

Freedom of Information Act 2000 ('FOIA')

Decision notice

Date: 4 December 2014

Public Authority: Hampshire County Council
Address: The Castle
Winchester
Hampshire
SO23 8JU

Decision (including any steps ordered)

1. The complainant has requested information relating to reducing the mileage rate for staff at Hampshire County Council ('the council'). The Commissioner's decision is that the council has correctly applied the exemption where disclosure would, or would be likely to, inhibit the free and frank exchange of views for the purposes of deliberation at section 36(2)(b)(ii) of the FOIA. He has also decided that the council breached the statutory time for compliance in relation to parts of the request. He does not require the public authority to take any steps to ensure compliance with the legislation.

Request and response

2. On 1 April 2014, the complainant wrote to the council and requested information in the following terms:

"A recent EHCC committee recently voted in favour of starting formal consultation on reducing the HCC mileage rate to 45p for all staff.

1. How did each individual elected member on this committee vote in respect of this issue.
2. Please provide a copy of the report upon which this decision was based.

3. Whose decision was it to initiate the report to the members of the Committee.
3. The council provided an initial response on 1 May 2014. It said that section 36(2)(b)(ii) applies and that it requires additional time to consider the balance of the public interest.
4. On 2 June 2014 the council provided a further response. It said that it does not hold recorded information in relation to question 1, as the matter was based on agreement by consensus rather than a formal vote and no record was kept of individual votes, it withheld information in relation to question 2 on the basis that the exemptions at section 36(2)(b)(i) and (ii) apply, and it provided narrative information in relation to question 3.
5. The complainant requested an internal review on 2 June 2014. The council provided its internal review response on 12 August 2014 in which it maintained its original position.

Scope of the case

6. The complainant contacted the Commissioner on 14 August 2014 to complain about the way his request for information had been handled. He said that the council had made a wrong decision of non-disclosure, that there was undue delay in the process and that the person reviewing the decision was the same person who made the initial decision.
7. The council's initial response said that the exemption at section 36(2)(b)(ii) applies whereas its response of 2 June 2014 said that the exemptions at sections 36(2)(b)(i) and 36(2)(b)(ii) apply. The record of the qualified person's opinion submitted to the Commissioner during his investigation only considered the exemption at section 36(2)(b)(ii). Therefore, the Commissioner has only considered whether the council was correct to apply the exemption at section 36(2)(b)(ii) of the FOIA.
8. During the Commissioner's investigation, the council reviewed the reports in light of the passage of time and provided the complainant with a summary of extracts from the two reports dated 12 November 2013 and 12 March 2014. It is only the remaining withheld information that the Commissioner has considered in this decision notice. For the avoidance of doubt, the withheld information is as follows:
 - Report dated 12 November 2013:
 - Part of paragraph 5.1

- Paragraphs 5.2, 6.2 and 6.5
 - Report dated 12 March 2014
 - Part of paragraph 2.1
9. He has also considered whether there has been a breach in relation to the time for compliance.

Reasons for decision

10. Section 36 states that information is exempt where, in the reasonable opinion of a qualified person, disclosure would or would be likely to prejudice the effective conduct of public affairs. Section 36 operates in a slightly different way to the other prejudice based exemptions in the FOIA. Section 36 is engaged, only if, in the reasonable opinion of a qualified person, disclosure of the information in question would, or would be likely to, prejudice any of the activities set out in sub-sections of 36(2).
11. In this case the Commissioner is considering the application of the exemption at section 36(2)(b)(ii).
12. Section 36(2)(b)(ii) provides an exemption where disclosure would, or would be likely to, inhibit the free and frank exchange of views for the purposes of deliberation.

Is the exemption engaged?

13. In order to establish whether each of the exemptions has been applied correctly the Commissioner has:
- Ascertained who is the qualified person or persons for the public authority in question;
 - Established that an opinion was given;
 - Ascertained when the opinion was given; and
 - Considered whether the opinion given was reasonable.
14. With regard to the first two criteria, the Commissioner has established that the opinion was given by Barbara Beardwell, Solicitor. The Commissioner is satisfied that Barbara Beardwell, being the council's Monitoring Officer, is a qualified person for the purposes of section 36(5) of the FOIA.

