

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 August 2016

Public Authority: Oadby and Wigston Borough Council
Address: Council Offices
Station Road
Wigston
Leicestershire
LE18 2DR

Decision (including any steps ordered)

1. The complainant requested information about allegations made about some of Oadby and Wigston Borough Council's (the 'Council') officers. The Council disclosed some information but withheld the remainder under sections 31(1)(g) and 2(b) and (c) (law enforcement) and 40(2) (personal information) of FOIA.
2. The Commissioner's decision is that the Council has applied section 31(1)(g) and (2)(b) and (c) of FOIA appropriately. The Commissioner does not require the Council to take any further steps as a result of this decision notice.

Background

3. The Commissioner understands that in May 2015, a number of the Council's employees, including senior officers, brought a grievance against some of the Senior Management Team.
4. The Council commissioned an independent investigation into the grievance which comprised more than 200 allegations. Following investigation the independent investigator did not uphold any of the allegations and the grievance was dismissed.

5. In November 2015 a local newspaper published an article which named three of the Senior Managers about whom the allegations had been made, together with the author of the report, Mr Richard Penn of the Local Government Association. Whilst the names of three of the Senior Management Team are in the public domain, the names of those raising the grievances are not. The article also specified some of the 'themes' contained within the grievance and confirmed that the grievance was not upheld.
6. The grievance was discussed at Council meetings held on 8 December 2015 and 6 April 2016, the latter being a Change Management Committee meeting. Both sets of minutes are publically available on the Council's website.
7. As part of its investigation response, the Council offered an alternative interpretation of part (c) of the request based on the newspaper article as detailed in paragraph 17 below.

Request and response

8. On 24 February 2016 the complainant wrote to the Council and requested information in the following terms:

"With reference to an article in the Leicester Mercury dated 19-11-2015 which reported on investigations by a Mr Penn of the Local Government Association into alleged staff problems at Oadby and Wigston Borough Council and for which the reporter understood that £100,00 had been set aside in order to cover the cost of the two investigations, I respectfully request the following under the provisions of the [sic] Freedom of Information Act: -

- a) The full nature of the initial complaint lodged by the group of eight Directors against the Chief Executive and the Monitoring Officer which were reported to have numbered 200.*
- b) Whether or not any subsequent appeals have been dealt with and what the results of those appeals were.*
- c) Specific details of the second investigation by Mr Penn into 'staff/management relations'.*
- d) Please make public full, un-redacted copies of Mr Penn's two reports.*
- e) The exact amount of Council Taxpayers' money which will have been expended on these two independent inquiries. If for any*

reason the inquiry process has not been completed, please advise the date on which it is expected to be completed.

I note that in the above mentioned report that it was reported that 'The Authority has declined to publish Mr Penn's report after he completed it earlier this month (ie November 2015) – arguing it is confidential – but issued a statement saying the grievance was not upheld'.

It seems clear to me that Oadby and Wigston Borough Council will continue to resist publishing full details of these two reports. This is not acceptable for a number of reasons: -

- i) The Authority exists to serve the Council Tax Payers of Oadby and Wigston who through their Council Tax pay for this service.*
- ii) The Authority is responsible for acting in an open, democratic manner.*
- iii) Internal problems of the type reportedly being investigated give rise to doubts as to the quality of service and value for money which Council Tax payers of the Borough have a right to expect. They should not, therefore, be kept from people who employ officers of the Council and who vote in Councillors to oversee the running of the Authority.*
- iv) The costs of the two investigations are being met using Council Tax Payers money.*

In closing, may I respectfully repeat that my request is for full, un-redacted copies of the Independent Inspector. "

9. The Council responded on 23 March 2016. It refused to confirm or deny whether any recorded information was held relevant to the request citing section 40(5) of FOIA.
10. The complainant requested an internal review on 30 March 2016, which the Council responded to late, in two parts, on 9 and 12 May 2016 (see 'Other Matters' section of this notice).
11. On 9 May 2016 the Council explained that a second investigation had not been carried out. Instead, it said the investigator, Mr Penn, had provided a supplementary report to the Council's Change Management Committee on 16 April 2016, which contained a number of observations and recommendations. The Council explained that this report was appended to the minutes of that committee meeting which is available on its website. It withheld two paragraphs of that appendix under section 31. Although this document is publically available, the Council

chose to provide the complainant with a copy as part of its internal review response. The Commissioner has commented on this report in the 'Scope' section of this notice.

12. Additionally, the Council explained that the exact cost could not be provided at that stage because "*processes relating to*" the investigation were ongoing. However, it provided the figure spent to date and explained that more funds would be added to the £110, 000 budget to deal with the ongoing appeals process.
13. In the second part of its internal review issued on 12 May 2016, the Council revised its position in relation to parts (a) and (d) of the request and provided a redacted version of the grievance report, citing sections 40(2), personal information and 31(1)(g) and 31(2)(b) (c) and (i), law enforcement.

