

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 February 2020

Public Authority: Hastings Borough Council

Address: Hastings Town Hall
Queens Square
Hastings
TN34 1TL

Decision (including any steps ordered)

1. The complainant asked Hastings Borough Council for the final peer review report and associated correspondence which relates to a Peer Review undertaken on the Council's behalf by the Local Government Association. The Council confirmed that it did not intend to publish a final report but confirmed that it held the report in draft format along with certain other related information. The Council informed the complainant that it was withholding this information in reliance on section 36 of the FOIA.
2. The Commissioner's decision is that Hastings Borough Council has correctly applied the exemptions to disclosure provided by sections 36(2)(b) and 36(2)(c) of the FOIA. The Council is therefore entitled to withhold the information the complainant has asked for.
3. The Commissioner requires the public authority to take no further action in this matter.

Request and response

4. On 14 January 2019, the complainant wrote to the Council to ask it to provide him with the following recorded information:

"Hastings Borough Council recently asked the Local Government Association to carry out a corporate peer challenge.

Please provide:

1. The final peer review report
2. Any correspondence discussing publication of the peer review
3. Any correspondence between the council and the peer review team

I would be interested in any information held by your organisation regarding my request. I understand that I do not have to specify particular files or documents and that it is the department's responsibility to provide the information I require. However, if it is not possible to provide the information requested due to the information exceeding the cost of compliance limits, please provide advice and assistance, under the obligations of the Act, as to how I can refine my request.

I would like to receive the information on email."

5. The Council responded to the complainant's request on 21 February 2019, advising him that, "The Review Team wrote a draft report about their visit to inform the Council of its findings and recommendations. The report will not be finalised". The Council sent the complainant a copy of the report's recommendations and action plan but refused to disclose any correspondence regarding the publication of the peer review and correspondence between the Council and the peer review team in reliance on section 36 of the FOIA - 'Prejudice to the conduct of public affairs'.
6. On 6 March 2019, the complainant wrote to the Council and requested that it carries out an internal review of its decision to withhold the correspondence he seeks. The complainant listed his reasons why he considered the report and correspondence he has asked for should be made public. The complainant also asserted that the Council's response had failed to differentiate between the different parts of his request and had not distinguished the public interest arguments associated with the disclosure of the final report and the correspondence.
7. Following the completion of its internal review, the Council wrote to the complainant to advise him that it did not agree with his assertions and confirmed that, "There is and will not be a final report".

Scope of the case

8. The complainant contacted the Commissioner on 15 March 2019 to complain about the way his request for information had been handled.

9. The Commissioner advised the complainant that the focus of her investigation would be to determine whether Hastings Borough Council has handled his request in accordance with the FOIA, and specifically whether the Council is entitled to rely on section 36 of the FOIA as a basis for refusing to provide him with the information it is withholding.

Reasons for decision

Section 36 – Prejudice to effective conduct of public affairs

10. The Council has confirmed to the Commissioner that it relies on the provisions of sections 36(2)(b) and 36(2)(c) to withhold the information requested by the complainant.
11. The withheld information is partially comprised of emails between the Council and the Local Government Association which concern the setting up of the Peer Review and information relating to the persons conducting the review. Some of the information is marked as being 'Not for Publication' and other information is marked 'Confidential'. A footnote claims that it is privileged, and that its copying and distribution is strictly prohibited.
12. The remaining withheld information is comprised of the 'Corporate Peer Challenge, Hastings Borough Council, Feedback Report' dated 22 – 24 March 2017, and the same information with deletions, insertions and comments.
13. All councils are expected to undertake a peer review, although this is not a requirement. In this case, the LGA suggested to the Council that it was an appropriate time to conduct a peer review.
14. The withheld reports – the draft and the draft with amendments, contain a narrative which the Council does not accept. The Council refused to sign-off a final report following discussions between its Leader, Deputy Leader and two Directors. The Council discussed the LGA's report with the LGA, but the Council holds no records of these discussions.
15. The draft reports were discussed with the LGA during telephone calls. There are no records of these calls.
16. Sections 36(2)(b) and 36(2)(c) state –

"(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 purposes of deliberation, or

