

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 November 2023

Public Authority: Spelthorne Borough Council
Address: Council Offices
Knowle Green
Staines
Middlesex
TW18 1XB

Decision (including any steps ordered)

1. The complainant has requested information about Spelthorne Borough Council's (the Council) handling of a report issued by its auditors. The Council disclosed some information but refused to disclose the remainder, citing sections 36(2)(b)(i) and (ii) and 36(2)(c) (Prejudice to the effective conduct of public affairs) of FOIA.
2. The Commissioner's decision is that the Council was entitled to rely on sections 36(2)(b)(i) and (ii) to refuse the remainder of the request. However, by failing to comply with the request within the statutory time for compliance, the Council breached sections 1(1)(a) and (b), and 10(1) of FOIA.
3. The Commissioner does not require further steps as a result of this decision.

Background

4. The request relates to a public interest report ('PIR') issued by the Council's then external auditors, KPMG. The report raised several concerns regarding the Council's programme of investment for the year 2017-2018.

5. On receipt of the PIR, the Council was required, "as soon as practicable", to publish a copy on its website, provide a copy to council members and make it available for inspection by the public. Furthermore, under schedule 7 of the Local Audit and Accountability Act 2014 ("LAAA"), the Council **must** consider the report within one month of receipt and provide the auditor with a formal response. As the PIR was received on 12 October 2022, this meant a Council meeting to consider the report must be held no later than 12 November 2022.
6. However, at the time the Council received the report, a by-election to elect a new councillor was expected to take place on 24 November 2022. The Council was therefore about to enter the pre-election period (commonly known as 'purdah'). It was subject to restrictions, established under section 2 of the Local Government Act 1986, and expanded on in guidance issued by the Local Government Association¹, on what it could publish or publicise. It consulted various sources and decided that publication during purdah would not be in accordance with those restrictions.
7. In the event, the by-election actually took place on 30 November 2022. The Council delayed publicising the PIR until half an hour after the closure of polls on 30 November 2022. An Extraordinary Council Meeting was held on 8 December 2022, to discuss the PIR, and the Council's proposed response.

Request and response

8. On 14 February 2023, the complainant wrote to the Council and requested information in the following terms:

"Please provide us with the following correspondence and information:

- All emails and other written correspondence exchanged with DLUHC [Department for Levelling up, Housing and Communities] about the Public Interest Report between 12th October and 8th December 2022
- All emails and other written correspondence exchanged with KPMG about the Public Interest Report between 12th October and the end of December 2022.
- Any emails between the statutory officers and the KPMG Task Group between 12th October and 8th December 2022.

¹ <https://www.local.gov.uk/our-support/guidance-and-resources/pre-election-period/what-pre-election-period-means-practice>

- The dates and attendance details of any KPMG task group meetings that took place between 12th October and 8th December 2022.”
9. The Council responded on 12 April 2023. It confirmed that it held the information, but said it was exempt from disclosure under sections 36(2)(b)(i) and (ii), and 36(2)(c) of FOIA.
 10. Following an internal review, the Council wrote to the complainant on 2 June 2023. It maintained that the information requested in the first three bullet points was exempt under section 36. It revised its position on the fourth bullet point, and disclosed the requested information.

Scope of the case

11. The complainant contacted the Commissioner on 16 July 2023 to complain about the way his request for information had been handled. He disagreed with the application of section 36 to withhold the information requested in the first three bullet points of the request. Noting that seven weeks had passed before the Council publicised the existence of the report, he argued that it was in the public interest for the grounds for this delay to be disclosed.
12. During the Commissioner’s investigation, the Council disclosed further information, comprising a letter from DLUHC to the Council. It maintained that section 36 was properly applied to the remaining information.
13. The analysis below considers whether the Council was entitled to rely on sections 36(2)(b)(i) and (ii), and 36(2)(c) of FOIA, to refuse the first three bullet points of the request. The Commissioner has viewed the withheld information when making his decision.
14. The timeliness of the Council’s response has been considered under sections 1 and 10 of FOIA.
15. It is important to note that any questions regarding the legality of the Council’s decision to delay publicising the PIR, and to delay holding a meeting to consider it, are entirely outside of the Commissioner’s remit and are not considered in this decision notice.

Reasons for decision

Section 36 – Prejudice to effective conduct of public affairs

16. The Council is relying on sections 36(2)(b)(i) and (ii), and 36(2)(c) of FOIA, which state:

“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 purposes of deliberation, or

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

17. The Commissioner’s guidance on section 36² states that information may be exempt under sections 36(2)(b)(i) and (ii) if its disclosure would, or would be likely to, inhibit the ability of public authority staff, and others, to express themselves openly, honestly and completely, or to explore extreme options when providing advice or giving their views as part of the process of deliberation.

18. These exemptions are concerned with the processes that may be inhibited, rather than what is in the withheld information. The issue is whether disclosure would, in future, inhibit the processes of providing advice or exchanging views.

19. As regards section 36(2)(c), prejudice to the effective conduct of public affairs can refer to an adverse effect on a public authority’s ability to offer an effective public service or to the disruptive effects of disclosure, for example, the diversion of resources in managing the effect of disclosure.

