



IN THE FIRST-TIER TRIBUNAL

Case No. **Appeal No. EA/2012/0213**

GENERAL REGULATORY CHAMBER INFORMATION RIGHTS

ON APPEAL FROM Information Commissioner's Decision Notice No: FS50428058

Dated 13<sup>th</sup> September 2012

BETWEEN

Mr Max Frohnsdorff

Appellant

And

The Information Commissioner

Respondent

And

Ashford Borough Council

Second Respondent

Determined at an oral hearing on 12<sup>th</sup> February 2013 at Field House

Date of Decision 4<sup>th</sup> April 2013

BEFORE

Fiona Henderson (Judge)

Roger Creedon

And

Henry Fitzhugh

Representation:

Mr Frohnsdorff represented himself,

Mr Scott was represented by Mr Francis<sup>1</sup>

The Information Commissioner was represented by Mr Capewell of Counsel

Subject matter: FOIA– s36

**Decision: The Appeal is allowed.**

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<sup>1</sup> Mr Scott is a journalist, Mr Francis is the Editor of the newspaper at which he works.

## REASONS FOR DECISION

### Introduction

1. This appeal is against the Information Commissioner's Decision FS50428058 dated 13<sup>th</sup> September 2012 which concluded that Ashford Borough Council (the Council) was correct to apply s36(2)(b)(i) FOIA to the information withheld.
2. The Appellant is the campaign co-ordinator of the Keep Chilmington Green Campaign. At a meeting on 16<sup>th</sup> May 2011, 6 of the successful candidates in elections to Great Chart with Singleton Parish Council (the PC) did not take office as parish Councillors. This followed a meeting where the parish Clerk explained that this would restrict their ability to vote on matters relating to a local development if they were considered to have fettered their judgement on that issue and that they could be fined if they voted when they ought not to<sup>2</sup>. The basis of their election campaign had been that they would oppose a planned development on rural countryside adjourning the village which included the building of more than 5000 new homes. The 6 were told that they must decide at that meeting whether or not to sign declarations of acceptance of office and were not permitted a later declaration.
3. Having failed to take up their seats at that meeting (Mr Frohnsdorff's case is that this was to take advice) they were then told that they were barred from Office and even though the forms signed by the Councillors who had taken up their seat were found to be defective and had to be re-signed by the existing Councillors the 6 "barred" Councillors were not given that opportunity.
4. The Chief Executive of Ashford Borough Council (who was also the returning officer for the elections) was present at the meeting. It is part of Ashford Borough Council's core strategy that the development should take place. Opponents of the development question his role in the formulation of the information given to prospective Councillors at that meeting by the parish Clerk and it is a matter of factual dispute as to whether he endorsed that advice at the meeting and the reasons for his presence at the meeting.
5. Subsequently the PC held a by-election in October 2011 where the 6 seats were won by candidates standing on the same manifesto (opposing the development).

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<sup>2</sup> On the basis of the new Localism Act which was not due to come into force until 2012.

Following the election, the Clerk resigned and a new Clerk was appointed. The new Chairman was elected in May 2012.

### The Information Request

6. Mr Frohnsdorff wrote to the Council on 26<sup>th</sup> September 2011 requesting copies of all correspondence, which the Chief Executive of Ashford Borough Council had had with 4 named individuals by email or post from April 25<sup>th</sup> to 26<sup>th</sup> September 2011.
7. The Council disclosed some information but refused some relying upon s36 FOIA. This decision was upheld upon review.
8. An FOIA request in similar terms was made on 17<sup>th</sup> September 2011 from another individual to the Parish Council. The Parish Council did not rely upon s36 FOIA and disclosed some material withheld by Ashford Borough Council on 12<sup>th</sup> October 2011.

### The Appeal

9. Because of the nexus of fact this case was heard at the same time as Scott v IC EA/2012/0219 in which the same reasoning has been adopted but a separate decision has been written for ease of reference. The Commissioner compiled a joint open bundle and made unified submissions, although the closed bundle was separated into the information falling within each specific information request.
10. The Council were joined as a second respondent at their request to this case only<sup>3</sup> on 30<sup>th</sup> January 2013. Their participation was limited to written submissions at their own suggestion.
11. Following the conclusion of the oral hearing Mr Frohnsdorff sought to make post hearing submissions by email on 13<sup>th</sup> February 2013. The Tribunal did not admit these submissions on the basis that it would not be in the interests of justice as the oral hearing had finished and the opportunity to make submissions and submit evidence had therefore passed. In reaching this decision the Tribunal had regard to rule 2 of the GRC rules.