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

17. The exemption provided by sections 36(2)(b) and 36(2)(c) is engaged if, in the reasonable opinion of a qualified person, disclosure would or would be likely to prejudice the effective conduct of public affairs.
18. To engage this exemption, the public authority's "qualified person" is required to consider the withheld information and the exemption which applies to it. This consideration cannot be delegated to another person within the public authority.
19. 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 copy of its request to the Council's Monitoring Officer to apply section 36 to the information the complainant has requested. That email is dated 14 February 2019.
20. The Council's qualified person is the Council's Monitoring Officer. The document in which she gave her qualified person's opinion is an email dated 18 February 2019.
21. In order to give her opinion, the qualified person had access to the information which the complainant has asked for, including the general and preliminary information, the draft report and its recommendations. The qualified person also had discussions with the Council's Director of Corporate Services and Governance.
22. The qualified person was not provided with any submissions about whether the exemption is engaged. The Council has informed the Commissioner that the qualified person read the information and guidance and made her decision following a discussion with the information officer.
23. The Council has informed the Commissioner that the qualified person was not provided with any arguments which were contrary to the engagement of the section 36 exemption.
24. The qualified person's opinion records that the LGA's report is based on interviews with the Council's officers and members, and that the

interviewees had been told they could be frank when responding to questions about how the council is managed.

25. The qualified person makes the point that the draft report was not agreed and was abandoned. She recorded her view that disclosure of the draft report would prejudice the Council's relationship with the LGA and be likely to create press and public reaction to the report's findings.
26. The qualified person noted that certain of its residents publish council information on their Facebook accounts and this would result in extra strain on the Councils resources at a time when funding cuts have seen staffing cut by nearly half.
27. In view of the document evidencing the qualified person's opinion, the Commissioner is satisfied that the Council's qualified person has given an opinion in this case. She must now consider whether that opinion is reasonable.
28. 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".
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.
30. 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.
31. The Council's rationale for its application of section 36 is primarily founded on the likely inhibition of the process by which the review took place¹. The Council asserts that that the disclosure of the requested information would prejudice the effective conduct of public affairs. It says, "Interviews were taken with officers and members of the Council on a frank, open and confidential basis", and, "Should the basis of those interviews not been confidential the review would not have worked for obvious reasons".

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https://ico.org.uk/media/fororganisations/documents/1175/section_36_prejudice_to_effective_conduct_of_public_affairs.pdf

32. In this case, the Commissioner is satisfied that a reasonable opinion has been given and therefore she finds that the exemption is engaged. Having accepted that the exemptions provided by sections 36(2)(b) and 36(2)(c) are engaged, the Commission must now consider whether, in all the circumstances of the case, the public interest in maintaining the exemptions outweighs the public interest in disclosing the information.

The public interest

33. 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 concerning the application of the public interest test in section 36 cases:

- 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), she 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.

34. 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.
35. Such disclosure of publicly held information assists the public in understanding the basis and how public authorities carry out their functions and make their decisions. This in turn fosters trust in public authorities.
36. The Commissioner also recognises that disclosure may also allow greater participation by the public in the Council's decision-making process and to make appropriate challenges to those decisions.
37. In this case, the requested information consists of emails relating to the peer review process and the draft report compiled by the LGA.
38. The Commissioner acknowledges the comments made by the complainant in his request for internal review. These comments were made in rebuttal of the Council's refusal. She particularly notes his comment that, "The importance of transparency in local government is well-established and releasing the independent findings of external peers would only enhance the conduct of public affairs because it would shed light on the running of a democratically-accountable organisation and the spending of tax payer's money."
39. The complainant also makes the following assertions:

"The reason why the Council has not published this report is because it disagrees with the narrative contained within it", and "if the Council disagrees with elements of the report then it should explain why publicly."

"It is very hard for the public to make judgements about the running of the Council when it is not in possession of the full facts. The authors wrote the review intending it to be for public consumption so the idea that releasing the report would or would be likely to inhibit the free and frank provision of advice is nonsensical."

"In fact that the Council itself invited the Local Government Association to conduct this review."

"Publication of this report would not prejudice the relationship between the Council and the Local Government Association because the Local Government Association encourages publication, Indeed, the vast majority of councils do 'as part of their continuing commitment to be accountable to the communities they serve'".