² <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/section-36-prejudice-to-the-effective-conduct-of-public-affairs/>

20. In this case, the Council is concerned about the 'chilling effect' on council staff, and on the third parties they consult, of disclosing communications on how the PIR should be handled during purdah, and on the Council's proposed response to the PIR. It further considered that it would have to expend resources on defending its decisions and that premature disclosure could have affected the outcome of the by-election.
21. The exemptions at section 36 can only be engaged on the basis of the reasonable opinion of a qualified person. The Commissioner is satisfied that the Council's Chief Executive is authorised as the qualified person under section 36(5)(o)(iii) of FOIA and that he gave the opinion that the exemption was engaged.
22. The complainant's complaint to the Commissioner was focussed on wanting to know the Council's justification for delaying publishing the PIR, and delaying the meeting to discuss the report. Having viewed the withheld information, the Commissioner notes that some of it comprises advice and deliberations on how to comply with the duties that accompanied receipt of the PIR, given the (then) purdah restrictions. The remainder comprises candid advice and deliberations regarding the Council's proposed response to the PIR itself, including discussions of legal advice and draft responses. The subject matter of this latter information falls outside of the concerns the complainant has expressed to the Commissioner, but due to the wording of his request (which was for all communications about the PIR, during a specified period), it falls within scope and must be taken account of when considering the Council's decision to apply section 36.
23. The Commissioner considers that it was reasonable for the qualified person to consider that there was a need to protect the confidentiality of those discussions and deliberations, both within the Council, and with any external parties consulted. The Council was concerned that disclosure would inhibit free and frank discussions in the future, and that the consequent loss of frankness and candour would damage the quality of advice and deliberation and lead to poorer decision making. The Commissioner is satisfied that the qualified person's opinion - that inhibition relevant to sections 36(2)(b)(i) and (ii) would occur through disclosure of the withheld information - is reasonable. He is therefore satisfied that those exemptions were engaged correctly.
24. The Commissioner is less persuaded that section 36(2)(c) applies. The qualified person's opinion provided no details as to the extent to which having to defend its position would impact on the Council's resources or its ability to offer an effective public service. And its arguments about disclosure (in response to the request) influencing the outcome of the by-election hold no weight, as the by-election took place before the request was made. The Commissioner therefore does not consider the

Council has shown that section 36(2)(c) is engaged and he has not considered its application further in this decision notice.

Public interest test

25. Section 36 is subject to the public interest test, as set out in section 2 of FOIA. This means that although sections 36(2)(b)(i) and (ii) are engaged, the requested information must be disclosed unless the public interest in maintaining the exemption is stronger than the public interest in disclosure.
26. The Council considers that disclosure **would** inhibit the processes of providing advice or exchanging views. The Commissioner has carried this higher level of likelihood through to the public interest test.

Public interest arguments in favour of disclosure

27. The complainant believes that, as a result of the delay in publicising the PIR, council members, and the wider public, were denied sufficient time to consider its contents, prior to the Council submitting its response to the auditors. He said:

“When [the PIR] was disclosed, the formal response required by the LAAA had already been prepared by officers and was rushed through the Council with no opportunity for discussion by members allowed, to avoid embarrassing the Council and the political leadership.

...It is in the public interest that the justification for not observing the statutory process is disclosed and this would include what correspondence there was between the Council and DLUHC and the external auditors.

The PIR contained serious criticism of the legality of actions taken by the Council and the future management of the financial risks involved. These should have been subject to detailed member consideration and scrutiny. To date the Council has refused to disclose the basis on which the course of action was sanctioned, claiming that it was done with agreement of DLUHC. This advice, which contradicted the legislation, should be disclosed.”

28. The Council noted the legitimate public interest in public authorities being transparent and accountable.

Public interest in maintaining the exemption

29. The Council argued that the public interest in transparency regarding the report was satisfied by the publication on its website of information about the PIR. It said:

"The following information was published on the Council's website:

- An update about the PIR³,
- Information about the full Council meeting⁴ on 8 December 2022 to note the external auditor's conclusions and to agree a formal response to the 5 recommendations made to the Council,
- The Chief Executive's Response⁵
- The Monitoring Officer's Response⁶
- Information about the council's formal response⁷, and
- FAQs on the Public Interest Report⁸.

Additionally, the live stream of the Council's meeting on 8 December 2022 (referred to above) was available on the Council's YouTube channel for 6 months from the date of the meeting in line with our data retention schedule".

30. The Council put forward 'chilling effect' arguments, saying that its officers, and those it consults with, need to be able to express their views on important matters, to debate possible options and to offer advice and recommendations, frankly and freely. If they become concerned that these discussions might be made public, the resultant loss of frankness and candour in the course of discussions and deliberations would damage the quality of advice to decision makers, and thus inhibit the Council's ability to make fully informed decisions on matters of importance.
31. It also argued that the Council needed a 'safe space' to consider its options and that it was not in the public interest to expend resources on explaining and justifying information on possible options which were not taken forward.