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<sup>3</sup> i.e. they did not seek joinder in the Scott case.

Scope of the Appeal

12. The Decision Notice was limited to consideration of s36(2)(b)(i)<sup>4</sup> FOIA but Ashford Borough Council also relied upon s36(2)(c) FOIA<sup>5</sup> before the Commissioner. The Tribunal has considered both these limbs in determining this appeal.
13. Following clarification in closed session, the Commissioner accepted that p5, p6-7 and p12-15 of the closed bundle in relation to Mr Frohnsdorff's also appeared in the open bundle or had been disclosed to a member of the public under FOIA on 12<sup>th</sup> October 2011. The Tribunal was satisfied that pursuant to rule 2 GRC Rules, it would not be in the interests of justice to consider these documents further as this would be an academic exercise and disproportionate. They were therefore not considered further as part of this appeal.

Prejudice to the conduct of public affairs

14. S36 provides

*(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—*

*b) Would or would be likely to inhibit*

*i) the free and frank provision of advice or...*

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

15. Mr Frohnsdorff does not take any point as to the engagement of the exemption (i.e. as to the identity of the qualified person or the reasonableness of his opinion), we note that for the exemption to be engaged, the opinion must be reasonable, not that the Tribunal would have reached the same decision. The issue before the Tribunal is therefore as to the balance of the public interest.

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<sup>4</sup> The free and frank provision of advice

<sup>5</sup> prejudice to the effective conduct of public affairs.

The public interest test

16. S36 FOIA is subject to the public interest test as set out in 2(2)(b) FOIA. We consider the test in relation to both limbs of s36 relied upon. The Tribunal has had regard to all the evidence and submissions before it including the withheld material in reaching its decision. Whilst we have sought to set out our reasons in general terms within the open decision, the Tribunal has compiled a confidential schedule making reference to the specific contents of the withheld information.

Factors in favour of withholding the disputed information*The Chilling Effect*

17. The withheld information predominantly relates to correspondence between the Chair of the PC, the Parish Clerk and the Chief Executive of the Borough Council. It is both the respondents' case that disclosure would not be in the public interest because:

- a) The Parish council Chairman and Clerk would have considered this communication to be private and confidential,
- b) In order to obtain the best advice, discussions would need to be full and frank, and the tone would be informal.
- c) Disclosure would have been seen by the Chairman as a betrayal of the close working relationship which would be likely to affect their relationship in the future.

18. Whilst it may be that the Chairman of the PC and the CEO of the Council may have considered some of this correspondence to be private and confidential we do note:

- a) The Clerk (upon whose behalf some of this correspondence held by the Council was withheld) does not appear to have considered this to be confidential, as she disclosed correspondence emanating from her in response to a FOIA request,
- b) Neither the Chair, nor the Clerk appear to have been asked by the Council whether they objected to disclosure of the withheld material,
- c) In corresponding in their official roles, the Clerk and Chair are acting on behalf of the PC, it would be expected that at least some of the withheld material would or

should have been communicated to the rest of the PC. Indeed it is evident from the face of the withheld material that some of it was circulated amongst existing Councillors without caveat as to the use that may be made of it (i.e there is no confidential marking). Some of the material that has come into the public domain has done so as it formed part of PC files and they themselves have disclosed it subsequently pursuant to FOIA. We would expect that any correspondence conducted by the Chair of the PC in his official capacity ought to be held by the PC and although the precise terms of the FOIA request to the PC in September 2011 is not known, in light of the material that was disclosed by the PC and the material that is held by the Council we would question whether a complete record of this correspondence was kept with the PC.

19. Councillor Hopkins' witness statement (filed with the agreement of the Parish Council as currently constituted) argues that there is no place for private discussions within the PC as this would subvert the legal entity of the PC. The Council maintain that this cannot be right in light of the terms of s36FOIA which provides for informal channels of communications. The Tribunal is satisfied that there is a difference between an informal communication on behalf of the PC, and the use of such a channel on behalf of an individual.
20. The Commissioner argues that in fulfilling an official role an officer of the PC may wish to seek clarification of matters from the Council without publicizing that fact to e.g. the rest of the PC, as any perceived lack of certainty might undermine them in their official role. The Tribunal notes that Councillor Hopkins concedes that the Chair person has responsibility for the correct and adequate chairing of meetings and we do not rule out a situation occurring in a future case where confidential advice is sought by an individual in order to enable them to fulfil their public responsibilities. However, upon consideration of the withheld material, we do not consider that it is applicable on the facts of this case in light of:
  - a) The fact that advice is being sought and accepted from the Council is apparent by the presence and participation of the CEO at the May meeting.
  - b) The CEO has written a public letter commenting upon his presence at this meeting (letter 28.9.11)

c) The Parish Clerk has disclosed her letters of 6.5.11 setting out her understanding of the CEOs wish to attend the meeting, and her email of 17.5.11 thanking the CEO for his support at the meeting.

d) Public comments have been made about some of the issues which form the subject matter of some of the withheld documents by the correspondents.

