

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 2 February 2017

Public Authority: Derby City Council
Address: The Council House
Corporation Street
Derby
DE1 2FS

Decision (including any steps ordered)

1. The complainant has requested a copy of an Independent Management Review ("IMR") of Derby City Council's Children's Social Care Department. The IMR which the complainant seeks was carried out for the purpose of a Serious Case Review into the death of a child referred to as DD12. Derby City Council has withheld the requested information in reliance on section 36(2).
2. The Commissioner's decision is that Derby City Council has properly applied section 36(2) and it is therefore entitled to withhold the requested IMR.
3. The Commissioner requires no further action in this matter.

Request and response

4. On 8 March 2016, the complainant submitted a request for information to Derby City Council via the WhatDoTheyKnow website. The terms of the complainant's request are:

"Please provide me with a copy of the IMR ["Independent Management Review"] referred to in the following document:-

<http://www.derbyscb.org.uk/media/derby-scb/content-assets/documents/serious-case-reviews/DD12-Final-Overview-Report--12-05-14.pdf>

The relevant IMR is the one produced by Derby City Council (Children's Social Care)."

5. On 15 March 2016, the Council wrote to the complainant to confirm that it holds the information she had requested. The Council advised the complainant that it would need to extend the statutory compliance period in order to consider the public interest test in respect of sections 33, 36 and 40 of the FOIA.
6. The complainant challenged the Council's response, questioning whether the Council was able to rely on section 33 and asserting her belief that the information contained in the IMR could be released in redacted format.
7. On 13 May 2016, the Council sent the complainant a refusal notice under section 17 of the FOIA. The Council's notice confirmed its reliance on sections 33 and 36 to withhold the requested information and it provided an outline of the public interest test considerations which the Council considered supports its application of these exemptions.
8. On 13 May 2016, the complainant asked the Council to review its decision to withhold the information she had requested. The complainant questioned whether the IMR could be withheld in its entirety in reliance on section 36, particularly the document's cover, index, matters of fact and recommendations. She also asserted her belief that the Council could not rely on section 33.
9. The Council carried out an internal review of its decision to withhold the requested information and on 9 June 2016 it provided the complainant with its final decision.
10. The Council confirmed its refusal to disclose the IMR document by virtue of section 36(2)(b) and (c) of the FOIA and confirmed that it was the Council's qualified person's opinion that the section 36 exemption was properly engaged.
11. The Council also advised the complainant that section 33 is not applicable to the IMR information, accepting that the Council does not have the functions provided by that exemption.

Scope of the case

12. The complainant contacted the Commissioner 13 June 2016 to complain about the way her request for information had been handled.
13. The Commissioner has investigated whether Derby City Council is entitled to withhold the IMR document in reliance on section 36(2)(b) and (c) of the FOIA. This notice sets out the Commissioner's decision.

Background information

14. The complainant seeks an Independent Management Report which was submitted to Derby Safeguarding Children Board ("DSCB") for the purpose of a serious case review. The particular review was carried out between May 2012 and June 2013 and concerned a child who is referred to as "DD12".
15. The aims or purposes of the serious case review are listed at paragraph 1.2 of the Serious Case Review Overview Report. The report is published on Derby City Council's website¹.
16. Each agency involved with DD12 produced an Independent Management Report. The IMRs were discussed at DCSB panel meetings and they were used as evidence for the purpose of compiling the Serious Case Review Overview Report.

Reasons for decision

Section 36 – Prejudice to the conduct of public affairs

17. Section 36 allows a public authority to withhold recorded information if its disclosure would prejudice the effective conduct of public affairs.
18. The Council has confirmed to the Commissioner that it is relying on section 36(2), This section 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

¹ <http://www.derbyscb.org.uk/media/derby-scb/content-assets/documents/serious-case-reviews/DD12-Final-Overview-Report--12-05-14.pdf>

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

19. 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.
20. The Commissioner asked the Council to provide him with evidence that the qualified person considered the application of section 36 personally. The Council did this by providing the Commissioner an assessment of the issues identified in respect of the complainant's request, and in particular to the Council's application of section 36.
21. The assessment document provided the qualified person with background information appropriate to the complainant's request and to the IMR itself. It also provided the qualified person with a breakdown of the issues which were considered relevant to the application of the two exemptions.
22. In addition to the assessment document, the Council confirmed to the Commissioner that the qualified person had access to an electronic folder containing all of the information and correspondence related to this request.
23. The qualified person is the Head of Legal Services at derby City Council, Olu Idowu.
24. On 11 May 2016, the qualified person confirmed his view that, "the information requested, disclosure of the IMR, should be withheld".
25. In an email dated 9 June 2016, the Council's Head of Governance and Assurance confirmed that the Council was not able to rely on the exemption to disclosure provided by section 33. This was because the Council does not have any of the functions necessary to engage this exemption. He did however conclude that the qualified person's opinion supports the application of the section 36(2)(b) and (c).
26. The Commissioner is satisfied that the Council's qualified person has given an opinion in this case. He must now consider whether that opinion is reasonable.
27. 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".
28. 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 and it is not necessary for the

Commissioner to agree with the opinion given; she needs only recognise that a reasonable person could hold the opinion given.

