

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 September 2018

Public Authority: Doncaster Council

Address: Civic Office
Waterdale
Doncaster
South Yorkshire
DN1 3BU

Decision (including any steps ordered)

1. The complainant submitted a request to Doncaster Council (the Council) seeking a copy of a particular letter sent by Sajid Javid, the then Communities Secretary, and also seeking copies of emails sent or received by the Council's Chief Executive and Mayor concerning the subject of devolution in Yorkshire. The Council disclosed the copy of the letter sent by Mr Javid. However, it sought to withhold the remaining information falling within scope of the request on the basis of section 36(2)(b)(ii) (effective conduct of public affairs) of FOIA. During the course of the Commissioner's investigation the Council disclosed all of the information it was seeking to withhold on the basis of this exemption with the exception of one email chain. The Commissioner has concluded that this email chain is exempt from disclosure on the basis of section 36(2)(b)(ii) of FOIA and that in all the circumstances of the case the public interest favours maintaining this exemption.

Background

2. In September 2015 38 devolution bids were submitted to the government for consideration, including five from across Yorkshire.
3. In October 2015 the then Chancellor, George Osborne, signed an agreement with the leaders of the Sheffield City Region, one of the five Yorkshire bids, to devolve powers and install a directly elected mayor. Initially involving nine local authorities across South Yorkshire, North

Derbyshire and North Nottinghamshire the deal was later amended only to include the local authorities of Barnsley, Doncaster, Rotherham and Sheffield.

4. However, in August 2017, 17 of the 20 Yorkshire councils, including both Barnsley and Doncaster councils, publicly stated their commitment to the 'One Yorkshire' option of a broader devolution deal within the region.
5. Sajid Javid, the then Communities Secretary wrote to the leaders of all Yorkshire Councils on 15 September 2017 and explained that the government's position was as follows:

'We are not at this point prepared to consider any other deal proposal which would cut across or unravel that Sheffield City Region deal.'

Parliament, with the consent of the four councils, has already legislated to implement key elements of the Sheffield City Region deal, in particular for a mayoral election in May 2018.

Government has no intention of seeking any further legislation to undo what has already been enacted on the deal.'

6. Shortly afterwards the leaders of Barnsley and Doncaster councils voted against the South Yorkshire deal in order to pursue a pan-Yorkshire one at a meeting of the Sheffield City Region Combined Authority.¹
7. In December 2017 local polls were held in Barnsley and Doncaster asking residents whether they favoured the One Yorkshire devolution option or the Sheffield City Region model. The polls found in favour of the One Yorkshire option by a margin of 85% to 15%.
8. In May 2018 the Sheffield City Region mayoral election took place with Dan Jarvis being elected as the first Mayor of the Barnsley, Doncaster, Rotherham and Sheffield Combined Authority.

¹ Meeting of Sheffield City Region Combined Authority held on 18 September 2017:
<http://meetings.southyorks.gov.uk/documents/g3636/Printed%20minutes%2018th-Sep-2017%2009.30%20Sheffield%20City%20Region%20Combined%20Authority.pdf?T=1&zTS=B>

Request and response

9. The complainant submitted a request seeking the following information to the Council on 2 January 2018:

'1) A copy of the response sent by Doncaster Council to the letter issued by Communities Secretary Sajid Javid on the subject of Yorkshire devolution dated 19th December 2017.

2) Copies of any e-mails exchanged between the Chief Executive and Mayor on the subject of devolution or Sajid Javid between 18/12/2017 and 02/01/2018.

3) Copies of any e-mails exchanged by the Chief Executive and/or Mayor with the leaders/chief executives of:

- Sheffield City Council*
- Rotherham Metropolitan Borough Council*
- Barnsley Metropolitan Borough Council*
- Sheffield City Region Combined Authority*
- West Yorkshire Combined Authority*
- Leeds City Council*
- Bradford Metropolitan District Council*

on the subject of devolution or Sajid Javid between 18/12/2017 and 02/01/2018.'

10. The Council responded to the request on 5 February 2018. It provided the complainant with a copy of the letter falling within the scope of part 1) of the request. However, it argued that the remaining information which it held was exempt from disclosure on the basis of section 36(2)(b)(ii) of FOIA.
11. The complainant contacted the Council on the same day and asked it to conduct an internal review into this decision.
12. The Council informed him of the outcome of the internal review on 16 February 2018. The review upheld the application of section 36(2)(b)(ii) of FOIA.

