

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 April 2019

Public Authority: Causeway Coast and Glens Borough Council

Address: Civic Headquarters
Cloonavin
66 Portstewart Road
Coleraine
BT52 1EY

Decision (including any steps ordered)

1. The complainant has asked the Causeway Coast and Glens Borough Council for a copy of the questions used by the Council for the recruitment of a Performance and Transformation Officer which took place on 13 December 2017. The Council refused to disclose the requested information in reliance on section 36(2)(c) of the FOIA, on the grounds that disclosure would prejudice the effective conduct of public affairs.
2. The Commissioner's decision is that the Causeway Coast and Glens Borough Council has correctly applied the exemption to disclosure provided by section 36(2)(c).
3. The Commissioner requires no further action in this matter.

Request and response

4. On 19 December 2017, the complainant wrote to the Council and submitted the following request for information under the Freedom of Information Act 2000:

"Further to a recent internal email information request, and subsequent refusal of the same, could you please - under FOI - provide me with a copy of the interview questions for the Performance and Transformation Officer post on Wed 13 Dec 2017."

5. The Council responded to the complainant's request by informing him that it holds information falling within the terms of his request. The Council went on to advise the complainant that it has decided to withhold that information in reliance on section 36(2)(c) of the FOIA, on the grounds that its disclosure could prejudice the effective conduct of public affairs.
6. Having received the Council's response, the complainant wrote to the Council and asked it to undertake a review of its decision to withhold the information he has asked for. The complainant's email set out a number of points in rebuttal of the Council's application of section 36(2)(c).
7. The Council conducted an internal review and on 8 March 2018, it provided the complainant with its final decision. The Council advised the complainant that it was "satisfied that the Council has acted in accordance with the legislation and in the handling of your request", and, "In response to your comments and as explained in the detailed letter of response, the recruitment and interview process is an ongoing Council process and release of information "to the world at large" through the FOI process should not prejudice Council in its ability to effectively conduct its public affairs." The Council referred the complainant to (in its opinion) a similar request made via the WhatDoTheyKnow website¹.

Scope of the case

8. The complainant contacted the Commissioner on 9 April 2018 to complain about the way his request for information had been handled. The complainant explained that he would like to have the interview questions to help him understand where he could have improved in his own internal interview. He said, "I was denied the information on the basis of Section 36(2)(c)... I feel that I have a right to this information and cannot see how it'd be in the public interest to withhold it".
9. The Commissioner advised the complainant that the focus of her investigation would be to determine whether the Council is entitled to withhold the information he has requested in reliance on Section 36(2)(c) of the FOIA.

¹ https://www.whatdotheyknow.com/request/interview_questions

Reasons for decision

10. The Council has informed the Commissioner that it has revisited the complainant's request. It says that its Head of Policy met with its Senior Information Risk Owner (the Council's Qualified Person), who, after looking at the ICO guidance and in light of the passage of time, maintain the view that the Council is unwilling to reverse or amend its position at this time.
11. The Commissioner acknowledges that Council's continued reliance on section 36(2)(c) to withhold the information requested by the complainant.

Section 36 – Prejudice to effective conduct of public affairs

12. Section 36(2)(c) 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 otherwise to prejudice, the effective conduct of public affairs."

13. The exemption provided by section 36(2)(c) is engaged if, in the reasonable opinion of a qualified person, disclosure would or would be likely to prejudice the effective conduct of public affairs.
14. To engage this exemption, the public authority's "qualified person" is required to consider the withheld information and the exemption which applies to it. This consideration cannot be delegated to another person within the public authority.
15. The Commissioner asked the Council to provide her with evidence that the qualified person considered the application of section 36 personally. The Council did this by sending the Commissioner a signed copy of the document which records the qualified person's opinion. The Council advised the Commissioner that consideration was also given to a similar request made to the Information Commissioner's Office via the WhatDoTheyKnow website (referred to above). As a result the qualified person agreed that in this instance s36(2)(c) was engaged.
16. The Council's qualified person is Ms Moira Quinn. The document in which she gave her qualified person's opinion is signed and dated 16 January 2018. In order to give her opinion, the qualified person had the withheld information described to her.

17. The qualified person's opinion records that she considered that 36(2)(c) applies to the withheld information. It also outlines the arguments put forward in respect of the prejudice which would or would likely occur if the withheld information was to be disclosed as well as arguments which are counter that position.
18. Whilst the contents of the withheld information is important for considering where the balance of the public interest lies, the primary reason for the Council's application of section 36 is the process(es) that would be or might be inhibited.
19. In view of the document evidencing the qualified person's opinion, the Commissioner is satisfied that the Council's qualified person has given an opinion in this case. She must now consider whether that opinion is reasonable.
20. The Commissioner adopts the plain meaning of the word "reasonable" as defined by the Shorter English Dictionary: The definition given is; "in accordance with reason; not irrational or absurd".
21. To engage section 36, the qualified person's opinion needs only to be reasonable: It needs to be an opinion reasonably held by a reasonable person.
22. This is not a high hurdle. It is not necessary for the Commissioner to agree with the opinion given; she needs only to recognise that a reasonable person could hold the opinion given.
23. In keeping with the requirement of the exemption, the Commissioner has considered whether the qualified person's opinion was reasonable. To do this, the Commissioner has considered all of the relevant factors including:
 - Whether the prejudice relates to the section 36(2)(c) claimed by the Council. 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.
24. 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.

