

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 March 2016

Public Authority: South Lakeland District Council
Address: South Lakeland House
Lowther Street
Kendal
Cumbria
LA9 4DQ

Decision (including any steps ordered)

1. The complainant has requested information relating to minutes of meetings of the independent remuneration panel (IRP) which provides recommendations to the Council. The Council refused to disclose the requested information, citing section 36(2)(b) of FOIA as a basis for non-disclosure.
2. The Commissioner's decision is that the Council has correctly applied section 36(2)(b)(ii) to the requested information. The Commissioner also finds that the Council is in breach of section 10(1) of FOIA as it did not respond to the complainant's request within the statutory time limit.
3. The Commissioner therefore requires no steps to be taken.

Request and response

4. On 9 December 2014, the complainant wrote to the Council and requested information in the following terms:
 1. All minutes of the 'independent' remuneration panel (IRP) of SLDC to date and going back to and including the last two meetings with Mr John Lyons as Chair (before his term of office ended).
 2. Running times of meetings if not recorded in minutes but recorded elsewhere.

5. The Council responded on 10 July 2015. It stated that the requested information was available to the public and that therefore section 21 of FOIA was applicable in this case.
6. Following an internal review the Council wrote to the complainant on 30 July 2015. It stated that section 21 of FOIA had been incorrectly applied in this case, however the requested information was exempt from disclosure under section 36(2) of FOIA.

Scope of the case

7. The complainant contacted the Commissioner on 14 August 2015 to complain about the way his request for information had been handled.
8. The Commissioner has considered the Council's handling of the complainant's request, in particular its application of section 36(2) to the requested information.

Reasons for decision

9. Section 36(2)(b) states that information is exempt if, in the reasonable opinion of the qualified person, its disclosure 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.
10. Section 36 is unique in that its application depends on the opinion of the qualified person that the inhibition envisaged would, or would be likely to occur. In determining whether the exemption was correctly engaged by the Council, the Commissioner is required to consider the qualified person's opinion as well as the reasoning that informed the opinion.

Therefore the Commissioner must:

- Ascertain who the qualified person is,
- Establish that they gave an opinion,
- Ascertain when the opinion was given, and
- Consider whether the opinion was reasonable.

11. The College has informed the Commissioner that the “qualified person” in this case is Matthew Neal, solicitor for the Council. The Commissioner is satisfied that Mr Neal is the appropriate qualified person for the purposes of section 36 of FOIA.
12. In order for the Commissioner to determine whether the exemption at section 36(2)(b)(i) and (ii) are engaged, he must determine whether the qualified person’s opinion is a reasonable one. In doing so, he has considered all of the relevant factors including:
 - Whether the prejudice 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, for example, whether the request concerns an important ongoing issue on which there needs to be a free and frank exchange of views or provision of advice.
 - The qualified person’s knowledge of, or involvement in, the issue.
13. 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. 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 is not rendered unreasonable simply because other people may have come to a different (and equally reasonable) conclusion. It is only unreasonable if it is an opinion that no reasonable person in the qualified person’s position could hold. The qualified person’s opinion does not have to be the most reasonable opinion that could be held; it only has to be a reasonable opinion.
14. The Commissioner’s guidance on section 36¹ explains that information may be exempt under section 36(2)(b)(i) and section 36(2)(b)(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. The guidance says that the rationale for this is that inhibiting the provision of advice or the exchange of views may impair the quality of decision making by the public authority. The exemptions are therefore about the processes that may be inhibited rather than what is necessarily in the information itself.

15. The Council has informed the Commissioner that its original response to the complainant's request was given to the qualified person to consider after the complainant had requested an internal review. The Council confirmed that the qualified person had been provided with the withheld information in its entirety and gave his opinion after having perused both the Council's original response and the withheld information.
16. The qualified person considered the requested information and the potential effects of its disclosure. He considered that IRP members need to be able to have free and frank discussions in their meetings regarding recommendations that the IRP plans to make to the Council. Councillors and Council Officers may also attend these meetings to make representations and to ask questions, and the qualified person considered that it is important that they are able to do so freely and frankly.
17. The Commissioner, having taken into account the issues considered by the qualified person, has concluded that the qualified person's opinion is reasonable in all the circumstances. He has also, from perusing the requested information, concluded that section 36(2)(b)(ii) is engaged in relation to all information in the report which was withheld under section 36, so has not considered the Council's application of section 36(2)(b)(i) to the requested information.

