

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 4 September 2017

Public Authority: Stratford-on-Avon District Council

Address: Elizabeth House
Church Street
Stratford-upon-Avon
CV37 6HX

Decision (including any steps ordered)

1. The complainant has requested information from Stratford-on-Avon District Council ("the Council") regarding the views of two independent persons which had been submitted to the Council in relation to its decision whether or not to investigate a complaint about a named councillor. The Council withheld the information under section 36(2) of the FOIA: Disclosure prejudicial to the effective conduct of public affairs.
2. The Commissioner's decision is that the Council has correctly applied section 36(2)(b)(i) and section 36(2)(c) to the withheld information.
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. On 23 January 2017, the complainant wrote to the Council regarding a complaint he had previously submitted about a named councillor. He requested information in the following terms:

"I have requested under the Freedom of Information Act all correspondent [sic] relating to my complaint."

5. The Council responded on 17 February 2017 explaining that it held the following information falling within the scope of the request:
 - 1) The complainant's completed complaint form;
 - 2) Comments provided by the subject Councillor;
 - 3) Views received from the two Independent Persons ("IPs");
 - 4) Email exchanges between a Council officer and (a) the complainant, (b) the subject Councillor and (c) the two IPs.
6. The Council provided the complainant with all of the information which it held within the scope of the request, with the exception of item 3) – the views of the IPs. It explained that it considered that this information was exempt from disclosure under 36(2)(b) or (c) of the FOIA – Prejudice to effective conduct of public affairs. It also considered that it would be exempt under section 40(2) of the FOIA – Third party personal data.
7. The Council explained that it was not able to offer an internal review, since the person responding to the request held the information in his capacity as monitoring officer, and no-one else at the Council was authorised under the constitution to carry out internal reviews.

Scope of the case

8. The complainant contacted the Commissioner on 23 February 2017 to complain about the way his request for information had been handled.
9. The Commissioner considers that the scope of the case has been to investigate whether the Council is correct to have withheld the views of the IPs under section 36(2) of the FOIA. If section 36(2) is found not to apply, she will go on to consider section 40(2).

Reasons for decision

Section 36(2) – Prejudice to the effective conduct of public affairs

10. Section 36(2) provides that information is exempt if in the reasonable opinion of the qualified person, disclosure-
 - (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.

11. In this case, the Council has withheld the information requested by the complainant under sections 36(2)(b)(i) and 36(2)(c).
12. For the exemption to be engaged, the proper qualified person for the public authority must have given his or her opinion on the application of the exemption.
13. In this case, the Council's Head of Governance & Democracy and Monitoring Officer (Phil Grafton) provided the opinion. The Commissioner is satisfied that he is the qualified person for the purposes of section 36.
14. In his letter to the complainant dated 17 February 2017, Mr Grafton gave his opinion that sections 36(2)(b)(i) and 36(2)(c) were engaged.
15. During the Commissioner's investigation, the qualified person also completed the Commissioner's pro forma Record of the Qualified Person's Opinion, which is dated 13 July 2017 and which provides more detail of his opinion.
16. The form shows that Mr Grafton was the person who originally considered the complaint about the named councillor, which formed the background to this information request. He can therefore be said to have considered relevant submissions, and to have had a detailed knowledge of the withheld information, when providing his opinion.
17. The qualified person gave his opinion that disclosing this information would be likely to inhibit the free and frank provision of advice and would be likely otherwise to prejudice the effective conduct of public affairs.
18. The Commissioner is satisfied that the Council has obtained the opinion of the proper qualified person and so this element of the exemption is met.
19. In order to determine whether the exemption is engaged the Commissioner must then go on to consider whether the opinion was reasonable with regard to the following:
 - whether the prejudice claimed relates to the specific subsections of section 36(2) that the Council is relying upon;