Scope of the case

13. The complainant contacted the Commissioner on 19 February 2018 in order to complain about the Council's decision to withhold information falling within the scope of his request. During the course of the Commissioner's investigation she advised the Council that some, albeit not all, of the information which it was seeking to withhold had

previously been provided to the complainant by Barnsley Council in response to a request he had submitted to it. As a result the Council provided the complainant with the parts of the withheld information which had already been disclosed by Barnsley Council. Following a further review of its position the Council provided the complainant with all but one of the emails which it had previously withheld. As a result of these developments, this decision notice simply considers whether this last remaining email, actually a short email chain comprising two emails, is exempt from disclosure on the basis of section 36(2)(b)(ii) of FOIA.

Reasons for decision

Section 36 – effective conduct of public affairs

14. Section 36(2)(b)(ii) of FOIA states that:

'(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-...

...(ii) the free and frank exchange of views for the purposes of deliberation'

15. In determining whether these exemptions are engaged the Commissioner must determine whether the qualified person's opinion was a reasonable one. In doing so the Commissioner has considered all of the relevant factors including:

- Whether the prejudice relates to the specific subsection of section 36(2) that is being claimed. If the prejudice or inhibition envisaged is not related to the specific subsection the opinion is unlikely to be reasonable.
- The nature of the information and the timing of the request, for example, whether the request concerns an important ongoing issue on which there needs to be a free and frank exchange of views or provision of advice.
- The qualified person's knowledge of, or involvement in, the issue.

16. Further, 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. This is not the same as saying that it is the only reasonable opinion that could be held on the subject. 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 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.

17. With regard to the process of seeking this opinion the Council sought the opinion of the qualified person, in this case the Council's Monitoring Officer, on 2 February 2018 and he provided his opinion on the same day. The qualified person was provided with a copy of the withheld information itself and arguments both for and against the engagement of section 36(2)(b)(ii) of FOIA.
18. With regard to the opinion itself, the qualified person argued that the issue of devolution in Yorkshire remained a live issue and one of key importance to the region. He also noted that it had been difficult for Yorkshire local authorities to produce proposals that would get 'buy in' from different areas. The qualified person explained that in his opinion the Chief Executives and politicians need to have a confidential channel of communication with other parties which is not in the public eye so that they have a safe space to discuss the future direction of the devolution options and to exchange views in private as to how those options might operate away from public scrutiny. The qualified person argued that if they were not able to do this, then there is a risk that in the future they may be less frank in such exchanges both in relation to this particular issue, and other key issues, resulting in options being 'off the table' and not fully explored to the detriment of effective decision making (ie a chilling effect). The qualified person concluded therefore that disclosure would be likely to inhibit the free and frank exchange of views for the purpose of deliberation.
19. In his submissions to the Commissioner, the complainant challenged a number of aspects of the qualified person's reasoning.
20. Firstly, he argued that all of the local authorities in Yorkshire had, at the time of his request, clearly stated their positions in relation to devolution in the region, including the local authority which is the focus of this complaint (ie Doncaster). Therefore, the complainant argued that the policy of devolution had been decided and was not continuing to be deliberated. In support of this position the complainant noted that the Council and 16 other councils in the region had publically stated their commitment to the 'One Yorkshire' option on 1 August 2017. Sheffield and Barnsley Councils had also publically stated their positions at the Sheffield City Region Combined Authority meeting of 19 September 2017. Furthermore, the complainant noted that the government has repeatedly stated its position that it is committed to the Sheffield City Region/south Yorkshire devolution agreement. Consequently, the

complainant argued that it was incorrect for the Council to argue that the devolution process continued to be deliberated. Therefore, in his opinion there was no need for a 'safe space' for ongoing discussions to which the Council referred to. The complainant also noted that the communities of Barnsley and Doncaster had been consulted on the devolution issue in December 2017 and this further undermined the safe space arguments given that the Commissioner's guidance explains that such arguments only apply if the decision in question has not been opened up for general external comment.

