

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 January 2016

Public Authority: Ryedale District Council
Address: Ryedale House
Malton
North Yorkshire
YO17 7HH

Decision (including any steps ordered)

1. The complainant has requested an email which relates to the proposed sale and subsequent redevelopment of a site owned by Ryedale District Council ('the Council'). The Council refused to disclose the email citing sections 36(2)(b)(i) and (ii) (inhibition to the free and frank provision of advice and exchange of views). During the Commissioner's investigation it also cited section 43(2)(commercial interests).
2. The Commissioner's decision is that the Council has correctly applied sections 36(2)(b)(i) and (ii) of the FOIA in this case and that the public interest in maintaining the exemption outweighs the public interest in disclosure. In light of this it has not been necessary to also consider section 43(2). No steps are required.

Request and response

3. On 18 June 2015, following previous correspondence, the complainant wrote to the Council and requested information in the following terms:

"There are also mentions of an e-mail from [name removed] to former Councillor Legard dated 26 July 2010 about the proposed redevelopment of WSCP [Wentworth Street Car Park]. This is being withheld from public view. I formally request a copy of this e-mail".*

(*the Commissioner has subsequently confirmed that the email requested is actually dated 8 July 2010).

4. The Council responded on 6 July 2015. It confirmed holding the requested information but refused to disclose it citing section 36(2)(b)(i) and (ii) and (c) of the FOIA as its basis for doing so.
5. Following an internal review the Council wrote to the complainant on 15 July 2015. It maintained its position.

Scope of the case

6. The complainant contacted the Commissioner on 30 September 2015 to complain about the way his request for information had been handled. He asked the Commissioner to consider the citing of section 36 as, in his opinion, the information is of significant public interest and, due in part to the passage of time, should now be disclosed.
7. In later correspondence with the Commissioner the Council refers only to sections,36(2)(b)(i) and (ii) so these are all that have been considered. It also introduced reliance on section 43(2).

Reasons for decision

Section 36 - prejudice to the effective conduct of public affairs

8. Section 36(2) of FOIA provides that:-

"Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under the FOIA-

(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"

9. For a public authority to cite section 36 of the FOIA its designated qualified person must give their reasonable opinion that the exemption is engaged. For the Commissioner to determine that the exemption is engaged it must therefore be established whether the designated qualified person has given their opinion, and whether the opinion was reasonable.

10. The Council confirmed that the opinion in relation to the application of section 36(2) was given by its Monitoring Officer. The designated qualified person for a Council is the Chief Executive or the Monitoring Officer and so the Commissioner is satisfied that an opinion was given by the designated qualified person.
11. The qualified person in this case is also the party who originally dealt with the information request. He confirmed he has had full sight of the withheld information whilst dealing with request and that he was also fully aware of the background to the request having been aware of matters at the time that the email was written as well as when the request was made.
12. The qualified person was of the opinion that section 36(2) was engaged and that the inhibition would be likely to occur should the withheld information be disclosed. He advised that this would be likely to occur for the following reasons:-
 - the particular contents of the email of 8 July 2010 are free and frank in nature and the whole issue is one of great sensitivity for which the Council needs a confidential safe space.
 - the context was highly sensitive at the time of the email in July 2010 and concerned an issue on which the Council needed a safe and confidential space in which to explore its own thinking.
 - the context remained equally sensitive at the time of the request because, whilst 5 years had passed, the issue remained 'live'; this remains the case now.
 - The email was deliberately and clearly marked as confidential.
13. He further added that the disclosure of the requested information:

"... would be very likely to cause substantial prejudice to the Council's ability to deliberate, provide advice and exchange views internally in a necessarily candid way. It is vital that the Council can do this, in particular as regards communications between officers and members in their capacities as office holders on Council committees. It is vital that – as was done here – candour and detail can be deployed. It is vital that this is done on a confidential basis, as was the explicit and emphasised position here. I repeat once again that the matter and its sensitivities were "live" at the time of the request.

Therefore, disclosure of this content at this time would have had serious consequences in terms of Council officers' and members'

abilities to correspond freely and confidentially on sensitive matters such as this. Such communication is essential to the effective discharge of the Council's functions".

14. The Commissioner's guidance on section 36 makes it clear that:

*"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 unreasonable 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." (para. 21)*

15. Provided that the Commissioner is satisfied that the opinion is in accordance with reason and not irrational or absurd, in short, that it is an opinion that a reasonable person could hold, then he will regard it as a reasonable opinion for the purposes of section 36.