15. In relation to the third criterion, the council has provided dates when the opinion was sought and given. The Commissioner is satisfied that the opinion was provided after the receipt of the request and before the initial response of 1 May 2014.
16. With regard to the fourth criterion, in deciding whether an opinion is reasonable the Commissioner will consider the plain meaning of that word, that being: in accordance with reason, not irrational or absurd. If it is an opinion that a reasonable person could hold, then it is reasonable for these purposes. This is not the same as saying that it is the *only* reasonable opinion that could be held on the matter. The qualified person's opinion is not rendered unreasonable simply because other people may have come to a different (and equally reasonable) conclusion. It is only not reasonable for these purposes if it is an opinion that *no* reasonable person in the qualified person's position could hold. The qualified person's opinion does not even have to be the *most* reasonable opinion that could be held; it only has to be *a* reasonable opinion.
17. The Commissioner has also been guided by the Tribunal's indication, in the case *Guardian Newspapers & Brooke v Information Commissioner & BBC*¹, that the reasonable opinion is limited to the degree of likelihood that inhibition or prejudice may occur and thus 'does not necessarily imply any particular view as to the *severity* or *extent* of such inhibition [or prejudice] or the *frequency* with which it will or may occur, save that it will not be so trivial, minor or occasional as to be insignificant' (paragraph 91). Therefore, when assessing the reasonableness of an opinion the Commissioner is restricted to focussing on the likelihood of that inhibition or harm occurring, rather than making an assessment as to the severity, extent and frequency of prejudice or inhibition of any disclosure.
18. With regard to the degrees of likelihood of prejudice the Commissioner has been guided on the interpretation of the phrase 'would, or would be likely to' by a number of Information Tribunal decisions. In terms of 'likely to' prejudice, the Tribunal in *John Connor Press Associates Limited v The Information Commissioner*² confirmed that 'the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk' (paragraph 15). With regard to the alternative limb of 'would prejudice', the Tribunal in *Hogan*

¹ Appeal numbers EA/2006/0011 & EA/2006/0013

² Appeal number EA/2005/0005

*v Oxford City Council & The Information Commissioner*³ commented that 'clearly this second limb of the test places a stronger evidential burden on the public authority to discharge' (paragraph 36).

19. In its response to the complainant, the internal review response and its record of the qualified person's opinion, the council stated that claimed inhibition *would be likely to* occur if the information was disclosed. Therefore, the Commissioner considers that it is appropriate to apply the lesser evidential test.
20. At the Commissioner's request, the council provided a copy of the qualified person's opinion. The Commissioner notes that the qualified person was: provided with all the information within the scope of the request; was aware of the background; and took into account the views of the council's Human Resources service before reaching her decision.
21. The record of the qualified person's opinion states that the inhibition would be likely to occur as the information relates to proposals to realign the council's business mileage rates, to HMRC rates, and disclosure would lead to speculation and concerns about the outcome when the issue has not yet been fully considered. It said that the issue is still subject to the democratic process which involves discussion and advice and continues to require a 'safe space' to continue this process as it would be likely that the process would be prejudiced if the withheld details were in the public domain. A counter argument put forward in the record of the qualified person's opinion were that the issue is of interest to all council staff. It also said that the interests of staff have been represented through ongoing consultation with Trade Unions.
23. Whilst the Commissioner does not accept that those involved in the process would be put off providing their views in full, it is not unreasonable to conclude that information would be less descriptive and couched in a more cautious manner. This would then be likely to have a harmful effect on the deliberation process relating to the realignment of the council's business mileage rates. He therefore finds that the opinion of the qualified person is a reasonable one in this instance and that section 36(2)(b)(ii) is engaged.

