

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 19 November 2007

Public Authority: Gloucestershire County Council
Address: Shire Hall
Westgate Street
Gloucester
GL1 2TG

Summary

The complainants asked the council for the information it had compiled on options for saving £10 million from its adult services budget.

The council withheld the requested information under s36 (prejudice to the effective conduct of public affairs).

The Commissioner decided that information which directly related to savings options was correctly exempted. He decided that part of the information was not exempt under s36 and should be released.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 ('the Act'). This Notice sets out his decision.

The Request

2. The complainants are a group of solicitors representing three individuals. On 11 April 2006 they requested information and copies of related documentation concerning the council's proposal to close one of its residential respite units for adults with learning disabilities.
3. On 19 April 2006 the council answered some of the complainants' queries and advised that a reply was being prepared in respect of the requested documentation.

4. On 20 April 2006 the complainants requested further information on issues that had been raised in the council's response of 19 April.
5. On 24 May 2006 the council provided further information in response to the complainants' letters but withheld three documents falling within the complainants' request. The withheld documents were considered by the council to be exempt from disclosure under s36 (prejudice to the effective conduct of public affairs) of the Act.
6. On 16 June 2006 the complainants requested an internal review of the council's decision and on 7 July 2006 the local authority upheld its original decision to withhold the information.

The Investigation

Scope and chronology of the case

7. The complainants wrote to the Commissioner on 31 August 2006 to formally complain about the council's withholding of the three documents.
8. On 29 November 2006 the Commissioner requested copies of the withheld information from the council to enable him to ascertain whether the exemption under the Act had been applied appropriately. The withheld documents are entitled:
 - (a) Medium Term Financial Strategy (MTFS)/Business Planning Template 2006/09 – Learning Disabilities
 - (b) MTFS/Business Planning Template 2006/09 – Adult Services
 - (c) MTFS Commitments TL savings 011105 – Excel spreadsheet (indicating the savings options for all council directorates and the levels of risk attached to each option).
9. Upon investigation, the Commissioner concluded that information relating to the suggested options for savings was correctly exempted under s36. He considered that parts of the withheld documentation were not exempt and should be disclosed to the complainants. He also considered that some information which was correctly withheld under s36 at the time of the request was no longer exempt as it related to savings that had since been implemented or publicised by the council.
10. The council agreed to redact the documentation in line with the Commissioner's advice and it released the information to the complainants on 21 August 2007. However, the complainants did not consider that the additional disclosure sufficiently resolved their

complaint and the Commissioner has therefore issued a formal decision notice.

Background information

11. The complainants represent three adults with learning disabilities who are cared for at home by their families with the assistance of residential respite provision. The council required its social services department to identify cuts of £10 million pounds in its adult services budget. One of the options put forward by the department was closure of the respite facility used by the complainants' clients.

Analysis

Section 36 (prejudice to effective conduct of public affairs)

12. The council relied on s36(2)(b) of the Act to withhold the three documents. The exemption allows the council to withhold the information if in the reasonable opinion of a qualified person its release would be prejudicial to the effective conduct of public affairs. In this instance the council's Head of Legal and Democratic Services considered that disclosure of the information would or would be likely to inhibit the free and frank exchange of views for the purposes of deliberation.
13. With reference to the reasonable opinion, the complainants argued that the council had failed to follow guidance issued by the Department for Constitutional Affairs (now Ministry of Justice) on the operation of s36. The guidance cited at paragraph 3.5 states:

'It will be extremely important to document thoroughly the reasons why information falls within section 36(2). The provision is wide-ranging and any decision to withhold information under it should be narrowed down as precisely as possible by clear reference to the harm that would be caused by disclosure of the information in question. It is because the scope of the provision is so potentially wide that the requirement for a qualified person to take the decision to withhold in each case has been included.'
14. The complainants maintained that contrary to this guidance, no explanation was given in the council's refusal letter for concluding that the information fell within the scope of s36.
15. The Commissioner is satisfied that the council provided a fuller explanation in its internal review of 7 July 2007. The review upheld the council's original decision that disclosure of the requested information was likely to inhibit the free and frank exchange of views for the purposes of deliberation. The Chief Executive's review letter advised

the complainants that the exempted information had not been approved by the council. The information represented 'work in progress' and included ideas which might prove impractical to implement. The letter explained that staff provide the administration with suggested options for savings in order to enable a debate within the council. This debate was unlikely to be effective if the options were to be made public. In the Chief Executive's view, staff advice concerning budgets would become more guarded if it was thought this advice would be publicised. Ultimately the quality of decision making would become diminished.

16. In his review the Chief Executive maintained that release of the savings options would cause undue alarm to the community. If the public were informed that closure of a service was on the list for year one but then that it was subsequently discounted that year, they would understandably be concerned that it might reappear on the closure list in future years.
17. He also argued that some options required further discussion with external partners before they could be realised and any publication of those options before negotiations were entered into would undermine the trust between the council and its partner agencies.
18. The complainants argued that the council had failed to demonstrate that s36 was engaged.
19. Firstly, they questioned the idea that disclosure would cause 'unnecessary' anxiety stating that no anxiety would arise from the discarding of savings options. Instead, they argued that the public would be 'rightly' concerned if some options were to be taken up over the next three years. In the complainants' opinion, the causing of legitimate concern should not be considered a factor which inhibits free and frank exchange of views. In their view, council staff regularly consider proposals for future service change which will cause anxiety to some sectors of the public - this 'goes with the job'. If the resultant 'natural' anxiety was to be used as a reason for non-disclosure then s36 would in their view have an alarmingly broad scope. It would lead to a level of non-disclosure likely to inhibit trust and understanding between the council and its stakeholders.
20. The Commissioner is not persuaded by this argument. It is based on the premise that a proportion of savings options would be permanently discarded whereas the possibility remains that they may be reconsidered in the future. It is the possibility of reconsideration which is likely to cause concern to the public.
21. Secondly, the complainants argued that s36 was not engaged because the publication of savings options prior to negotiations with the council's partners would not prevent constructive discussion. The complaints argued that, instead, transparency through disclosure would

