. The report found that the absence of a procedure led to a system which operated inconsistently.
64. The Commissioner has considered the representations made by the Council in respect of part (ii) of the complainant's request. The Commissioner accepts those representations and finds that the Council does not hold the requested information. The Commissioner's decision in respect of part (ii) of the complainants request is that the Council has complied with section 1 of the FOIA.

### **Part (iii) of the complainant's request**

65. In part (iii) of his request, the complainant asked for "All records relating to the decision process, reviews and meetings that led to my removal from the List of out of hours arboricultural contractors."
66. When this request was received, the Council considered it to be very similar to a subject access request made by the complainant on 29 November 2016 and a further request on 21 November 2017. The

Council therefore determined that section 8(3) of the Data Protection Act 1998 applied.<sup>2</sup>

67. The Council had concluded that the whole of part (iii) of the complainant's request was covered by the provisions of the Data Protection Act, on the grounds that it related to records about him and his removal from the 'out of hours list'.
  68. Now, following its receipt of the Commissioner's enquiry, the Council has revisited part (iii) to determine whether it holds any recorded information, which is not the complainant's personal data, which meets the criteria of part (iii) of the request and which falls to be considered under the provisions of the FOIA.
  69. Having carried out the searches referred to above at paragraph 62, the Council has informed the Commissioner that it has found no information other than the two sets of minutes referred to above which fall outside the scope of the request.
  70. The Commissioner agrees with the Council that the two sets of minutes fall outside the scope of the complainant's request. She is satisfied that the Council hold no recorded information which meets the terms of part (iii) of the complainant's request and therefore her decision is that the Council has complied with section 1 of the FOIA.
- 

---

<sup>2</sup> The Commissioner has considered both of these requests separately under reference FS50706802 and FS50714626.

## Right of appeal

---

71. 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](mailto:GRC@hmcts.gsi.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

72. 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.

73. 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**