16. After reviewing the withheld information, the Commissioner has concluded that it was reasonable for the qualified person to hold the opinion that disclosure would be likely to result in inhibition relevant to sections 36(2)(b)(i) and (ii) and, therefore, those exemptions are engaged.

17. As section 36 is a qualified exemption, it is necessary to consider the public interest test. Section 2(2)(b) of the Act states that a public authority may refuse to disclose information requested if in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

18. The Tribunal in *Guardian & Brooke*¹ indicated the distinction between the consideration of the public interest under section 36 and the consideration of the public interest under the other qualified exemptions contained within FOIA.

"The application of the public interest test to the s 36(2) exemption involves a particular conundrum. Since under s 36(2) the existence of the exemption depends upon the reasonable opinion of the qualified person it is not for the Commissioner or the Tribunal to form an independent view on the likelihood of inhibition under s36(2)(b), or indeed of prejudice under s 36(2)(a) or (c). But when

¹ EA/2006/0011 and EA/2006/2013

it comes to weighing the balance of public interest under s 2(2)(b), it is impossible to make the required judgment without forming a view on the likelihood of inhibition or prejudice."

19. The Commissioner agrees with the view of the Tribunal as set out above. That it is "*not for the Commissioner to form an independent view...*" does not prevent him from considering the severity, extent and frequency of any prejudice or inhibition which might occur when he is assessing the public interest. Whilst the Commissioner can and should give due weight to the reasonable opinion of the qualified person when assessing the public interest, he can and should also consider the severity, extent and frequency of the likely prejudice or inhibition which would be likely to be caused by disclosure of the withheld information.

Public interest arguments in favour of disclosing the withheld information

20. The Council acknowledged that there are several factors which favour disclosure, including openness and transparency in relation to Council business. It made specific reference to transparency regarding the project to dispose of a long lease of the Council's car park.
21. The Commissioner also notes that there is a public interest in the public having the ability to understand the basis on which decisions which may affect them are taken and that disclosure of the withheld information may inform public debate and lead to improved trust in those decisions.

Public interest arguments in favour of maintaining the exemption

22. The Council explained that the email was sent as a response to questions raised by a Councillor has argued that it needs to have the opportunity to exchange free and frank views between its officers.
23. It also argued that:

"It is considered that disclosure is more likely than not to have an adverse effect on the ability of officers of the local authority to communicate internally and giving professional and/or legal advice to the Chair and Vice-Chair of the Committees on major projects in an impartial and appropriate manner away from public interference".

Balance of the public interest arguments

24. When asking for an internal review the complainant comments:

"I accept, unreservedly, that professional / legal advice given between officers and members is a relevant factor. However free and frank discussions between officers and members should however be visible to public scrutiny and I reject this factor as inappropriate. That is what elected members are there for to create the link between officers and the public".

25. In agreement with the complainant, the Commissioner accepts that there is a strong public interest in openness and transparency and in furthering public understanding of the process of discussion which leads ultimately to decision-making within public authorities such as the Council. Disclosure of the withheld email may therefore increase public trust and confidence in the Council and its decision-making processes.
26. However, whilst there are strong arguments in favour of disclosing the withheld information, the Commissioner considers that there is also a strong public interest in the Council being able to discuss issues freely and frankly and to be able to have the space to consider all issues and thereby make informed decisions. Whilst the complainant may be of the opinion that this process should be fully visible to the general public, the Commissioner considers that it is in the public interest to ensure that every aspect of the issues under consideration is considered frankly and candidly with a view to making a full and informed decision, which means that it may be necessary to do so in a 'closed' environment.
27. The Commissioner understands the complainant's views. However, he has viewed the email in question and he considers that it shows a free, frank and robust exchange of views on what is viewed by some to be a controversial issue. Whilst it is noted that the email requested dates from some time prior to the request, he is nonetheless satisfied that it relates to a 'live' and ongoing issue. As such, on this occasion the Commissioner considers that it is more important to allow the Council the space in which to deliberate on issues such as disposal of its property on a confidential basis, to ensure completely free and frank deliberations. Therefore, he finds that the public interest in favour of disclosure of the withheld information is outweighed by the public interest in maintaining the exemptions contained at sections 36(2)(b)(i) and (ii) of FOIA.
28. In view of this conclusion, it has not been necessary to also consider the citing of section 43(2).

Right of appeal

29. 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

30. 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.
31. 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

Carolyn Howes
Senior Case Officer
Information Commissioner's Office
Wycliffe House
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