21. We are not satisfied that any of the parties had the right to expect that the communications would be kept confidential in this case. Both the Council and the PC are bound by the provisions of FOIA and should know the legal obligations of transparency.

22. Mr Frohnsdorff relies upon the fact that the circumstances in which a meeting does not take place in public is limited, in support of his contention that there cannot be correspondence falling within s36 FOIA. We note that the withheld material may inform proceedings in the PC but it is different from the contents of a meeting. By way of analogy, had the Chair obtained legal advice this would not automatically be made public. However, we are satisfied that the parties to the correspondence did so in the knowledge that s36 is not an absolute exemption.

23. It is argued that disclosure of the exchanges would be likely to inhibit future informal discussions. The Council does not regulate parish councils, therefore their involvement can only be informal and through the co-operation of the PC . Closing off or limiting this avenue of advice and communication in future cases would not be in the public interest because :

i) This would impact negatively upon both authorities' decision making which would be less informed.

ii) This might lead to the PC feeling that they have to pay for future advice (which would be detrimental to resources).

24. In light of the Tribunal's assessment of the expectation of confidentiality as set out above, the Tribunal considers that the argument that this would lead to a "chilling effect" has very limited weight on the facts of this case, in particular in light of the disclosure made at the relevant time by the PC itself.

*Disclosure would increase tensions*

25. In light of the localised nature of parish councils, disclosure of such full and frank discussions could increase tensions within the community. Tone in this type of channel of communication is informal, and the Commissioner argues that disclosure of the type of informal language used would lead to a deepening of divisions which is contrary to public interest – (this is distinct from allowing it to be withheld to prevent embarrassment). In assessing the tone of the emails the Tribunal has also considered whether the channel is being used to make personal statements not on behalf of the PC or the electorate that they represent.
26. Whilst it is acknowledged that where advice is sought the discussions would need to be full and frank, the Tribunal reinforces the Commissioner's observation that the purpose of this section is not to prevent embarrassment, and the requirement to be full and frank in the context of s36 FOIA pertains more to content than tone.
27. The Commissioner further argues that the correspondence provides a snapshot in that some of the wording is open to interpretation and could be read in different ways some of which are more inflammatory than others. This he argues will invite speculation and theorization which would not be in the public interest. The Tribunal is satisfied that transparency and accountability means that the public should have the right to judge the issues for themselves based upon the facts and that disclosure of this information will further those aims.

*The Public interest in having a properly functioning Parish Council*

28. Since the information was current at the relevant time, the Commissioner argues that disclosure would be likely to have a detrimental effect on the Council's attempts to broker a satisfactory resolution (tending to entrench the parties in their opposing positions).
29. We note that the relevant time in relation to Mr Frohnsdorff's request was from 26th September when the request was made to 29<sup>th</sup> November 2011 when the internal review was concluded. We note that by the 29<sup>th</sup> November 2011 the by-elections had been completed and the 6 new Councillors had taken up their seats. The Clerk had resigned but was working out her notice, however, despite losing a vote of no confidence the Chair had refused to resign. A new Chair was not elected until May



2012. We accept Mr Frohnsdorff's argument that at the relevant time a solution had been found to the issue of the vacant seats.