- the nature of the information and the timing of the request; and
 - the qualified person's knowledge of or involvement in the issue.
20. The Commissioner has recently issued guidance on section 36 of the FOIA. With regard to what can be considered a 'reasonable opinion' it states the following:
- "The most relevant definition of 'reasonable' in the Shorter Oxford English Dictionary is 'In accordance with reason; not irrational or absurd'. 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."*
21. It is important to note that, when considering whether section 36 is engaged, the Commissioner is making a decision not on whether she agrees with the opinion of the qualified person, but whether it was reasonable for him or her to reach that opinion.
22. Having reviewed the information placed before the qualified person, the Commissioner is satisfied that the qualified person considered relevant arguments. The qualified person had access to the withheld information, being the opinions of the IPs, and had indeed previously sought and considered them.
23. By way of background, the Council has explained that a local authority is required by section 28 of the Localism Act 2011 to appoint at least one IP whose views may be sought if the Council is asked to consider an allegation against it or against its members.
24. The Council's procedure for dealing with allegations against councillors is set out in a published document *Arrangements for Dealing with Complaints of Councillor Misconduct*¹. In this document, it is explained that the Council will seek the views of one or more IPs when investigating an allegation.
25. The Council has explained that it has appointed two IPs.
26. It has argued that the relationship between the IPs and the Council is founded on mutual trust and confidence, and has explained that the

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<https://www.stratford.gov.uk/doc/174912/name/Arrangements%20for%20Dealing%20with%20Complaints%20of%20Councillor%20Misconduct%20updated%20June%202015%20.pdf>

views of the IPs are not routinely published, although their names are in the public domain.

27. The views of the IPs are taken into account by the Council, which then makes a decision whether to progress the complaint. However, the Council's decision will not necessarily accord with the views of the IPs.
28. The Council will then either undertake a formal investigation, or alternatively may conclude that a formal investigation is not in the public interest, as happened in this case, when the complaint would remain unsubstantiated.
29. Where a complaint is unsubstantiated, details of the allegations are not made public. The individual who brought the complaint would then have a limited right to complain to the Local Government Ombudsman (LGO).
30. In giving his opinion, the qualified person has explained that, in his view, disclosing information concerning unsubstantiated complaints would be prejudicial to the impartiality and process of considering the complaint by the LGO if such a complaint were made.
31. The qualified person also considers that the disclosure of the information would have an effect on the manner in which IPs offer their views in future, and would lead to views being expressed in a more inhibited way. He considers that it would, therefore, be likely to prejudice the process of obtaining IPs' views which is part of the Council's complaints procedure.
32. He also considers that this in turn would lead to the Council being unable to investigate a complaint fully, and would possibly lead to a position where the quality of the Council's decision was affected.
33. Therefore, with regard to the two limbs of section 36(2) of the FOIA which are under consideration, the qualified person's opinion is that the disclosure of the information would be likely to prejudice both the free and frank provision of advice, and the otherwise effective conduct of public affairs.
34. The Commissioner has reviewed the withheld information and is satisfied that it was reasonable for the qualified person to reach this opinion. With regard to section 36(2)(b)(i), it is reasonable to consider that IPs would be constrained by the knowledge that their views in respect of allegations could be made public, which in turn would be likely to prejudice the free and frank provision of advice. With regard to section 36(2)(c), this may refer to an adverse effect on a public authority's ability to offer an effective public service or to meet its wider objectives or purpose. In the Council's view, it is reasonable to consider that the disclosure of the IPs' views may lead to a number of outcomes, including

IPs being less willing to engage frankly with the process, and including possible prejudice in the event of a further complaint being made to the LGO.

35. The Commissioner is satisfied that section 36(2)(b)(i) and section 36(2)(c) of the FOIA are engaged, and has now gone on to consider the public interest test, balancing the public interest in disclosure against the public interest in maintaining the exemption.

Public interest test

36. Section 36(2)(b)(i) and section 36(2)(c) are qualified by the public interest test as set out in section 2(2) of the FOIA. This means that even though the exemption is engaged, it is necessary to consider whether the public interest in favour of maintaining the exemption outweighs the public interest in disclosure. The exemption can only be relied on if it does.
37. When considering complaints about the application of any limb of section 36(2) in cases where the Commissioner finds that the qualified person's opinion is reasonable, she will also consider the weight of that opinion in applying the public interest test. She will consider the severity, extent and frequency of that inhibition in assessing whether the public interest test dictates disclosure.