Public interest test under section 36

24. Section 36(2)(b)(ii) is a qualified exemption and therefore the Commissioner must consider whether the public interest in maintaining

³ Appeal number EA/2005/0026 & 0030

the exemption outweighs the public interest in disclosure of the information. The Tribunal in *Guardian Newspapers & Brooke v Information Commissioner & BBC*⁴ indicated the distinction between the consideration of the public interest under section 36 and consideration of the public interest under the other qualified exemptions contained within the FOIA:

"The application of the public interest test to the s36(2) exemption involves a particular conundrum. Since under s36(2) the existence of the exemption depends upon the reasonable opinion of the qualified person it is not for the Commissioner or the Tribunal to form an independent view on the likelihood of inhibition under s36(2)(b), or indeed of prejudice under s36(2)(a) or (c). But when it comes to weighing the balance of public interest under s2(2)(b), it is impossible to make the required judgment without forming a view on the likelihood of inhibition or prejudice." (Paragraph 88)

25. As noted above, the Tribunal indicated that the reasonable opinion is limited to the degree of likelihood that inhibition or prejudice may occur and thus 'does not necessarily imply any particular view as to the *severity* or *extent* of such inhibition [or prejudice] or the *frequency* with which it will or may occur, save that it will not be so trivial, minor or occasional as to be insignificant' (paragraph 91). Therefore, the Commissioner's view is that whilst due weight should be given to reasonable opinion of the qualified person when assessing the public interest, the Commissioner can and should consider the severity, extent and frequency of prejudice or inhibition to the subject of the effective conduct of public affairs.

Public interest arguments in favour of disclosing the requested information

26. The council said that there is public interest in the openness and transparency of council decisions and that recommendations and advice concerning the staff mileage rate are of public interest not only to staff but to the wider public in the context of financial accountability.
27. The complainant has said that the outcome of the staff mileage rate decision is not ongoing as a final decision has been reached by the council.

⁴ Appeal numbers EA/2006/0011 & EA/2006/0013

28. The Commissioner considers that the 'default setting' of the FOIA is in favour of disclosure. This is based on the underlying assumption that disclosure of information held by public authorities is in itself of value because it promotes better government through transparency, accountability, public debate, better public understanding of decisions and informed and meaningful participation of the public in the democratic process. In this particular case, disclosure would aid transparency as to how the council considers the realignment of its staff mileage rates.

Public interest arguments in favour of maintaining the exemptions

29. The council said that it is in the public interest that as an employer it is able to effectively manage its financial outgoings and in order to do so it is necessary to have the freedom to consider and comment in private on matters to which the reports relate, and to discuss and develop its views with frankness and candour.
30. It further explained that the internal deliberations and decision making process of the council requires a safe space in which issues can be fully explored before decisions are subject to public debate. It said that issues considered and commented on in the report remained subject to determination and subject to further advice from officers and that disclosure would be likely to inhibit the free and frank provision of advice and deliberations in future. It explained that as the issue was, and is, the subject of negotiation and where appropriate, further consultation with the affected officers, disclosure would inhibit council officers from providing candid advice about the strengths and weaknesses or consequences of one course of action or another, which in turn, would not be beneficial to the decision making process.

Balance of the public interest arguments

31. Where, as with this case, a qualified exemption is engaged, the information requested must still be disclosed unless, in all circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing it.
32. The council said that the balance of the public interest lies in withholding the reports.

33. Having seen the withheld information, the Commissioner has considered where the balance of the public interest lies, taking into account the severity, frequency and extent of the claimed prejudice.
34. The Commissioner's guidance on section 36⁵ states that;
- "The safe space argument could also apply to section 36(2)(b), if premature public or media involvement would prevent or hinder the free and frank exchange of views or provision of advice... This need for a safe space will be strongest when the issue is still live. Once the public authority has made a decision, a safe space for deliberation will no longer be required. If it was a major decision, there might still be a need for a safe space in order to properly promote, explain and defend its key points without getting unduly sidetracked. However, this can only last for a short time and the public authority would have to explain clearly why it was still required at the time of the request on the facts of each case. The timing of the request will therefore be an important factor."
35. The Commissioner has established that at the time of applying the exemption, negotiations with the Trade Unions were still in progress. He understands that, at the present time, negotiations with the Trade Unions have concluded but there will continue to be an ongoing process of consultation with affected individuals. As the Commissioner must base his decision on the situation at the time of applying the exemption, he has given weight to the public interest in maintaining a safe space.
36. The Commissioner considers that there is a public interest inherent in section 36(2)(b)(ii), that being a prejudice-based exemption, in avoiding harm to the decision making process. He has taken into account that there is automatically some public interest in maintaining this exemption.
37. The Commissioner has considered the public interest arguments presented in this case. He has given due weight to the opinion of the qualified person and has considered the likely extent, frequency and severity of any impact of disclosure on the free and frank exchange of views for the purposes of deliberation. He has given weight to the fact that the deliberation process was ongoing at the time the exemption