Balance of the public interest

32. When balancing the opposing public interests in a case, the Commissioner will decide whether it serves the public interest better to disclose the withheld information, or to withhold it, because of the interests protected by the relevant exemption. If the public interest in

³ <https://www.spelthorne.gov.uk/publicinterestreport>

⁴ <https://democracy.spelthorne.gov.uk/ieListDocuments.aspx?CIId=133&MIId=4068&Ver=4>

⁵ <https://tinyurl.com/43rjujaf>

⁶ <https://tinyurl.com/ypm44za6>

⁷ <https://tinyurl.com/jcd49pk5>

⁸ <https://tinyurl.com/rmef8fmf>

maintaining the exemption does not outweigh the public interest in disclosure, the information must be disclosed.

33. When considering the public interest test, the Commissioner has taken account of the fact that all decisions about how to respond to the requirements of the LAAA during the pre-election period had been taken by the time of the request. This means that the Council's arguments about needing a 'safe space' to consider live matters do not apply, as those matters were no longer 'live' at the time.
34. Furthermore, for the reasons set out in paragraph 24, the Commissioner places little weight on the Council's arguments about the cost to it of defending its position, as it has provided no supporting evidence of what that impact might be.
35. The Commissioner considers that there is a presumption running through FOIA that openness is, in itself, to be regarded as something which is in the public interest. More specific to this case, the Commissioner recognises the need for transparency and accountability on the part of public authorities, as regards any deviation from compliance with statutory obligations. Disclosure would undoubtedly inform the public about the deliberations the Council undertook, and the advice it received, when reaching its decision not to publicise the PIR, or hold a meeting about it, until after the by-election. It would also provide a significant insight into the Council's formal response to the PIR itself.
36. However, the Commissioner also recognises that, having accepted the reasonableness of the qualified person's opinion, he must give weight to that opinion as an important piece of evidence in his assessment of the balance of the public interest.
37. In the circumstances of this case, the Commissioner accepts that there is a need to protect against the chilling effect that disclosure would have on the future provision of advice and the exchange of views. Council officers, and those they consult, must be able to express themselves freely and frankly, in order that the decisions they make are informed, robust and well founded. Having considered the frank and confidential nature of the withheld information, the Commissioner accepts that disclosure would, in future, have the effect of making people less willing to express their views on high profile subjects with complete candour.
38. The Commissioner has therefore been mindful of the public interest in Council officers being able to have free and open conversations for the purposes of advice and deliberation. It is also important that they maintain trust with external bodies with which they consult, that such information will not be made public without good cause.
39. Furthermore, although not relied on here, the Commissioner notes that any information which discusses legal advice may be covered by the

convention of legal professional privilege, and may be exempt, in its own right, under section 42 of FOIA.

40. The Commissioner recognises the complainant's concerns that the Council did not comply with the timescales imposed by the LAAA. However, the Council was clearly required to consider whether the PIR, which was critical of particular decisions taken by its 2017/2018 administration, could unduly influence voters in the upcoming by-election, and it was therefore reasonable that it should seek advice on the intersection of the LAAA and section 2 of the Local Government Act 1986.
41. The complainant expressed particular interest in knowing the extent of DLUHC's input into the decision. On that point, the Commissioner notes that in the recently disclosed letter from DLUHC to the Council, DLUHC declined to provide advice on the issue, instead advising the Council to take its own independent legal advice on the matter. The Commissioner considers that this informs the complainant about the extent of DLUHC's input into the decision. He also notes the significant amount of information the Council has proactively published about its response to the PIR, on its website.
42. The Commissioner considers the public interest in protecting good decision-making by the Council, to be a compelling argument in favour of maintaining the exemption. While he acknowledges that the public interest in openness and transparency would be served if the information was disclosed, on balance, he finds the public interest in protecting the Council's access to unfiltered, informed and frank advice and information on important matters, to be the stronger argument.
43. His decision is therefore that the Council was entitled to rely on section 36 of FOIA to refuse the first three bullet points of the request.

Procedural matters

Section 1 – General right of access

Section 10 - Time for compliance

Section 17 – Refusal of request

44. Section 1(1)(a) of FOIA states that a person who asks for information is entitled to be informed whether the information is held. If it is held, section 1(1)(b) states that the person is entitled to have that information communicated to them.
45. Section 10(1) of FOIA states that on receipt of a request for information a public authority should respond within 20 working days.

46. The complainant submitted his request on 14 February 2023 and the Council responded 39 working days later, on 12 April 2023, refusing to disclose the requested information. After further consideration, it disclosed the information requested in the fourth bullet point, on 2 June 2023.
47. By failing to respond to the request within 20 working days, the Council breached sections 1(1)(a) and 10(1) of FOIA. By failing to disclose the information which was not exempt under section 36 within 20 working days, it also breached sections 1(1)(b) and 10(1) of FOIA.
48. By failing to issue a valid refusal notice within 20 working days the Council breached section 17(1) of FOIA.
49. The Commissioner has made a separate record of these breaches, for monitoring purposes.

Right of appeal

50. 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

51. 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.

52. 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

Samantha Bracegirdle
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