Scope of the case

14. The complainant initially contacted the Commissioner on 5 April 2016 to complain about the way his request for information had been handled. The Commissioner queried whether he had exhausted the internal review process; the complainant provided a copy of the internal review outcome on 9 May 2016.

Information held in scope of request

15. At internal review, the Council identified the following two documents as falling within the scope of the request:
 - i) The investigation report by Mr Penn into the grievances raised by a number of the Council's employees;
 - ii) A supplementary report by Mr Penn to the Council's Change Management Committee on 6 April 2016, which contains a number of observations and recommendations following investigation of the grievance.
16. The Council explained that it had initially interpreted part (c) of the request (ie specific details of the second investigation by Mr Penn into 'staff/management relations') as being for the supplementary report by Mr Penn to the Council's Change Management Committee of 6 April 2016. It therefore disclosed all but two paragraphs of this report.
17. However, the Council is now of the view that the reference in the press article to Mr Penn's "two" reports could have been in relation to the fact that Mr Penn initially considered looking at other matters, which he

didn't subsequently do. Clearly the Council is not in a position to further comment on the press article as it does not know exactly what the journalist is referring to. The Council has confirmed that Mr Penn did not undertake any other investigation into related matters.

18. The Commissioner also notes that the change management report detailed in paragraph 15(ii) above post-dates the complainant's request and therefore did not exist at the time of his request. She has therefore excluded it from consideration.
19. During the Commissioner's investigation, the Council confirmed that it no longer wished to rely on section 31(2)(i), but wished to maintain its reliance on sections 31(1)(g) and 31(2)(b) and (c).
20. The Commissioner has therefore considered whether the Council is entitled to rely on sections 31(1) and 40(2) of FOIA to withhold the remaining requested information.

Reasons for decision

The disputed information

21. The disputed information consists of the investigation report by Mr Penn into the grievances raised by a number of the Council's employees.
22. In respect of the above, the Council has disclosed a heavily redacted version of Mr Penn's investigation report to the complainant, relying on both sections 31 and 40(2) of FOIA. Specifically, it has provided the information which focuses on the general approach and outcomes of the investigation report, including the contents list (minus the names of those making the allegations). Details of those making the allegations, together with the specific allegations have also been withheld.
23. The Council has confirmed that the investigation was 'live' at the time of the complainant's request.
24. Section 31(1)(g) states that:

"Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice

(g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2)."

25. In relation to the specified purposes under (2), the Council explained that the relevant functions were those contained at sections 2(b) and (c) which state:

“(b) the purpose of ascertaining whether any person is responsible for any conduct which is improper,

(c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise.”

26. Section 31 is a prejudice-based exemption. In order to be engaged, the following criteria must be met:

- The actual harm which the public authority alleges would, or would be likely to, occur if the withheld information was disclosed has to relate to the applicable interest within the relevant exemption;
- The public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and
- It is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie disclosure ‘would be likely’ to result in prejudice or disclosure ‘would’ result in prejudice.

27. The Council explained that it wished to rely on section 31 for the vast majority of the redactions in the investigation report.

28. The relevant applicable interests cited in these exemptions are that it must be the function of a public authority, in this case the Council, to ascertain whether any person is responsible for conduct which is improper and whether regulatory action would be justified.

29. In relation to section 31(2)(b), ie the purpose of ascertaining whether any person is responsible for any conduct which is improper, the Council stated that it has the function of ensuring that its staff conduct themselves in a manner which is reasonable, appropriate and not in breach of any policies. It said that one of the ways it carries out this function is conducting investigations under the Grievance Policy and Procedure, such as, in this case, where there are significant concerns over employees’ conduct, so as to ascertain whether their conduct has been improper.

30. Should any of the grievance appeals overturn the original decision, which could result in the Council having to determine whether any regulatory action needs to be taken against any of its employees, the Council has argued section 31(2)(c) would also be applicable.
31. When considering the second point, listed in paragraph 26 of this notice, the Commissioner must be satisfied that the nature of the prejudice is "*real, actual or of substance*" and not trivial or insignificant. He must also be satisfied that some causal relationship exists between the potential disclosure and the stated prejudice.
32. The Council explained that it has a function to ensure its employees conduct themselves properly, and that part of that function is to investigate any allegations of improper conduct. It is known that the Council utilised an independent investigator to investigate the significant number of allegations made against some senior members of staff.
33. The Council has argued that disclosure of the requested information, which is linked to an ongoing investigation, has the potential to undermine any ensuing proceedings, (such as potential disciplinary or regulatory matters), or impede the Council in establishing if any of the allegations have occurred.
34. The Council also argued that there has already been an element of press interest in the grievance investigation to date, and therefore, it has very real concerns that if further information is disclosed into the public domain, it could have unjustified adverse effects on the individuals concerned.
35. With regard to the third point in paragraph 26, the Council argued that disclosure of the requested information *would be likely to* prejudice the function of the Council to investigate whether anybody is responsible for improper conduct and also whether circumstances would justify regulatory action.
36. In the Commissioner's guidance "*The prejudice test*"¹ she considers the issue of whether disclosure "would" or "would be likely to" prejudice a cause or matter. She notes that in the Information Tribunal decision of *Christopher Martin Hogan and Oxford City Council v the Information Commissioner* (EA/2005/0026 and 0030, 17 October 2006) it states:

