

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 5 January 2024

Public Authority: Nottingham City Council

Address: Loxley House
Station Street
Nottingham NG2 3NG

Decision (including any steps ordered)

1. The complainant requested a copy of a financial controls report. Nottingham City Council (the "council") withheld the information under the exemption for prejudice to the effective conduct of public affairs (section 36(2)(c)).
2. The Commissioner's decision is that, whilst the exemption is engaged, the public interest favours disclosing the requested information.
3. The Commissioner requires the council to take the following step to ensure compliance with the legislation:
 - Provide the complainant with all the information withheld under section 36(2)(c).
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Background

5. In 2021 it was reported that Nottingham City Council (the "council") wrongfully used £15.86m from the Housing Revenue Account - intended for things such as repairs - for general council services. It was reported that the council said it was required to issue a notice under section 114 of the Local Government Finance Act 1988 - a formal acknowledgement it had acted unlawfully specifically in relation to housing services¹.
6. In 2023 the council commissioned accountants Ernst & Young to review its accounting practices and it was reported that the resulting report raised serious concerns². The report has not been published but some of its findings were summarised in a meeting of the council's Audit Committee on 30 June 2023³.

Request and response

7. On 12 July 2023 the complainant made the following request to Nottingham City Council (the "council"):

"I would like to see the full, unredacted Financial Controls Assessment report prepared by Ernst & Young, a copy of which was summarised by the council at the audit committee meeting on June 30.
8. The council responded on 7 September 2023 and confirmed that it was withholding the information under the exemption for prejudice to the effective conduct of public affairs – section 36(2)(c) of the FOIA.
9. On 14 September 2023 the complainant asked the council to review its handling of the request.
10. On 1 November 2023 the council provided the outcome of its internal review which confirmed that it was maintaining its position.

¹ See: <https://www.bbc.co.uk/news/uk-england-nottinghamshire-59673401>;
<https://www.bbc.co.uk/news/uk-england-nottinghamshire-64167580>

² <https://www.bbc.co.uk/news/uk-england-nottinghamshire-66058807>

³ <https://committee.nottinghamcity.gov.uk/ieListDocuments.aspx?CIId=145&MIId=10006>

Scope of the case

11. On 8 November 2023 the complainant submitted a complaint to the Commissioner about the council's handling of their request.
12. The Commissioner has considered whether the council correctly withheld the requested information.

Reasons for decision

Section 36 – prejudice to the effective conduct of public affairs

13. The council withheld the requested information under section 36(2)(c) of the FOIA.

14. Section 36(2)(c) of the FOIA states:

“(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—

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

The qualified person

15. In order to establish that the exemption has been applied correctly, the Commissioner considers it necessary to:
 - a. ascertain who acted as the Qualified Person;
 - b. establish that an opinion was given by the person;
 - c. ascertain when the opinion was given; and
 - d. consider whether the opinion was reasonable.
16. The council confirmed that the Qualified Person, Malcolm Townroe (Director of Legal & Governance) was provided with a rationale as to why the exemption could apply and copies of the withheld information. The Qualified Person provided their opinion that the exemption was engaged on 23 August 2023.
17. To engage section 36(2)(c), the Qualified Person must give an opinion that the prejudice or inhibition specified would or would be likely to occur. But that in itself is not sufficient: the opinion must be reasonable.

18. In this context an opinion either is or is not reasonable. In deciding whether an opinion is reasonable, the plain meaning of that word should be used, rather than defining it in terms derived from other areas of law. The most relevant definition of 'reasonable' in the Shorter Oxford English Dictionary is: "in accordance with reason; not irrational or absurd". Therefore, if it is an opinion that a reasonable person could hold – then it is reasonable.
19. This is not the same as saying that it is the only reasonable opinion that could be held on the subject. The qualified person's opinion does not become unreasonable simply because other people may have come to a different (and equally reasonable) conclusion. It does not even have to be the most reasonable opinion that could be held; it only has to be a reasonable opinion. It is only unreasonable if it is an opinion that no reasonable person in the qualified person's position could hold.
20. The Qualified Person's (QP) opinion explains that the requested information was a confidential review conducted by Ernst and Young (the "Report") under instruction from the Corporate Director of Finance and Resources at the council regarding Financial Controls in six specific areas of the council. It confirms that this commissioned work was an initial exploratory review into particular areas of concern in the council.
21. The QP argues that disclosure of this sensitive commercial and financial information would likely lead to further public scrutiny, and media interest and would, therefore, be likely to have a significant disruptive effect, diverting limited resources in Finance and Legal & Governance to manage the effect of disclosure.
22. According to the QP, disclosure of the information 'would be likely to' prejudice the effective conduct of public affairs as it relates to an ongoing finance process involving the council and external parties. Whilst the initial Ernst and Young report has concluded, the QP confirmed that the council commissioned additional remediation work from Ernst and Young. The report, therefore, relates directly to an important ongoing issue on which there needs to be a free and frank exchange of views and provision of advice.