29. The IMR contains information which relates to the death of a child. In the Council's opinion, there is a need to respect the confidentiality of the deceased child and that of his/her family. The Council argues that it has a duty of confidentiality to handle the sensitive information contained within the IMR. It recognises that disclosure of the IMR could cause distress to the deceased's family and lead to a loss of confidence by the public for the Council's failure to maintain confidentiality.
30. The Council argues that disclosure of the IMR could result in a "negative corporate impact". It considers that disclosure could potentially prevent its officers from being frank and honest about operational weaknesses within the service. There would be a real potential for officers to fear they would be open to scrutiny outside of the management review process and this would negatively negative impact the effectiveness of independent management reviews which rely on a free and frank exchange of views. The Council argues that disclosure of the IMR and the accompanying detriment to openness within the Council would clearly be the causal link necessary for this exemption to apply.
31. In the Commissioner's guidance on the section 36, paragraph 46 states – "The 'exchange of views' must be part of a process of deliberation", and "'deliberation' refers to the public authority's evaluation of competing arguments or considerations in order to make a decision".
32. Here, in order to determine whether sections 36(2)(b)(ii) and 36(2)(c) are engaged, the Commissioner has considered whether it is reasonable for the qualified person to conclude that disclosure of the withheld information would be likely to prejudice the exchange of views, in the context of an independent management review. The Commissioner will consider the Council's reliance on section 36(2)(b)(ii) first and will consider its reliance on section 36(2)(c) if necessary.
33. The Commissioner has considered the nature of the withheld information in the context of an Independent Management Review. She accepts the qualified person's opinion that the disclosure of the withheld information would likely prejudice the exchange of views which would inevitably arise in the course of that and future reviews.
34. The Commissioner readily accepts that the Council requires a 'safe space' to consider the role of its Children's and Young People's Department and the actions of that department's officers. It is for this reason the Commissioner has decided that section 36(2)(b)(ii) is engaged.

The Public Interest

35. The Council's application of section 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.
36. 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), 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.

Public interest arguments in favour of disclosing the requested information

37. The Commissioner considers that some weight must be given to the general principle of achieving accountability and transparency through the disclosure of information held by public authorities.
38. Disclosure of publicly held information assists the public in understanding the basis and how public authorities make their decisions and carry out their functions. This in turn fosters trust in public authorities and may also allow greater participation by the public in the Council's decision making process.
39. In this case, members of staff in the Council's Children's and Young People's Department have participated in an independent management review: This review is concerned with the death of a young child.
40. The Commissioner recognises that there is a significant public interest in knowing that the IMR has been rigorously conducted and that it has identified possible areas of fault and weakness where lessons can be learned. It follows that the public interest can be served through the disclosure of information which demonstrates that the Council has purposefully participated in the IMR process and that the review culminated in a number of appropriate findings.
41. Having examined the withheld information, the Commissioner finds there is a clear public interest in the public having knowledge that the Council's staff are properly participating in Independent Management Reviews; that its staff have assisted the Review in identifying appropriate lessons to be learned for its Children's and Young People's Department. The Commissioner recognises that the public should be properly assured that the Council is undertaking appropriate investigations of its Children's Services where these are warranted.

Public interest arguments in favour of maintain the exemption

42. In this case, the complainant made her request for a copy of the IMR after it had been completed. It is therefore clear that disclosure of this IMR would have no impact on the 'safe space' or candour arguments advanced by the Council. This cannot be said in respect of future IMR which the Council's staff might be asked to participate in.
43. The Serious Case Review Overview Report which was compiled in respect of child DD12 is published on the Council's website. This report sets out the case in some detail and Appendix 3 of the report sets out its

recommendations based on its considerations of the IMRs submitted by the relevant organisations².

44. The Serious Case Review's consideration of the IMRs and its subsequent publication of its recommendations provides the public with a great deal of information. This information as goes to serve the public interest identified at paragraphs 40 and 41 above.

The Commissioner's decision

45. The Commissioner must afford significant weight to the disclosure of recorded information where it would result in greater transparency and accountability of the actions taken by public authorities. This is especially so where the recorded information relates to the death of a child.
46. Weighed against this are the Council's concerns about the real and significant risks to the conduct of future IMRs. The Commissioner cannot ignore the Council's assertions concerning the effects that disclosure of the IMR will have on its staff. She accepts that Council officers would potentially be less frank and honest in their cooperation with future IMRs and this would negatively impact their effectiveness.
47. In the Commissioner's opinion, the Council's publication of the Serious Case Review Overview Report goes a long way in satisfying the public interest in respect of the IMR of its actions related to child DD12. The Commissioner believes that the information available to the public by virtue of the Overview Report is sufficient to allow proper scrutiny of the Council without compromising the IMR process.
48. On balance, the Commissioner has decided that greater weight must be given to those arguments which favour the continued withholding of the requested IMR. The Commissioner has therefore decided that the Council is entitled to rely on section 36(2)(b)(ii) to withhold that information and has therefore not gone on to consider section 36(2)(c).

² Derby City Council Children's Social Care; Derby City Council Legal Services; Derbyshire Police; Derbyshire Healthcare NHS Foundation Trust; Derby Hospitals NHS Trust; Primary Care in respect of GP Services; Her Majesty's Court and Tribunal Services; and CACASS

Right of appeal

49. 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

50. 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.
51. 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