¹ https://ico.org.uk/media/for-organisations/documents/1214/the_prejudice_test.pdf

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

37. The Commissioner considers that the first limb relates to 'would' and the second limb to 'would be likely'. The Commissioner's view is that 'would' means 'more probable than not' ie more than a 50% chance of the disclosure causing the prejudice, even though it is not absolutely certain that it would. With regard to 'would be likely to' the Commissioner considers that this refers to a lower level of probability than 'would' ie there must be more than a hypothetical or remote possibility of prejudice occurring. The Commissioner considers that there must be a real and significant risk of prejudice, even though the probability of prejudice would be less than 50%.
38. The Commissioner considers that, given that the information in question is part of the Council's ongoing investigation into the allegations made about some of its senior officers, disclosure during this investigation would be likely to be prejudicial that investigation.
39. Taking everything into account, the Commissioner is therefore satisfied that the disclosure of the disputed information would be likely to prejudice the function of the Council to ascertain whether any person is responsible for any improper conduct and/or whether regulatory action would be justified in pursuance of any existing enactment or any that may arise. Having accepted that the exemptions are engaged, the Commissioner will go on to consider the public interest arguments.

Public interest arguments in favour of disclosing the requested information

40. The Council acknowledged the public interest in transparency by showing the public that it takes allegations of improper conduct very seriously. Disclosure would show how such allegations are handled.

Public interest arguments in favour of maintaining the exemption

41. The Council argued that the public interest in maintaining sections 31(1)(g) and 2(b) and (c) outweighed the public interest in disclosure.
42. It advised that, where there are allegations of improper conduct by its senior officers, that such allegations are subject to a robust investigation which may be compromised if details about such alleged conduct are released into the public domain before the investigation has been completed. There is strong public interest in ensuring that no such compromise occurs because of premature disclosure.

43. The Council also said that such early disclosure could have an impact on the investigation and/or create undue pressure on those tasked with the investigatory and/or decision making functions related to the allegations.

Balance of the public interest arguments

44. The Commissioner has considered the public interest arguments from both parties, including the public interest in transparency.
45. The Commissioner notes the complainant's argument that if the investigation is complete, he considers that the requested information should be disclosed. However, the Commissioner has seen evidence that, at the time of the request, there was still an ongoing investigation into the allegations of improper conduct by the Council.
46. The complainant himself stated in an email to the Commissioner on 23 May 2016: *"I appreciate that, if there is still an element to the Investigation which is ongoing and which, if put in to the public domain, might compromise the result then clearly this needs to be accepted."*
47. The Commissioner also considers that it is in the public interest for the Council to be able to carry out investigations into the allegations made, without being undermined by the premature disclosure of information.
48. The Commissioner also accepts the Council's argument that, whilst disclosure of the information in question would be of interest to the complainant, there is no wider public interest in disclosing it while the Council's investigation is ongoing.
49. The Commissioner considers that appropriate weight must be given to the public interest inherent in the exemption; that is, the public interest in avoiding likely prejudice to the Council's ability to ascertain whether anybody is responsible for any improper conduct and whether regulatory action would be justified. The Commissioner considers that it is clear that there is a very substantial public interest in avoiding that prejudice and that this is a strong public interest factor in favour of maintenance of the exemption.
50. The Commissioner has weighed the public interest in avoiding prejudice to the Council's function to investigate whether a person has acted improperly and whether there are any circumstances which would justify regulatory action, against the public interest in the openness and transparency and the complainant's arguments regarding disclosure. Her conclusion is that the public interest in avoiding this prejudice is a strong factor and so she considers that the public interest in maintaining the exemption outweighs the public interest in disclosure.

Conclusion

51. Taking all of the above into account, the Commissioner is satisfied that section 31(1)(g) and (2)(b) and (c) have been applied appropriately in this case and that the public interest in maintaining the exemption outweighs the public interest in disclosure.
52. As the Commissioner has found that section 31 is engaged, she has not considered the Council's reliance on section 40(2).

Other matters

53. Part VI of the section 45 Code of Practice makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. As he has made clear in his *'Good Practice Guidance No 5'*, the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by FOIA, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days. The Commissioner is concerned that in this case, it took over 28 working days for an internal review to be completed, despite the publication of his guidance on the matter.

Right of appeal

54. 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

55. 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.
56. 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
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