21. Furthermore, the complainant noted that the Commissioner's guidance explained that once a decision had been finalised, chilling effect arguments become more and more speculative as time passes and it will be more difficult to make reasonable arguments about a generalised chilling effect on all future discussions.
22. To summarise this aspect of the complainant's submissions, he argued that the Council's position in respect of devolution was settled and that deliberations around this issue were therefore concluded by the point he submitted his request. Rather, in the complainant's view the issue in question was the failure to implement the agreed and legislated Sheffield City Region Deal. Moreover, as there were no ongoing deliberations about devolution ongoing, the complainant argued that the safe space arguments identified by the qualified person did not apply and the chilling effect arguments should only be given minimal (if any) weight. The complainant also suggested that if the Commissioner accepted that the issue of devolution was ongoing, then this would have a deeply concerning impact on the application of FOIA as it would mean that any issue could be determined to be a live issue in perpetuity.
23. Secondly, the complainant argued that the chilling effect arguments were irrelevant as there are many valid alternative methods that Chief Executives of the local authorities can use to exchange candid or confidential views such as the regular meetings of the One Yorkshire group of council leaders and Chief Executives, telephone conversations as well as social media.
24. Thirdly, the complainant argued that if the behaviour of the Chief Executives were to change, it would change when they were made aware of the request being submitted which would bring about a more cautious attitude to e-mail communication and not the disclosure of the information. Therefore, there is no causal link between disclosure and the inhibition. However, as the Chief Executives involved are senior public servants who are well aware of the criteria of FOIA, in the complainant's view they would continue to behave in a consistent manner with regard to FOIA so there would be no inhibition effect if the information was disclosed.

25. Fourthly, the complainant argued that the description by the Council of the difficulty and complexity of devolution in Yorkshire is in his view a value judgement. Moreover, he argued that it was not a basis for applying the exemption in any case as the Commissioner's guidance section 36 states '*these exemptions are about the processes that may be inhibited, rather than what is in the information*'. The complainant argued that the use of the difficulties surrounding devolution in Yorkshire are irrelevant to the decision to apply the exemption.
26. It is clear to the Commissioner that in determining whether the qualified person's opinion is a reasonable one, and thus whether the exemption contained at section 36(2)(b)(ii) is engaged, she has to consider whether, at the time of the request, the issue of devolution in Yorkshire remained a live issue. She has considered the arguments advanced by both parties carefully and also taken into account the various developments along the road to devolution in the region, some of which are summarised in the Background section above. Having done so, she accepts the rationale of the complainant's position to the extent that, as he argues, at the point that he submitted his request in January 2018 the Council's position on devolution was clear. That is to say, having previously been supportive of the South Yorkshire plan for devolution, and becoming a part of the Sheffield City Region Combined Authority, by August 2017, it was clear that the Council now supported the 'One Yorkshire' option of broader devolution deal within the region. Such a position was formally confirmed at the Sheffield City Region Combined Authority the following month and effectively endorsed by the outcome of the community poll of December 2017. The Commissioner therefore accepts the complainant's view that at the point that the request was submitted the Council had clearly adopted the position that it favoured the 'One Yorkshire' option.
27. However, the Commissioner disagrees with the complainant's suggestion that because this was the Council's settled intention by the point his request was submitted this meant that its decision making in respect of devolution was concluded. In the Commissioner's view this is far from the case. Rather, in her view at the time the request was submitted active discussions were still taking place as to how the local authorities, including the Council, who wanted to be part of a broader One Yorkshire devolution could secure that outcome. Moreover, it is also the Commissioner's understanding that from the point of view of the Council this included actively considering its future role and relationship with the Sheffield City Region Combined Authority. In other words, although the Council's ultimate goal in terms of devolution was decided by the point that the request was submitted, how it achieved that goal was clearly a matter of ongoing work and discussions.
28. The Commissioner recognises that the complainant has raised concerns that if it was accepted that the decision making surrounding devolution

was live at the time he submitted his request then it could be argued that *any* decision making on *any* issue could be determined to be a live issue in perpetuity. The Commissioner accepts that this is a valid concern and she would be resistant to a public authority arguing that decision making was live simply because the issues in question may be revisited or re-examined in the future. However, in the context of this case, in her view the issue of devolution in Yorkshire, and in particular the Council's position final position within that, was far from concluded and remained a matter of live and active discussion at the point at which the complainant submitted his request.

