

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 June 2019

Public Authority: Fareham Borough Council
Address: Civic Offices
Civic Way
Hampshire
PO16 7AZ

Decision (including any steps ordered)

1. The complainant has requested the notes from interviews undertaken as part of a complaints process.
2. The Commissioner's decision is that Fareham Borough Council has used the correct information access scheme in responding to the request and was entitled to withhold the information under section 36 – prejudice to the effective conduct of public affairs.
3. The Commissioner does not require any steps.

Request and response

4. On 23 April 2018 the complainant wrote to Fareham Borough Council ('the council') and requested information in the following terms:

"Please treat this email as a request for environmental information under the Environmental Information Regulations 2014.

Please send me any written notes the council holds recording what was said and what happened during the planning committee hearing on the 13th December 2017 when it considered the application for planning permission under reference P/17/0679/FP.

To the extent that there are written notes of the above description which contain information in respect of which there is an exemption from the duty under the above regulations to make the information available on request, I request that the written notes be disclosed with the exempted information redacted.

This is to include all written notes taken from your interviews with planning committee officers you refer to in your letter dated 5th April 2018."

5. The council responded on 22 May 2018. It stated that:

[1] Written notes taken during the "Planning Committee on 13 December are no longer held by the Council as these were destroyed following publication of the minutes."

[2] The council is withholding the written notes taken from interviews with planning committee officers ('the interview notes') on the basis of FOIA exemptions at section 36 – prejudice to the effective conduct of public affairs; section 41 – information provided in confidence; and section 40 – personal information.

6. The complainant requested an internal review on 22 May 2018 and made the following argument for the withheld information [2] to be released:

"The statements that you refer to withholding in the possession of your legal representative [name] are to be withheld due to explanation 'The council believes that Officers' should have a safe space to provide views and speak freely. It believes that if released, this may set a precedent that notes may be released in the future and we believe in favour of non-disclosure outweigh those in favour and therefore it will

not be disclosing this information'. Unfortunately [name] the councils legal representative has already set the precedent of removing this safe space as she has released what the officers accused me of in her letter dated 5th April 2018, so the reason for withholding them is no longer a valid reason as [name] has already put the contents in the public domain.."

7. Following an internal review the council wrote to the complainant on 29 June 2018. It upheld its original position.

Scope of the case

8. The complainant contacted the Commissioner on 12 August 2019 to complain about the way the request for information had been handled. Specifically that the council is withholding information in response to [2] incorrectly on the basis of the FOIA exemptions cited. Furthermore the complainant questions whether the requests should be responded under the Environmental Information Regulations 2004 (EIR) rather than the FOIA.
9. The Commissioner therefore considers the scope of the case is to decide whether the council applied the correct information access regime, that being either the FOIA or the EIR. Furthermore whether it is correct in its reliance on the exemptions at FOIA section 36, section 41 and section 40 to withhold the interview notes [2].

Background

10. The Commissioner has reviewed the letter of 5 April 2018 ('the Planning Complaint Response', which the complainant refers to in his request. The letter provides a formal response to complaints he raised with the council about a planning application. The information request references the interviews carried out with council officers to investigate these complaints, and as such relate to the written notes recorded during these interviews ('the interview notes').
11. The complainant raised a separate complaint to the Information Commissioner regarding a Subject Access Request (SAR) made to the council under the provisions of the Data Protection Act 1998. This was for the same information and was dealt with separately by the Commissioner. It is outside of the scope of this decision notice.

Reasons for decision

Regulation 2(1) - environmental information

12. Information is 'environmental information' if it meets the definition set out in regulation 2 of the EIR. If the information satisfies the definition in regulation 2 it must be considered for disclosure under the terms of the EIR rather than the FOIA.
13. Regulation 2(1) of the EIR defines environmental information as information on:
 - (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
 - (b) factors, such as substances, energy, noise, radiation or waste...emissions...and other releases into the environment, likely to affect the elements referred to in (a);
 - (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;..."
14. Information about a plan or a measure or an activity that affects or is likely to affect the elements of the environment is environmental information. The council states that the interview notes relate to the *"conduct of elected Members and Officers at a Fareham Borough Council meeting and the subsequent handling of the complaint."* The Commissioner agrees that these matters do not relate to the decisions made about the planning application but rather conduct and process.
15. The Commissioner finds that the information is not environmental information. The council is correct, therefore, to consider it under the FOIA.