30. The Commissioner maintains that despite new elections the problems continued. He argues that there was public concern about impending planning applications and a fear that the community did not have a properly functioning parish council to represent their views to the Borough Council (the PC is a statutory consultee for planning matters and can provide comments on planning applications affecting their area).
31. The Commissioner found in his decision notice that at the relevant time the PC was dysfunctional, this was hotly refuted by Mr Frohnsdorff and the current chair of the PC who was one of those elected in November 2011 and they point to the fact that budgets were set, meetings conducted and business transacted throughout the period concerned. The Commissioner argued that dysfunctional is not a term of art and does not mean ceased to function and points to the fact that there were numerous complaints and cross complaints up until January 2012 by PC members in support of his contention that the PC was not functioning properly at the time and that the public interest was served in all attempts to help the PC to run smoothly. The Commissioner points to the Council's reserve powers (wherein they can take over the running of the PC if it ceases to function) – which would be a drain upon the reserves and resources of the Council were they to be activated, in support of his contention that the public interest favoured withholding the information which might have inflamed tensions.
32. The Tribunal does not find it helpful to define dysfunctional and accepts that the PC was deeply divided and relations between the factions were not good and its functioning was not optimum. The Commissioner points to the PC meeting that was abandoned in January 2012 (after the relevant date) in support of his contention that the Council remained dysfunctional after the October 2011 elections. The Council rely upon 4 letters that it received from members of the public complaining that the PC was unable to fulfil its duties in support of their contention that the PC was dysfunctional. The identity of the individuals who wrote these letters has been redacted and the Tribunal has not been provided with an unredacted copy, however, we note the similarity in date, content and phrasing in these letters and on a balance of probabilities we do not consider them to be independent of each other but representative of a collective view of those opposed to the new Councillors.

33. We note that this meeting was abandoned due to the need to appoint a new Clerk and all other meetings before and after, were effective and conducted business. We consider of more relevance that the reserve powers were not activated and that business continued albeit with difficulty, and that this is despite the disclosure under FOIA made in September 2011. In considering the difference between the material already disclosed and that which remains withheld, we repeat our finding that the remit of this section is not to prevent embarrassment neither is it to stifle legitimate dissent and democratic disagreement both of which are in the public interest.

In favour of disclosure

34. The Commissioner accepts that:

a) From coverage in the press it is apparent that there was concern about the role of the Chief Executive at the meeting of 16<sup>th</sup> May 2011.

b) There is strong public interest in whether the advice of the Parish Clerk was correct and whether her advice has been derived from advice from the CEO of the Council.

c) The Council has a planning interest in the scheme being approved, it is important in the interests of transparency whether the Council has had improper influence on the actions of the PC.

d) Both the Council and PC are publicly funded, the use of their resources is important in the interests of accountability to their electorate and transparency particularly in the context of elected representatives not taking up their seats.

35. The Tribunal also adds that it would be an abuse of the unofficial channel of communication which arises out of an official position for it to be used to further personal or 'political' ends and is satisfied that it is an important element of transparency that the public can satisfy themselves as to whether this channel has been misused in this way or not.

36. The Commissioner argues that the public interest in transparency is reduced by the fact that there has been critical scrutiny in the press.

37. The Tribunal considers all these arguments to be important especially in light of the limited weight it has given to the need for an informal channel of communication on

the facts of this case. We have reviewed the withheld material and note that the Commissioner argues that its disclosure would not shed greater light on why Chief the Executive attended the meeting of 16<sup>th</sup> May 2011 in the first place, although he concedes that it would shed greater transparency. The Tribunal disagrees, and considers that whilst it may not give a definitive answer it is important by way of context and there is some material of direct relevance. The Tribunal takes into consideration the apparent discrepancy between material already in the public domain (disclosed under FOIA, or circulated publicly or in the press) in relation to why the CEO was at the meeting <sup>6</sup>, and whether the CEO endorsed the advice given by the Clerk<sup>7</sup> and considers that the withheld material may shed further light on these apparent inconsistencies.

### Conclusion

38. For the reasons set out above, and in the confidential annex<sup>8</sup> we are satisfied that the balance of public interest lies in favour of disclosure and that neither s36(2)(b)(i) nor s36(2)(c) FOIA were properly applied.
39. The Public Authority must disclose the withheld information within 35 days of the date of this decision.

Dated this 4<sup>th</sup> day of April 2013

Fiona Henderson  
Tribunal Judge

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<sup>6</sup> The email from the parish clerk 6.5.11 “ *I understand you might wish to join us for the inaugural meeting of our new Council on Monday 16<sup>th</sup> May*”

The letter from the Council CEO 28.9.11“ *I attended the meeting at the request of the parish council*”

<sup>7</sup> The email from the Parish Clerk of 17.5.11: “*Your support was much appreciated and reinforced my explanation of the situation leaving no room for argument*”

The letter from the Council CEO 28.9.11: “*I did not confirm that what the Clerk had said was correct*”

<sup>8</sup> The confidential annex references the withheld information and should remain confidential until after the Public Authority has made the disclosures as ordered by the Tribunal.