29. As a result the safe space arguments are potentially relevant. Moreover, the Commissioner accepts that it is reasonable to argue that disclosure of the emails sent between the Chief Executives and politicians of the local authorities would be likely to infringe on their safe space to discuss issues relating to devolution given the focus and interest from the public about this issue. Furthermore, the Commissioner also accepts that it is reasonable to argue that disclosure of these exchanges risks having a chilling effect on the related and similar discussions in the future given the content and context of these exchanges.
30. The Commissioner has therefore concluded that the qualified person's opinion was a reasonable one and the exemption contained at section 36(2)(b)(ii) in relation to the withheld information is engaged.
31. In reaching this decision the Commissioner has taken into consideration the further arguments advanced by the complainant at paragraphs 23 to 25 above. However, none of these points persuade her that the opinion is anything but a reasonable one. In relation to paragraph 23, the Commissioner does not consider it to be a sustainable argument to suggest that face to face meetings or telephone conversations would represent an equally effective way for such similar discussions to take place given both the geographical problems involved and the benefits of email providing an effective, written form of communication.
32. In relation to paragraph 24, in the Commissioner's view the potential risks of a chilling effect comes primarily through the disclosure of information itself rather than the potential fear that information may be requested. As the complainant himself notes, the individuals in question are senior leaders and she would not expect them to be dissuaded from sending free and frank emails simply because information could be requested, not least because of the demands upon the roles of such individuals to use email as a method for such communication and given the potential protections FOIA provides for such communications. In other words, the Commissioner is firmly of the view that the existence of FOIA itself does not create a credible chilling effect; rather it is the actual disclosure of information under it that does.

33. Finally, in relation to paragraph 25, the passage in her guidance to which the complainant points to states that:

'Note that these exemptions are about the processes that may be inhibited, rather than what is in the information. The issue is whether disclosure would inhibit the processes of providing advice or exchanging views. In order to engage the exemption, the information requested does not necessarily have to contain views and advice that are in themselves notably free and frank. On the other hand, if the information only consists of relatively neutral statements, then it may not be reasonable to think that its disclosure could inhibit the provision of advice or the exchange of views.'

34. The Commissioner's point here is that it could potentially be argued by public authorities that information which is not free and frank is still exempt on the basis of section 36 of FOIA. In the context of this case, the Commissioner is not clear that this section of guidance lends any support to the suggestion that the qualified person's opinion is not a reasonable one. For the avoidance of any doubt the Commissioner accepts that the process of future deliberation on the issue of devolution would be likely to be harmed if the withheld information was disclosed.

Public interest test

35. Section 36 is a qualified exemption and therefore the Commissioner must consider whether in all the circumstances of the case the public interest in maintaining the exemption cited outweighs the public interest in disclosing the information.

Public interest arguments in disclosing the information

36. The complainant argued that there was clearly considerable interest in the position of devolution in the Yorkshire region both from the general public, business groups and trade unions. He emphasised that the issue will have a significant impact on the future of government arrangements across the region with widespread impacts on the economy, transport and skills over the next 30 years. In his opinion, this means that there was a compelling public interest in the disclosure of withheld information so that the public could understand the discussions which had taken place on this issue between the local authorities' Chief Executives and politicians.
37. More specifically, the complainant argued that there was growing concern at the failure to implement an agreed and previously legislated part of devolution in Yorkshire, namely the Sheffield City region deal, which as a result the complainant suggested risking costing the region £30m a year in guaranteed funding. He suggested that this had given rise to concerns that local leaders were failing to work together for the

benefit of the region and there was therefore a clear public interest in the Council being open and transparent about discussions its leader and Chief Executive may have had on this issue.

38. The complainant drew the Commissioner's attention to the meeting of the Sheffield City Region Combined Authority on 18 September 2017 when the leader of Sheffield City Council Julie Dore allegedly called the Chief Executive of Doncaster Council Jo Miller a 'disgrace'. The complainant noted that Julie Dore went on to say in a BBC interview 'It's actually Jo Miller that started the negotiations with Tom Riordan [Chief Executive of Leeds City Council] in Leeds to then release herself from South Yorkshire, when in fact Jo Miller was instrumental in helping us get the South Yorkshire (devolution) deal originally... I feel that there's been a serious failure of trust there.'²
39. The complainant also noted that the meetings of the 'One Yorkshire' council leaders were held in private and there has to date been no detail made publicly available about such discussions. He argued that this added to the public interest in greater transparency and accountability.