actually contribute to negotiations with external partners. They maintained that as one of the aims of such discussions was to achieve savings, external partners would feel misled if information on savings options was not shared. The complainants argued that external partners would want to know the level of savings under consideration and refusal to disclose this would inhibit trust and understanding.

22. The Commissioner is not persuaded by this argument. The obligations and duties of local authorities require the prudent control of public spending and the achievement of best value. A public authority's discussions with external partners will often involve negotiation around levels of service quality and price, particularly in situations of potential competitive tender. It would be unusual business practice for an organisation to enter such business negotiations having already announced its expectations concerning contract price.
23. The Commissioner is mindful of the Information Tribunal's decision in EA/2006/0011 and EA/2006/0013 of *Guardian/Brooke v the Information Commissioner* issued on 8 January 2007. In its decision the Tribunal concluded that in order to satisfy the statutory wording in s36 - '*in the reasonable opinion of a qualified person*' - the opinion must be both reasonable in substance and reasonably arrived at. The Commissioner is satisfied that the opinion more fully explained in the council's internal review is both reasonable and reasonably arrived at.
24. In his view, the withheld information represents 'blue sky thinking'. Because the savings options that have been suggested herald the possibility of cuts across a range of local services, each proposal has the potential to upset different sections of the community. Staff who formulate such options need space to do so without the inhibitions that would ensue if this was carried out in the public domain. Council members also need the ability to evaluate the options without the pressure of speculation arising from premature public disclosure. In the Commissioner's view such disclosure would inhibit the free and frank exchange of views and would affect the quality of deliberation. He is satisfied therefore that the s36 exemption is engaged.

Public interest test

25. The exemption at s36 exemption is subject to the public interest test.
26. The council put forward the following public interest arguments in support of its decision to withhold the information:
 1. Disclosure would inhibit the future consideration by staff of potential options which are new, innovative or unusual but which could nevertheless contribute to the service effectiveness.

2. Some of the savings options suggested for the next three years may never be adopted. Their disclosure would unnecessarily affect the morale of staff and service users.
 3. Disclosure would undermine the trust and understanding between staff and executive members which is necessary for the proper functioning of the council.
 4. Disclosure would undermine the trust and understanding between the council and its partner agencies.
27. The council acknowledged the following public interest arguments in favour of disclosing the information:
- 1, Disclosure would contribute to open policy making and increased trust between citizens and local government.
 2. Disclosure would help to explain the formulation of the council's medium term financial strategy.
28. The Commissioner considered an additional argument that could be deployed in favour of disclosure:
3. Disclosure contributes to the public understanding of decisions that elected representatives are required to take when balancing priorities of public spending control with the community's need for essential services.
29. The Commissioner considered the complainants' argument that the council had failed to recognise the most important factor which weighed in favour of disclosure. This was that the requested information was directly relevant to the planned public consultation on the proposal to close the respite unit. The complainants argued that the council is subject to a common law duty to undertake public consultation and in order to reach the threshold of lawfulness it must provide sufficient information to allow consultees to respond to its proposals. The intention of the proposed closure of the respite unit was to save money as a contribution to an overall cut of £10 million pounds in the council's adult services budget. The complainants submitted that in these circumstances information about the alternative savings options is fundamental to the consultation process. In their view, refusal to provide this information interferes with the rights of consultees and with the council's legal obligation to undertake adequate consultation.
30. The Commissioner is not persuaded by this argument. The inference is that users of the respite unit should have the opportunity to choose alternative cuts in service provision. In his view this would be an impractical proposition as it entails one group of users being placed in

the untenable position of selecting service reduction for another vulnerable group.

31. Whilst in many cases the greater transparency and increased understanding that accrues from disclosure of information are powerful reasons for release, in this instance decisions had yet to be debated and short listed by the council. The requested information was still at the 'work in progress' stage and the Commissioner considers that any premature publication would incur a more negative than positive effect. He has weighed the competing public interest arguments in this case and has concluded that the public interest in withholding the information outweighs the public interest in disclosing it.

The Decision

32. The Commissioner's decision is that the public authority dealt with parts of the information that related directly to savings options in accordance with the Act but failed to deal correctly with other parts.

Steps Required

33. As the council has disclosed the parts of the information which the Commissioner considers are not subject to the s36 exemption, he requires no further steps to be taken.

Right of Appeal

33. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@dca.gsi.gov.uk

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 19th day of November 2007

Signed

**Graham Smith
Deputy Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Relevant statutory obligations and provisions under the Act

Section 36 provides that:

(1) This section applies to-

- (a) information which is held by a government department or by the National Assembly for Wales and is not exempt information by virtue of section 35, and
- (b) information which is held by any other public authority.

(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-

- (a) would, or would be likely to, prejudice-
 - (i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or
 - (ii) the work of the Executive Committee of the Northern Ireland Assembly, or
 - (iii) the work of the executive committee of the National Assembly for Wales,
- (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.