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[http://www.ico.org.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/section_36_prejudice_to_effective_conduct_of_public_affairs.ashx](http://www.ico.org.uk/for_organisations/guidance_index/~/media/documents/library/Freedom_of_Information/Detailed_specialist_guides/section_36_prejudice_to_effective_conduct_of_public_affairs.ashx)

was applied. The Commissioner has concluded that in the circumstances of this case the public interest in maintaining the exemption outweighs the public interest in disclosure of the requested information and therefore the exemption at section 36(2)(b)(ii) has been applied correctly.

Section 10 – Time for compliance

38. Section 10(1) states:

“Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”

39. Section 10(3) enables an authority to extend the 20 working day limit up to a ‘reasonable’ time in any case where;

- it requires more time to determine whether or not the balance of the public interest lies in maintaining an exemption; or
- it needs further time to consider whether it would be in the public interest to confirm or deny whether the information is held.

40. The council received the request on the 1 April 2014. On 1 May 2014 it provided an initial response stating that it considers that the exemption at section 36(2)(b)(ii) applies and that, by virtue of section 10(3), it does not have to comply with the request until such time as in reasonable in the circumstances as it has not yet reached a decision on the balance of the public interest. It also said that it hopes to formally respond to the request by 2 June 2014, if not before. The final response was provided on 2 June 2014.

41. Any authority claiming an extension will still be obliged to issue a refusal notice explaining which exemption applies and why within 20 working days. This notice must explain that it requires more time to consider the public interest test, and provide an estimate of the date on which a final decision is likely to be made.

42. The FOIA does not define what might constitute a ‘reasonable’ extension of time. However, the Commissioner’s view is that an authority should take no more than an additional 20 working days to consider the public interest, meaning that the total time spent dealing with the request should not exceed 40 working days.

43. In relation to part 2 of the request, as the council had reached the decision that a specific qualified exemption applied, informed the

complainant of that within 20 working days from the initial request (allowing for the two public holidays in April 2014), and then took no more than an additional 20 working days (allowing for the two public holidays in May 2014) to inform the complainant of where it considered the balance of the public interest to lie, the Commissioner does not consider that there has been a breach in relation to the time for compliance.

44. In relation to parts 1 and 3 of the request, as the provision at section 10(3) cannot apply as a qualified exemption was not under consideration, the Commissioner considers that the council breached section 10(1) of the FOIA by not providing a response within 20 working days.

Other matters

Internal review

45. As he has made clear in 'The Guide to Freedom of Information'⁶, the Commissioner considers that internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the FOIA, the Commissioner's view of a reasonable time for completing an internal review is 20 working days from the date of the request for review, or 40 working days in exceptional cases. In this case the Commissioner notes that complainant requested an internal review on 2 June 2014 but the council did not provide an internal review response until 12 August, over two months later. The council should ensure that internal reviews are carried out promptly in future.
46. The Commissioner considers that an internal review should be carried out by someone who did not deal with the request, where possible, and preferably by a more senior member of staff. In this case the complainant has said that the person carrying out the review was the same person who made the decision on non-disclosure. The Commissioner notes that the Monitoring Officer carried out the internal review and also was the qualified person for the purpose of deciding whether the exemption at section 36(2)(b)(ii) applies. However, he also notes that the response was sent and signed from a different person, a

Senior Compliance Officer, and considers that, whilst a qualified person must give their opinion on whether an exemption under section 36 applies, the balance of the public interest can validly be undertaken by someone other than the Monitoring Officer which is what appears to have happened in this instance.

Right of appeal

47. 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

48. 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.
49. 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