Public interest test

18. As the Commissioner has decided that the exemption under section 36(2)(b)(ii) is engaged, he has gone on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information. In his approach to the competing public interest arguments in this case, the Commissioner has drawn heavily upon the Information Tribunal's decision in the case of *Guardian Newspapers Limited and Heather Brooke v Information Commissioner and BBC*.¹
19. The Commissioner notes, and adopts in particular, the Tribunal's conclusions that, having accepted the reasonableness of the qualified

¹ EA/2006/0011 & EA/2006/0013

person's opinion that disclosure of the information would, or would be likely, to have the stated detrimental effect, the Commissioner must give weight to that opinion as an important piece of evidence in his assessment of the balance of the public interest. However, in order to form the balancing judgment required by section 2(2)(b), the Commissioner is entitled, and will need, to form his own view as to the severity of, and the extent and frequency with which, any such detrimental effect might occur. Applying this approach to the present case, the Commissioner recognises that there are public interest arguments which pull in competing directions, and he gives due weight to the qualified person's reasonable opinion that disclosure would, or would be likely to inhibit the free and frank provision of advice.

Public interest arguments in favour of disclosure of the requested information

20. There is a general presumption of openness running through FOIA and the Commissioner accords strong weight to the public interest in such general openness and transparency with regard to decisions made by public authorities. The Council acknowledges the importance of such general openness and transparency in relation to its decision-making processes.
21. The Council also considers that it is important to involve the public in its decision-making processes where possible, in order to further public understanding of the Council's decisions.

Public interest arguments in favour of maintaining the exemption

22. The Council has explained that it considers that disclosure of the requested information would be likely to inhibit the frankness and candour with which the IRP members exchange views and with which Councillors and Council Officers make representations and ask questions if they were to anticipate that any such discussions may be published. This would be likely to have a detrimental effect on such discussions and ultimately on recommendations made by the IRP.
23. The Council has further explained to the Commissioner that IRP members receive a modest remuneration on a statutory basis – they are not Council employees. The IRP operates on an advisory basis only and does not ultimately make decisions. Its recommendations are made publicly available on the Council's website.

Balance of the public interest arguments

24. The Commissioner considers there is a strong public interest in openness and transparency, particularly to ensure that decisions are made fairly and effectively. This is because it would provide the public with a greater understanding and reassurance of how the Council has arrived at their decisions.
25. The Commissioner does however consider that such decisions require free and frank discussions between the IRP members and the sharing of views of third parties such as councillors and officers. Disclosure of information which would be likely to inhibit the frankness and candour of such discussions would not be in the public interest as in turn it would be likely to have a negative impact upon the final decision-making process.
26. The Commissioner considers that there is a strong public interest in ensuring that whilst options are being considered and discussed, those involved do not feel constrained from providing free and frank views on the possible recommendations to be made. If those providing the views feel inhibited from being as free and frank as possible, there is a real risk that the views they provide might be lacking in frankness and candour and consequently limit the recommendations provided. This would clearly have a detrimental effect on final decisions made.
27. The Commissioner considers that there is a strong public interest in disclosure of information in general as transparency would assure the wider public that the Council makes decisions in a fair and effective manner. However, as the IRP members can only make recommendations and have no final decision-making power, and as their recommendations are published on the Council's website, the Commissioner considers that this provides sufficient transparency without compromising the integrity of the IRP's discussions.
28. Therefore, on balance the Commissioner considers that, in this case the public interest arguments in favour of disclosure are outweighed by the public interest arguments in favour of maintaining the exemption. Section 36(2)(b)(ii) of FOIA was therefore correctly applied in this case.

Section 10(1) – time for compliance

29. Under section 1(1) of the FOIA a public authority must confirm or deny whether the information specified in a request is held and, where it is, provide it to a requester.

30. Section 10(1) of the FOIA requires a public authority to comply with section 1(1) within 20 working days of the date of receipt of the request.
31. In this case the complainant's request was made on 9 December 2014 and the Council responded on 10 July 2015. As the Council failed, by some margin, to respond within 20 working days, the Commissioner finds that it breached section 10(1) of FOIA.

Right of appeal

32. 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

33. 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.
34. 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

Rachael Cragg
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