Public interest in maintaining the exemption

40. The Council argued that although the position it had adopted in response of devolution was in the public domain, and had been widely reported in the media, it was not necessarily the case that disclosure of how politicians and/or Chief Executives/Managing Directors reached a particular view as to differing opinions informs or improves public debate. The Council argued that if the withheld information was disclosed then it could lead to authorities taking longer to piece together acceptable devolution proposals, that proposals that come forward not being fully developed, or simply not as beneficial for the region as they might otherwise have been. The Council argued that given the importance of the issue to the region and the public interest in allowing Chief Executives and/or politicians the space to develop and exchange ideas it was satisfied that the public interest favoured maintaining the exemption.

Balance of the public interest arguments

41. In considering complaints regarding section 36, where the Commissioner finds that the qualified person's opinion was reasonable, she will consider the weight of that opinion in applying the public interest test.

² <https://www.lgcplus.com/politics-and-policy/devolution-and-economic-growth/leader-accuses-jo-miller-of-betrayal-as-devo-deal-collapses/7021300.article>

This means that the Commissioner accepts that a reasonable opinion has been expressed that prejudice or inhibition would, or would be likely to, occur but she will go on to consider the severity, extent and frequency of that prejudice or inhibition in forming her own assessment of whether the public interest test dictates disclosure.

42. With regard to the safe space arguments, the Commissioner recognises that public authorities may need a safe space in which to develop ideas, debate live issues, and reach decisions away from external interference and distraction. This need for a safe space will be strongest when the issue is still live. Once the public authority has made a decision, a safe space for deliberation will no longer be required. If it was a major decision, there might still be a need for a safe space in order to properly promote, explain and defend its key points without getting unduly side-tracked.
43. Applying this approach to the particular circumstances of this case, for the reasons discussed above the Commissioner agrees with the Council that the issue of devolution was still live at the point the complainant submitted his request. Furthermore, the Commissioner accepts the Council's suggestion that the issue of devolution has, and no doubt will continue to be, a complex one, and as a result she accepts that there is a clear need for a safe space in which political leaders and senior officials in the region can have safe space to discuss all and any options about this matter away from the public glare. Moreover, having taken into consideration the content of the information which the Council is seeking to withhold the Commissioner accepts that its disclosure at the point that the complainant submitted his request would represent some infringement into this safe space.
44. With regard to attributing weight to chilling effect arguments, the Commissioner recognises that council officers are expected to be robust and impartial when giving advice. They should not easily be deterred from expressing their views by the possibility of future disclosure. Nonetheless, chilling effect arguments cannot be dismissed out of hand. If the decision making which is the subject of the requested information is still live, the Commissioner accepts that arguments about a chilling effect on those ongoing discussions are likely to carry significant weight. Arguments about the effect on closely related decisions or policies may also carry weight. However, once the decision making in question is finalised, the arguments become more and more speculative as time passes. It will be difficult to make convincing arguments about a generalised chilling effect on all future discussions.
45. Again, in applying this approach to the circumstances of this case it is relevant to recognise that in the Commissioner's opinion the issue of devolution remained live when the request was submitted. Furthermore, having considered the content of the withheld information the

Commissioner accepts that its disclosure risks having some element of a chilling effect on the future discussions between the parties in question on the topic of devolution. Therefore, taking into account her assessment of the weight that should be attributed to the safe space and chilling effect arguments, the Commissioner is persuaded by the Council's line of argument that disclosure of the withheld information poses a genuine threat to the effectiveness of future deliberations between the politicians and senior leaders on the issues of devolution. In the Commissioner's opinion this would be very much against the public interest.

46. With regard to attributing weight to the public interest arguments in favour of disclosing the withheld information, the Commissioner acknowledges the strength of the arguments advanced by the complainant. The issue of devolution in Yorkshire clearly has significant and wide ranging consequences for the region not only now but for many years to come. In light of this the Commissioner accepts that there is a clear public interest in the bodies involved being open and transparent about their decision process of about. In the Commissioner's view this public interest is arguably increased given how the Council's position on devolution has evolved; ie from supporting (and being an active part of) South Yorkshire devolution to now advocating the One Yorkshire option. However, despite the weight of such arguments, in the Commissioner's view the extent to which disclosure of the withheld information, which consists of one email chain, would actually serve these interests is arguably somewhat limited.
47. In light of this, and given the cumulative weight which she accepts should be added to the safe space and chilling effect arguments, the Commissioner has concluded that the public interest favours maintaining the exemption contained at section 36(2)(b)(ii) in relation to the withheld information.

Right of appeal

48. 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

49. 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.
50. 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

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