

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 August 2023

Public Authority: Flintshire County Council
Address: County Hall
Mold
Flintshire
CH7 6NR

Decision (including any steps ordered)

1. The complainant requested copies of emails relating to their previous FOIA request. Flintshire County Council (the Council) refused the request under section 36(2)(b)(ii) (inhibition to the free and frank exchange of views) of FOIA.
2. The Commissioner's decision is that the Council was entitled to rely on section 36(2)(b)(ii) of FOIA to refuse the request.
3. The Commissioner does not require the Council to take any further steps.

Request and response

4. On 12 January 2023, as part of an internal review request, the complainant submitted a new request in the following terms:

"You state that Aura have requested that the contract not be released as it would affect their commercial interests. However you fail to state what those specific concerns actually are. You merely state s43. Please can you release all communications between yourselves and Aura in relation to my FOI request. This will reveal what their actual concerns are."

5. The Council confirmed that it held the information requested, but refused to disclose it on the basis of section 36(2)(b)(ii) of FOIA. The complainant requested an internal review, following which the Council upheld its original position.

Reasons for decision

6. In this case the Commissioner is considering the Council's application of the exemption at section 36(2)(b)(ii) of FOIA which states that information is exempt from the duty to disclose:

"...if, in the reasonable opinion of a qualified person, disclosure of the information would, or would be likely to, inhibit the free and frank exchange of views for the purposes of deliberation."

The qualified person's opinion

7. To find that any part of section 36(2) is engaged, the Commissioner must establish that a qualified person gave an opinion which found that the exemption applied and also that the opinion was reasonable.
8. The Council confirmed that its qualified person is the Chief Officer (Governance)/Monitoring Officer.
9. The Commissioner is satisfied that the Council's Monitoring Officer is authorised as the qualified person under section 36(5) of FOIA.

Was the opinion reasonable?

10. In determining whether the exemption is correctly engaged, the Commissioner must determine whether the qualified person's opinion was a reasonable one. In doing so the Commissioner will consider all of the relevant factors. These may include, but are not limited to:
 - whether the prejudice or inhibition 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; and
 - the qualified person's knowledge of, or involvement in, the issue.

11. 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. The qualified person's opinion does not have to be the most or only reasonable opinion that could be held: it only has to be a reasonable opinion.
12. Having seen the explanation of the qualified person's opinion, the Commissioner is satisfied that the opinion that a disclosure of its correspondence would be likely to inhibit the council's discussions with a third party regarding the sensitivity of the information whilst the issues in question were still live was reasonable.
13. The Commissioner accepts that it was therefore reasonable for the qualified person to conclude that a disclosure of the information during that period would be likely to inhibit the free and frank exchange of views for the purposes of deliberation. The Commissioner's conclusion is, therefore, that the exemption provided by section 36(2)(b)(ii) is engaged.

The public interest test

14. Even where the qualified person has concluded that the exemption applies, the public interest test must be applied to the decision whether or not to disclose the withheld information.
15. The Commissioner has therefore gone on to consider whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the withheld information.
16. When considering a complaint regarding the application of the exemption at section 36(2)(b)(ii), where the Commissioner finds that the qualified person's opinion was reasonable, he will consider the weight of that opinion in applying the public interest test. In this case, this means that the Commissioner accepts that a reasonable opinion has been expressed that inhibition would be likely to occur, and he will go on to consider the severity, extent and frequency of that prejudice in forming his own assessment of whether the public interest test favours disclosure.
17. The withheld information consists of emails between the Council and Aura which are linked to the complainant's original request for information about contracts between the Council and Aura. This original request was refused under section 43(2) of FOIA (commercial interests) and an internal review of the request was underway at the time of this second request.

Arguments for disclosure

18. The Council accepts that there is public interest in facilitating the transparency and accountability of its decision-making and presenting a full picture of the FOI deliberations, and that disclosure would be in the general public interest of enhancing public understanding of the FOIA and how exemptions are applied.

Arguments for maintaining the exemption

19. The Council stated that, there is a need to preserve a 'safe space' in which the Council can openly seek and consider views and opinions from its officers or relevant third parties, including suppliers, when considering the application of section 43(2) of FOIA, as it needed to do in considering the complainant's original request.
20. It explained that, officers of the Council, suppliers, or other appropriate organisations must be able to have full, free and frank discussions in order to explore all potential elements relating to the disclosure of information. It stated that these considerations and deliberations create an important part of the written record between the parties.
21. It went on to state that if the various parties did not feel comfortable expressing their view and opinions due to possible disclosure, this would hinder decision making and could result in an absence of an audit trail and a lack of accountability which could limit any internal review for FOIA requests.

Commissioner's decision

22. The Commissioner has considered these arguments and accepts that transparency and accountability of the Council's decision making would help to improve understanding of FOIA and its processes.
23. In this case, the information being requested is correspondence relating to the application of section 43(2), to the original request and the decision on whether or not to disclose that information. As laid out in the Commissioner's guidance on this exception, he expects public authorities to consult with third parties in such cases. Therefore the frequency of this type of correspondence is likely to be high.
24. If such discussions were to be disclosed on a regular basis, it is likely that the parties would feel less secure discussing sensitive information on a full and frank basis. This is because the very nature of the correspondence in such cases is a discussion about the sensitivity of commercial information.

25. There is a strong public interest in allowing such discussions to take place without fear of subsequent disclosure in order that a fully informed decision can be made by the public authority.
26. Having reviewed the withheld information, the Commissioner is of the opinion that there is minimal public interest in the content of the correspondence, and that this would not outweigh the public interest in providing a 'safe space' for discussions.
27. The commissioner's conclusion is that the public interest in the maintenance of the exemption outweighed the public interest in disclosure of the withheld information. Therefore the Commissioner's decision is that the Council was entitled to refuse the complainant's request on the basis of section 36(2)(b)(ii).

Right of appeal

28. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

29. 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.
30. 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

Ben Tomes
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