The Commissioner's view

23. The prejudice described in section 36(2)(c) could refer to an adverse effect on an authority's ability to offer an effective public service or to meet its wider objectives or purpose, but the effect does not have to be on the authority; it could be an effect on other bodies or the wider public sector. It may also refer to the disruptive effects of disclosure, for example the diversion of resources in managing the effect of disclosure.

24. The Commissioner recognises that the focus of the council's position is centred on the need to have a 'safe space' to develop ideas, debate live issues, and reach decisions away from external interference and distraction.
25. Traditionally, safe space arguments relate to internal discussions but public authorities do sometimes invite external organisations or individuals to participate in their decision making process (eg consultants, advisors, lobbyists, interest groups). Safe space arguments can still apply where external contributors have been involved, as long as those discussions have not been opened up for general external comment. However, this argument will generally carry less weight than if the process only involved internal contributors.
26. The Commissioner considers that the need for a safe space will be strongest when the issue is still live. Once a decision has been made, a safe space for deliberation will no longer be needed. If it was a major decision, there might still be a need for a safe space to properly promote, explain and defend its key points without getting unduly side-tracked. However, the maintenance of a safe space should not be open-ended and should be directly linked to the context.
27. In relation to the likelihood of the described prejudice occurring, the Commissioner notes that the QP has specified that it 'would be likely' to occur, which is a lower standard than 'would prejudice'. This means that the chance of prejudice must still be significant and weighty, and certainly more than hypothetical or remote, but it does not have to be more likely than not that it would occur.
28. Having considered the opinion provided by the QP and referred to the withheld information, the Commissioner is satisfied that disclosure would be likely to result in interference to the safe space needed to consider and act on the Report and that this, in turn, would be likely to otherwise prejudice the effective conduct of public affairs. It follows that the Commissioner accepts that the opinion provided by the QP is a reasonable one and that the exemption in section 36(2)(c) is engaged. As this exemption is qualified, he has, therefore, gone on to consider the public interest test.

Public interest in disclosure

29. In considering the relevant public interest factors in this case the Commissioner has referred to another decision notice which relates to a

request for the same information submitted by a different complainant. Given the identical nature of the request and the timeframe the Commissioner considers it appropriate to transpose the public interest factors considered here⁴.

30. It has been argued that senior officers who are experienced professionals should be able to separate themselves from any external interference or distraction. It follows, therefore, that there is no need for a safe space.
31. A further argument in favour of disclosure relates to the widely publicised serious concerns about the council's financial operations provide weighty grounds for transparency and accountability. Information in the public domain about the Report confirms that there were 'very serious concerns' about the council's financial management.
32. The council's suggestion that disclosure would have a disruptive effect and/or would result in the diversion of limited resources to manage the effects of disclosure has also been challenged. It is arguable that any such concerns are more than offset by the need for transparency around the council's financial management.
33. The council has acknowledged there is a public interest in transparency and accountability for the decisions surrounding the Financial Controls across the council. It has recognised that disclosure of the Report would serve the general public interest in promotion of better governance through transparency, accountability and public debate. The council has further acknowledged that disclosure would provide a better public understanding of shortcomings of Financial Controls across the council. Disclosure would also, the council accepts, provide the opportunity for an informed and meaningful participation of the public in the financial processes and decision making at the council

Public interest in maintaining the exemption

34. In its submissions the council highlighted an element of the Commissioner's own guidance which draws a distinction between the public interest and what interests the public. In other words, the public interest cannot automatically be identified with what is of interest to the public⁵.

⁴ ICO reference: IC-270925-J2V7.