Application of exemptions

Withheld Information

16. The withheld information comprises notes of interviews, held between the investigating officer and individual council officers, in relation to the previously mentioned complaint about a planning application.

Section 36 – prejudice to the effective conduct of public affairs

17. The council confirmed that it is relying upon the limbs of section 36(2) at 36(2)(b)(i) and 36(2)(c).

18. The relevant provisions in section 36 state¹:

“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—

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

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

19. Both exemptions can only be engaged on the basis of the reasonable opinion of a qualified person. In a local authority (such as a council), the qualified person would normally be the Chief Executive or the Monitoring Officer.

20. The qualified person who issued the opinion in this case was the council’s Monitoring Officer. The Commissioner is therefore satisfied that the opinion was issued by a qualified person by virtue of section 36(5)(a) FOIA.

¹ The full text of section 36 can be found here:
<http://www.legislation.gov.uk/ukpga/2000/36/section/36>

21. The council has advised that the opinion was sought and given verbally during discussions that took place with the qualified person on 17 May 2018 in respect of the original request and 26 June 2018 following the request for an internal review. The council clarified that the qualified person's opinion was given verbally *"as they were part of the Public Interest Test Panel meeting where this matter was discussed which is usual procedure for the Council."*
22. The council confirmed that the *"qualified person was told why an opinion was being sought, was presented with the content of the request and was given a comprehensive summary of the notes and the relevant background information which enabled them to consider the circumstances of this case before forming their opinion."*
23. The council advised that the qualified person had been provided with considerations for releasing the notes, including that they would provide a *"transparent narrative from an Officers' perspective of what took place at the meeting of the Planning Committee."* Additionally consideration was given the time and resources spent in dealing with the matter, and the complainant's dissatisfaction with the council's handling of the request. This was balanced with arguments in favour of maintaining the exception. Being that council officers need to have *"a safe space to provide views and speak freely"* and that the release of the information *"may set a precedent that it would become usual practice to release such information and that may discourage officers in providing such open and honest accounts in future to support complaints investigations"*.
24. The council outlined the qualified person's opinion:
 - the prejudice specified at 36(b)(i) would be likely to occur because it would be *"detrimental to those making statements and it infringed in their expectation of giving information to assist a complaints investigation in an open and honest way."*
 - the prejudice specified at 36(2)(c) would be likely to occur because *"release may hinder the conduct of public affairs in response of any future complaint investigations because Officers may not feel confident to volunteer their side of the story if they felt it may be released to an individual for which they had no control over the further distribution / publication of material. A lack of cooperation may lead to the public authority not being able to conduct investigations in a fair and balanced way."*

Was the qualified person's opinion reasonable?

25. In determining whether the exemptions are engaged, the Commissioner has considered whether the qualified person's opinion was a reasonable one. In doing so the Commissioner 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. Whether it concerns an important issue 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.
26. Further, 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.
27. The Commissioner has been guided on the interpretation of the phrase 'would prejudice' or 'would be likely to prejudice' by a number of Information Tribunal decisions. The Tribunal has been clear that this phrase means that there are two possible limbs upon which a prejudice based exemption can be engaged; ie either prejudice 'would' occur or prejudice 'would be likely to' occur.
28. With regard to likely to prejudice, the Information Tribunal in *John Connor Press Associates Limited v The Information Commissioner* (EA/2005/0005) confirmed that "*the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk*".
29. With regard to the alternative limb of 'would prejudice', the Tribunal in *Hogan v Oxford City Council & The Information Commissioner* (EA/2005/0026 & 0030) commented that "*clearly this second limb of the test places a stronger evidential burden on the public authority to*

discharge”, and the occurrence of the prejudice claimed “is more probable than not”.