40. The Council says that it disagrees with the complainant's comments. It says that the LGA facilitates the peer review process and on this occasion the narrative is in dispute between those concerned in its production. It adds, "We agree that the Council should be transparent and democratically accountable which is why, despite the report being in dispute and not finalised, we have taken the decision to publish the recommendations. We stand by our view that in these circumstances participants need to be able to express themselves without the restriction of publication".
41. The Commissioner has examined the withheld information. The Council has advised the Commissioner that the Revised Draft Report contains edits and comments made by its Leader, Deputy Leader and two Directors. It has not been shared internally with any staff outside of this group of senior leaders, including with Trades Union representatives and staff who took part in the review process.
42. The qualified person's opinion is based on the final report being structured on interviews carried out with the Council's officers and members. The Commissioner understands that these interviews were carried out under 'Chatham House Rules' where the interviewees were told that they could be frank when talking about how the Council is managed. On reading the two draft Reports, the Commissioner was unable to find any instance where a comment or response is attributable to a particular officer or member.
43. The Council explained why the potential publication of the report would prejudice the effective conduct of public affairs, when the comments/responses are anonymised.
44. The Council said it, "...is a fairly small organisation with 2 Directors and 4 Assistant Directors whose names are in the public domain. As to the Councillors, the Leader, Deputy Leader and Cabinet members are also all in the public domain", and "...it is very easy to be able to attribute comments to whom has the operational responsibility. That is so both in terms of lead officers and lead councillors with certain portfolios". The other issue for the Council is the lack of consensus as to what was agreed.
45. The Council emphasise that the LGA's recommendations have been released into the public domain. It says, "Releasing a report which is itself disputed serves no purpose", and "Local authorities must be given space to be able to scrutinise their own structures and working practises within a 'safe space' without the threat of publication in the public domain.

46. Additionally, the Council asserts that “the discourse surrounding the interviews contained people’s personal opinions of the other officers and members of the council and the way it works, and these views are contested. To release this information into the public domain would be a breach of confidentiality that took part”.
47. The Commissioner finds that the public interest in maintaining the exemption provided by sections 36(2)(b) and (c) is greater than the public interest favouring the disclosure of the withheld information. The Commissioner considers that officials should be able to consider and discuss the setting up of the peer review and the LGA’s draft report in a ‘safe space’, without the fear of inappropriate disclosure.
48. In the Commissioner’s opinion, without that safe space, the loss of frankness would damage the quality of any advice given and would impact on good decision making. The Commissioner must also recognise the ‘Not for publication’ and ‘Confidential’ markings on some of the withheld documents and she must give appropriate weight to these.
49. Likewise, the Commissioner gives weight to the fact that the Council has published the LGA’s recommendations. In the Commissioner’s opinion this publication has greatly served the public interest in knowing what the LGA’s recommendations are, how the Council has responded to those recommendations, and how it intends to respond.
50. The Commissioner accepts that publishing the draft report would identify where the Council disagrees with the LGA’s narrative and she also accepts the complainant’s assertion publication of the report would allow the public to properly make judgements about the running of the Council.
51. The Commissioner agrees with the complainant’s assertion that the report’s authors wrote the review intending it to be for public consumption. However, she does not agree with the second part of his assertion that it is nonsensical that publication of the report would result in the inhibition of free and frank of advice. On the contrary, the Commissioner considers a detrimental impact on the ‘safe space’ and the resultant loss of candour would be a real possibility.
52. In the Commissioner’s opinion, disclosure of the withheld information would prejudice the future participation of the Council’s officers and members in similar exercises, particularly where they have been told their interviews would be treated as confidential.
53. The Commissioner notes that the Council did not pay a fee to the LGA to carry out its Peer Review process. This is because the Council pay an annual membership subscription to the LGA. The only additional

expenditure the Council met included office consumables and lunch allowances for the Peer Review Team.

54. Having considered the public interest and bearing in mind that the Council has published the LGA's recommendations, the Commissioner considers that greater weight must be given to maintaining the section 36 exemption. The Commissioner's decision is that Hastings Borough Council is entitled to rely on sections 36(2)(b) and 36(2)(c) of the FOIA to withhold the information requested by the complainant.

Right of appeal

55. 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@justice.gov.uk

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

56. 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.
57. 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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