⁵ <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/the-public-interest-test/#pit4>

35. The council stated that, due to its technical nature, the Report has only been shared with a select audience of senior officers. Again, referring to the Commissioner's guidance; this time that relating to the 'Consideration of the identity or motives of the applicant'⁶, the council observed that a requester's private interests including those of members of the local press are not the same as the public interest and what may serve those private interests does not necessarily serve a wider public interest.
36. The council has further argued that disclosure of the Report undermines ongoing remediation work around Financial Controls across the whole council, and the delivery of good governance which is counter to any public interest in disclosure. The council considers that disclosure would be likely to be detrimental to this remediation process and that there is a strong public interest in ensuring that the quality and frankness of this remediation process is not harmed by the disclosure of the Report in relation to a confidential process.
37. The council has argued that there is a strong public interest in ensuring that the quality of decision making is not harmed by confidential technical information being shared. It considers that the Report and associated decisions taken are based on process that can be as frank and candid as is possible. The council considers that the public interest clearly lies in protecting the ability of senior officers and commissioned parties to carry out and maintain the confidentiality of this process. The council maintains that disclosure of the Report would have a significant disruptive effect; it would divert limited resources in the council to manage the effect of disclosure and future disclosures of confidential reports.

Balance of the public interest

38. The Commissioner recognises that the purpose of the exemption is to protect authorities from harm to its ability to carry out its functions and, specifically in this case, to allow the council to effectively consider and make decisions regarding its finances. The Commissioner accepts that there will always be some public interest weighting in favour of facilitating effective governance.

⁶ <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/consideration-of-the-applicant-s-identity-or-motives/>

39. In relation to the council's arguments regarding the distinction between the public interest and matters of interest to the public, the Commissioner recognises that this can be a real distinction and that a high volume of public and media interest does not in itself prove a valid public interest.
40. However, given the facts of this case, the Commissioner does not find it plausible to dismiss the interest in the council's financial governance as a purely private interest, as if it were the equivalent of mischievous or salacious tabloid reporting.
41. The Commissioner considers that the publicly documented concerns about the council's financial management provide legitimate and demonstrable grounds for public concern and a valid public interest argument in favour of disclosure in this case.
42. Moreover, the Commissioner notes that public concerns about the council's financial management are not confined to the matters associated with the Report. It is a matter of public record that the council recently lost considerable sums of public money in its investment in Robin Hood Energy⁷. It is not the Commissioner's role to scrutinise the council's financial practices but it is clear that it would be reasonable for the public to be concerned about the council's practices.
43. In its submissions to the Commissioner the council emphasises the 'confidential' nature of the Report. The Commissioner recognises that this can give an indication of the importance and sensitivity of the information but it does not in itself constitute a public interest factor in favour of withholding the information. The council also makes reference to the 'technical' nature of the Report. Again, whilst this can indicate a level of detail which could be damaging to reveal, it is not in itself an argument against disclosure. The council has not properly explained the relevance of these factors to the Commissioner.
44. In considering the public interest factors more directly associated with the exemption, namely, the need for a safe space for effective decision making, the Commissioner considers that the arguments provided by the council are generic and do not provide details of the specific harm which disclosure would be likely to cause. Public awareness of any issues identified in the Report should not inhibit the council's ability to make decisions and any concerns about misinterpretation of technical details could be addressed in a preface or covering release.

⁷ <https://www.bbc.co.uk/news/uk-england-nottinghamshire-54056695>

45. In relation to the council's financial governance it is the case that on 29 November 2023 the Chief Finance Officer issued a report under section 114(3) of the Local Government Finance Act 1988 (a "section 114 notice") because, "...in his professional opinion, the council isn't able to deliver a balanced budget for this year, which is a legal requirement."⁸
46. The Commissioner recognises that the issuing of the section 114 notice postdates the request and cannot be considered as a relevant public interest factor. However, he does consider that, to an extent, it retroactively legitimises and adds weight to the public interest concerns which count in favour of disclosure in this case.
47. Having considered the relevant evidence, whilst noting the council's legitimate concerns about disclosure, the Commissioner considers that, in this case, the very unusual circumstances mean that there is an enhanced need for transparency and accountability regarding the council's financial governance. He considers that the public interest in disclosure, therefore, outweighs that in maintaining the exemption.
48. The Commissioner has concluded that, whilst the exemption in section 36(2)(c) was correctly engaged by the council, the public interest favours disclosing the information.

⁸ <https://www.mynottinghamnews.co.uk/section-114-report-issued-for-nottingham-city-council/>

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@justice.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

Christopher Williams
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