Arguments in favour of disclosure

38. There is always a public interest in ensuring that a council's statutory obligations are carried out in a transparent manner and consistently with its published policies.
39. There is also a public interest in knowing that the quality of a council's decision has been founded on robust evidence, and that the decision-maker is impartial.
40. The complainant has expressed the view that, in the event that a decision has been taken not to progress a complaint about a councillor, it is in the public interest to understand how that decision was arrived at.
41. In his view, his complaint was based on a real concern over a councillor's conduct and he wishes to understand why the Council has decided not to investigate formally. The Commissioner considers that this would potentially be part of a council's obligation to be accountable and to act in a transparent manner.

Arguments in favour of maintaining the exemption

42. The Council is concerned that, going forward, its ability to carry out its obligations to investigate complaints effectively would be affected if it were to disclose the views of IPs routinely on request, especially in the cases of an unsubstantiated complaint. This concern can be seen to apply to both limbs of section 36(2) which are under consideration.
43. With regard to the provision of free and frank advice (section 36(2)(b)(i)), the Council has expressed a concern that IPs would be inhibited in providing their views if the views were likely to be made public. It considers that IPs would become wary of engaging with the Council if the disclosure of their views became routine. Under section 28(7) of the Localism Act 2011, the IPs' expectations are only that their views are "*sought and taken into account by the authority*" rather than any expectation that they will be published more widely.
44. The Commissioner understands that, by keeping the IPs' views confidential within the authority, the Council considers it can be confident that their views will be expressed openly, honestly and without fear of any public reaction or backlash.
45. With regard to the effective conduct of public affairs (section 36(2)(c)), the Commissioner considers that the relevant public interest arguments in favour of maintaining the exemption follow on from the other limb under consideration, above. If the IPs were likely to be inhibited when providing their advice, the Council would find it difficult to obtain free and frank views which, in turn, would make it difficult to carry out a robust investigation into any allegations.
46. The Council has a responsibility to conduct thorough investigations and any factor which may diminish this process can be said to be contrary to the public interest in the Council effectively conducting its public affairs.
47. The Commissioner also notes the Council's concern over the 'next step' in the process when a complaint is unsubstantiated: a complaint to the LGO. The LGO will naturally be expected to consider such a complaint impartially, which might be made more difficult if the IPs' views were made public.

The Commissioner's decision

48. The Commissioner has considered whether the public interest in the information being disclosed outweighs the public interest in the exemption being maintained.
49. She notes that the IPs' identities are in the public domain and that their views were expressed while carrying out a public function, which may be

said to give less weight to the arguments against disclosing the information.

50. However, befitting his seniority, the Commissioner will place some weight on the qualified person's reasonable opinion that disclosure would inhibit the future provision of advice to the Council, and thereby be likely to prejudice the effective conduct of public affairs going forward.
51. The Commissioner also notes that the IPs have themselves objected to the disclosure of their views. In one case, the IP has written explicitly on this subject to the Council, referring to a "*tacit agreement*" that their correspondence and conversations in relation to a complaint are private.
52. The Commissioner has considered the wider public interest in the information itself. The complaint against the councillor, which led to the request for information, was in relation to a planning decision affecting a public space. At the time of the request, the Council had within the last few months approved a decision to erect a temporary structure, which had caused some concern and disapproval in the local area. The complaint concerned the conduct of one of the councillors.
53. The Commissioner notes that, notwithstanding a high level of local interest in the approval of the structure, the information requested relates to a specific complaint regarding the conduct of a councillor. She does not consider that there is a significant wider public interest in how the Council reached its decision not to investigate this complaint.
54. The Commissioner is satisfied that the Council has correctly withheld the information under section 36(2)(b)(i) and section 36(2)(c) of the FOIA. She has not therefore gone on to consider the exemption at section 40(2) – Third party personal data. She does not require the Council to take any steps.

Right of appeal

55. 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

56. 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.
57. 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

Alun Johnson
Team Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF