



**IN THE FIRST-TIER TRIBUNAL  
GENERAL REGULATORY CHAMBER  
INFORMATION RIGHTS**

**Case No. EA/2018/0062**

**ON APPEAL FROM:**

**The Information Commissioner's  
Decision Notice No: FS50690170  
Dated: 8 March 2018 (*incorrectly dated 2017*)**

**Appellant: Mr Kevin Shaw**

**Respondent: The Information Commissioner**

**Second Respondent: Norfolk County Council**

**Date of hearing: 4 December 2018 at Fleetbank House, London**

**Date of decision: 16 January 2019**

**Before**

**Anisa Dhanji  
Judge**

**and**

**Marion Saunders  
Paul Taylor**

**Panel Members**

**Subject matter**

FOIA section 36(2)(c) - whether disclosure would or would be likely to prejudice the effective conduct of public affairs; section 2(2)(b) whether in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure.

**DECISION**

This appeal is dismissed.

**Signed**

**Anisa Dhanji**

**Judge**

**IN THE FIRST-TIER TRIBUNAL  
GENERAL REGULATORY CHAMBER  
INFORMATION RIGHTS**

**REASONS FOR DECISION**

**Introduction**

1. This is an appeal by Kevin Shaw (the “Appellant”), against a Decision Notice (“DN”) issued by the Information Commissioner (the “Commissioner”), on 8 March 2018.
2. It concerns a request made by the Appellant on 28 April 2017 to Norfolk County Council (the “Council”), under the Freedom of Information Act 2000 (“FOIA”), for information about the Council’s adult social care accounts for bad debts (the “Request”).
3. The Appellant made the Request because of his concern that the Council’s bad debt provision had increased from £1.572 million on 1 April 2015, to £3.121 million by 31 March 2016.
4. The Council refused the Request citing various exemptions in FOIA. Following an internal review requested by the Appellant, the Council maintained its refusal.

**The Request**

5. In brief, the Appellant wanted to know:
  - which organisations/people did the bad debts relate to?
  - what was the sum of money relating to each such organisation/person?
  - what was the opening amount in respect of bad debts for each such organisation/person, and what additional amounts were set aside at the year end?
6. In refusing the Request, the Council relied primarily on the exemption in section 43(2) of FOIA (commercial interests), but noted that some of the information might also be exempt under section 40(2) (personal data), and section 41 (information provided in confidence).

**Complaint to the Commissioner**

7. On 6 July 2017, the Appellant complained to the Commissioner about the time taken by the Council to deal with his request for an internal review. On 18 July 2017, the Appellant also complained to the Commissioner about the Council’s refusal of his Request.

8. During the course of the Commissioner's investigation, the Council said that also relied on the exemption in section 36(2)(c) (prejudice to the effective conduct of public affairs).
9. The Commissioner found, in her DN, that section 36(2)(c) was engaged in relation to the entirety of the information within the scope of the Request, and that the public interest in maintaining the exemption outweighed the public interest in disclosure. Accordingly, the Commissioner held that the information was exempt from disclosure.
10. Having reached this finding, the Commissioner considered that it would serve no useful purpose to go on to assess whether any other exemptions relied upon were also engaged.

### **Appeal to the Tribunal**

11. The Appellant has appealed against the DN under section 50 of FOIA.
12. The scope of the Tribunal's jurisdiction in dealing with an appeal from a DN is set out in section 58(1) of FOIA. If the Tribunal considers that the DN is not in accordance with the law, or to the extent that it involved an exercise of discretion by the Commissioner, she ought to have exercised the discretion differently, the Tribunal must allow the appeal or substitute such other notice as could have been served by the Commissioner. Otherwise, the Tribunal must dismiss the appeal.
13. Section 58(2) confirms that on an appeal, the Tribunal may review any finding of fact on which the Decision Notice is based. In other words, the Tribunal may make different findings of fact from those made by the Commissioner, and indeed, as in this case, the Tribunal will often receive evidence that was not before the Commissioner.
14. The parties have lodged an agreed open bundle. We have also been provided separately, with the Appellant's "Final Arguments". In addition, we have been supplied with a closed bundle containing the disputed information.
15. The Council has not made any submissions in this appeal, but we have considered its responses to the Commissioner's investigations.
16. The Appellant has requested that this appeal be determined on the papers without an oral hearing. The Commissioner and Council have agreed. Having regard to the nature of the issues raised, and the nature of the evidence, we are satisfied that the appeal can properly be determined without an oral hearing.

### **Statutory Framework**

17. Under section 1 of FOIA, any person who makes a request for information to a public authority is entitled to be informed if the public authority holds that information, and if it does, to be provided with that information.

18. The duty on a public authority to provide the information requested does not arise if the information is exempt under Part II of FOIA. The exemptions under Part II are either qualified exemptions or absolute exemptions.
19. The key issue in this appeal, upon which the parties have concentrated their arguments, is in relation to section 36(2)(c) of FOIA. Section 36(2)(c) is a qualified exemption. Pursuant to section 2(2)(b), information that is subject to a qualified exemption is only exempt from disclosure if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information. This balancing exercise must be undertaken as at the date of the refusal.
20. Section 36(2)(c) FOIA provides that information will be exempt from disclosure if:
 

*... in the reasonable opinion of a qualified person, disclosure of the information under the Act:*

...