30. With regard to both section 36(2)(b) and 36(2)(c) there is a less strong evidential burden on the council, as the qualified person’s opinion is that prejudice would be likely to occur.
31. Information may be exempt under section 36(2)(b)(i) or (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 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.
32. The Commissioner accepts that the investigation process followed by the council involves confidentiality and that there is a certain degree of ‘safe space’ needed to allow all relevant parties to discuss matters openly and freely without fear of outside scrutiny.
33. The Commissioner recognises that open and candid discussions are key to effective investigations, and that individuals involved are much more likely to be open and frank if the investigation is confidential.
34. The Commissioner therefore considers that the loss of this safe space and the potential ‘chilling effect’ on future conversations means that there is a more than hypothetical chance that the prejudice could occur.
35. The Commissioner accepts the prejudice argued for section 36(2)(c), being relating to the negative consequences of the disclosure on future investigations; is different than that argued for section 36(2)(b).
36. The Commissioner therefore considers that the opinion is reasonable, that the prejudice envisioned under sections 36(2)(b) and 36(2)(c) are different and that both section 36(2)(b) and section 36(2)(c) are therefore engaged. The Commissioner has gone on to consider the public interest arguments associated with these exemptions.

Public interest arguments in favour of disclosing the information

37. The council acknowledged it considered *“that as part of its ongoing commitment to transparency, these notes would provide a transparent narrative from an Officers’ perspective of what took place at the meeting of the Planning Committee.”*
38. The complainant states the Planning Complaint Response broke the confidential nature of the investigation *“and set a precedent of releasing*

the contents of these notes and officers accounts solely about me". The complainant states that in the Planning Complaint Response the council's solicitor released details regarding "what the officers accused me of" and therefore information is in the public domain and the reason for withholding and arguments for confidentiality are no longer valid.

Public interest arguments in favour of maintaining the exception

39. The council states *"Officers' should have a safe space to provide views and speak freely. It believes that if released, this may set a precedent that notes may be released in the future and we believe this would hinder Officers' giving information when interviewed, due to fear that their accounts would be released."*

Balance of the public interest arguments

40. The opinion of the qualified person is limited to the degree of likelihood that inhibition or prejudice would occur. In assessing the public interest arguments therefore, particularly those relating to withholding the information, the Commissioner considers the relevance of factors such as the severity and extent with which providing advice and the free and frank exchange of views, and the conduct of public affairs, might be inhibited if the information was to be disclosed.
41. The Commissioner understands the council's concerns relating to disclosure of the requested information are that disclosure would erode the safe space needed to investigate allegations; disclosure could lead to changes in the ways officers interact with council investigations; and disclosure may impact on future cooperation.
42. The Commissioner acknowledges that the Planning Complaint Response, addressed to the complainant, by its very nature, clearly contains information that was gathered during the complaint investigation. However, she does not agree that providing a response to a complaint is the same as putting the investigation detail into the public domain. The Commissioner therefore considers the written notes, which are the subject of this request, are not already in the public domain.
43. The Commissioner recognises that there is a public interest in ensuring the integrity of an investigative process. Her view is that that integrity is best maintained by preserving a 'safe space' in which the parties involved can exercise a degree of candour. This safe space would be removed by disclosure of the interview notes. It is the Commissioner's view that the council's ability to investigate complaints would be hampered by the disclosure of the information and that this is not in the public interest.

44. The Commissioner recognises that there is a strong public interest in ensuring that any complaints are investigated with an appropriate degree of impartiality and thoroughness. Whilst the Commissioner has accepted that there would be some prejudice likely to occur from disclosure, the investigation had concluded and the outcome was known at the time of the request. To some extent this could be seen to weaken the council's arguments. However, this does not change the fact that disclosure of the interview notes would be likely to impact the quality of the council's investigations in the future.
45. The Commissioner therefore concludes that the council has correctly engaged the exemptions at section 36(2) FOIA and that the balance of the public interest lies in maintaining the exemption for all of the withheld information.
46. As she has found that 36(2) is engaged, it has not been necessary for the Commissioner to consider the other exemptions cited by the council.

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
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