25. 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.
26. In this case, the Commissioner is satisfied that the qualified person's opinion relates to the prejudice relevant to section 36(2)(c) and the qualified person had an adequate level of knowledge of the issue. The Commissioner is therefore satisfied that a reasonable opinion has been given and she is satisfied that the exemption provided by section 36(2)(c) is engaged.
27. The Commissioner must now consider whether it is in the public interest for the withheld information to be disclosed.

The public interest test

28. In *Guardian and Heather Brooke v the Information Commissioner and the BBC* (EA/2006/001 and EA/2006/0013), the Tribunal provided some general principles concerning the application of the public interest test in section 36 cases:
 - The lower the likelihood is shown to be that the free and frank exchange of views or provision of advice would be inhibited, the lower the chance that the balance of the public interest will favour the exemption.
 - While the Commissioner cannot consider whether prejudice is likely (that is for the qualified person to decide), she is able to consider the severity, frequency or extent of any likely prejudice.
 - Since the public interest in maintaining the exemption must be assessed in the circumstances of the case, the public authority is not permitted to maintain a blanket refusal in relation to the type of information sought.
 - The passage of time since the creation of the information may have an important bearing on the balancing exercise. As a general rule, the public interest in maintaining the exemption will diminish over time.
 - In considering factors against disclosure, the focus should be on the particular interest that the exemption is designed to protect, in this case the effective conduct of public affairs.

- While the public interest considerations in the exemption from disclosure are narrowly conceived, the public interest considerations in favour of disclosure are broad ranging and operate at different levels of abstraction from the subject matter of the exemption.
 - Disclosure of information serves the general public interest in promotion of better government through transparency, accountability, public debate, better public understanding of decisions, and informed and meaningful participation of the public in the democratic process.
29. The Council acknowledges that disclosure of the requested interview questions would support the general principles of transparency and openness. Their disclosure would allow the public to better understand the process of candidate selection which the interview questions are part of.
30. The Commissioner considers disclosure of the interview questions would assist the public to understand the basis on which the Council makes its decisions about staff recruitment and disclosure would likely promote greater trust in the Council's decision making process.
31. Here, the requested information is the set of interview questions asked of candidates during a particular recruitment exercise. The circumstances relevant to the recruitment exercise must be considered because there is a public interest in the Council being able to maintain a position where an effective recruitment and selection campaign can be run. Should this be adversely affected, the Council would be unable to undertake effective interviews without candidates knowing the interview questions likely to be asked.
32. In the Council's opinion, knowing the specific type and nature of questions which are asked during its interviews is likely to remove the element of quick thinking required from the assessment process. It would likely result in 'schooled' or rehearsed answers and could result in the Council choosing the wrong candidates.
33. It is important for the Council to be able to offer a fair recruitment process where candidates are neither advantaged nor disadvantaged by the disclosure of the withheld interview questions. This would be particularly so where some candidates are aware of the disclosure whilst some are not. Unless the questions are routinely provided as part of the application process – which they are not – disclosure of the questions under FOIA would likely lead to an uneven playing field.
34. The Council acknowledges that it could write new questions. However it argues that there would be little public interest in it doing this. It would cause its Human Resources unnecessary work and would disrupt its

recruitment process. It asserts that the Council would likely be required to rethink the recruitment process which would lead to a wasting of time and effort and result in disproportionate disruption and unnecessary workload.

35. The Council draws the Commissioner's attention to the Northern Ireland Local Government Competency Framework². It points out that there are limited competencies and behaviours expected of staff and therefore it argues it is safe to assume that its interview questions have developed over time for each competency and are used on more than one occasion and across various job descriptions.
36. In view of this, the Council asserts that it would have to consider its recruitment and selection procedures and explore new ways to recruit. This would inevitably cause disproportionate disruption to its recruitment procedures, particularly at a time of financial restraint and ongoing restructuring. It says, "This impact would not just be limited to Council but to those who use a similar recruitment processes".
37. The Commissioner acknowledges the Council's position in this matter. She has weighed the public interest arguments in favour of disclosure and those against it and she has determined that greater weight must be given to those arguments which favour the continued withholding of the interview questions.
38. The Commissioner is sympathetic to the complainant's position where he has attended an internal interview and he would like to have the questions asked at that interview to help him understand where he could have improved his responses. In the Commissioner's opinion, this is not sufficient reason for the Commissioner to order disclosure of the interview questions. The Commissioner must make the point that disclosure of information under the FOIA is to the world at large: It is not a disclosure solely to the person who has requested it. The impact on the Council of disclosing the interview questions into the public domain is too great to justify that action and therefore the Commissioner has decided that the Council is entitled to rely on section 36(2)(c).

² <http://www.lgsc.org.uk/fs/doc/publications/competency-framework-for-local-government.pdf>

39. Right of appeal

40. 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

41. 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.
42. 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
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