*(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.*
21. The Council has relied on the second limb, namely, “would be likely to”.
22. In this context, “otherwise” means otherwise than by prejudicing collective ministerial responsibility (section 36(2)(a)), or the free and frank provision of advice or exchange of views (section 36(2)(b)).
23. Section 36(5) explains what is meant by a “qualified person”. For a local authority within the meaning of the Local Government Act 1972, including county councils and district councils, the qualified person is the Monitoring Officer or the Chief Executive.

## **The Parties’ Position**

### **The Council**

24. The Council says that it is required, by the relevant financial reporting standards, to include sufficient provision for bad debts in its accounts, particularly as part of the closing accounts for each financial year. It decides which debts should be included as potential bad debts based on the likelihood of recovery, taking into account a range of factors, including the age of the debt, and any legal dispute there may be about the debt.
25. The Council also says that bad debts are written off throughout the year, at the point at which they are identified as uncollectable. Details about the value and number of debts, together with further details about large debts (over £10,000), are reported to the Council’s Policy and Resources Committee. The Council says it has informed the Appellant where, in the public domain, this information can be found.
26. As to why and how section 36(2)(c) is engaged, the Council says that if it becomes known that it regards certain debts as potentially unrecoverable,

that would discourage repayment by those debtors, and so reduce the prospect of recovery. It says that this cannot be in the public interest. The Council has provided the opinion of its Monitoring Officer, to this effect.

27. In favour of disclosure, the Monitoring Officer recognises that publishing information about unpaid debts could encourage payment by leaving some debtors embarrassed.
28. Against disclosure, the Monitoring Officer considers that:
  - if debtors knew that their debt was on the list of debts likely to be written off, this may discourage them from using every effort to repay the debt;
  - disclosure relating to debts which are identified as “disputed” could lead the public to believe that organisations and individuals owed money which they may not in fact owe; and
  - disclosure could damage the Council’s relationships with some organisations with whom it works closely (particularly where negotiations about debts were ongoing), which, in turn, could hinder the Council’s negotiations and result in lower levels of recovery for the Council.

#### The Commissioner

29. The Commissioner says that the qualified person’s opinion was reasonable. The qualified person was aware of the facts and circumstances surrounding the Request and provided arguments for and against disclosure. The grounds of appeal disclose no complaint in relation to the reasoning of the qualified person, nor to the Commissioner’s conclusion that the opinion of the qualified person was reasonable.
30. As regards the public interest balance, the Commissioner says she recognises the “*very strong public interest in creating greater transparency on the writing off of debts*” by the Council - and indeed the public interest in relation to any explanation of the spending and/or loss of public money, particularly at a time when public authorities are facing financial constraints and cutting services.
31. The Commissioner also says that she paid particular attention to the Appellant’s concern that the doubtful debt provision had significantly increased over the relevant financial year. She accepts that this would raise the public’s concerns over the financial decisions taken by the Council.
32. However, the Commissioner considers that the factors against disclosure are weightier. She accepts that if it was known that a debt had been identified as one that might need to be written off, the debtor may withhold payment with a view to having the Council write it off completely.
33. The Commissioner took into account the potential prejudice to the Council’s relationships with debtor organisations and individuals if it disclosed details of debts while negotiations with such debtors were ongoing. Also, since these

debts were only potentially owed, the Commissioner considered that disclosing the information requested would not necessarily give the public accurate information.

34. The Commissioner further noted that the Council did publish details of debts that were actually written off (albeit without the names of the individuals and/or organisations to whom the debts related). This information gave a more accurate picture of the position.
35. In addition, the Commissioner noted that the majority of the debts in issue related to care services provided by the Council to individuals. She considered that publishing details of debts owed by individuals could dissuade such individuals from taking up care services in the future, and therefore, disclosure of the information could prejudice the provision of a public service. This was not in the public interest.

### The Appellant

36. The Appellant does not accept that section 36 is engaged. He says that in any event, the public interest in maintaining the exemption outweighs the public interest in disclosure of the information.
37. He also argues that the Commissioner should not have decided that the Council was entitled to rely on section 36 FOIA when this exemption had not been relied upon by the Council at the time it refused the Request and was only invoked during the course of the Commissioner's investigation.
38. Furthermore, the Appellant says that the Council has provided no evidence to support its contention as to the likely prejudice that would follow disclosure. He argues that to accept the Council's position without evidence, as the Commissioner has done, is to completely circumvent the legal process.
39. He does not understand why the Commissioner has said that the debts are only potentially owed (DN paragraph 38). He contends that there must be a contract, and therefore they must be actually owed, or it must be that the Council's work or services were inadequate, and that is why the amounts are being disputed.
40. In addition, he does not accept that the Council's relationship with debtors would be damaged if it disclosed details of bad debtors. The Appellant says that if there are ongoing disputes about debts, that suggests that the Council's relationship with the debtors is already damaged.
41. Also, the Appellant says that if the majority of the debts relate to care services that have been provided by the Council to individuals, and if such individuals do not pay, the Council should pursue them. If they cannot pay, then to be transparent, the Council should account for the costs as funded care. Otherwise, the Council taxpayer is funding services for unknown individuals and/or organisations and there is no transparency.

42. He says that there is a strong public interest in knowing why the potential bad debts are so large. He notes that there is a monthly bad debt average in the region of £125,000.
43. He says that the information that is in the public domain does not give the names of individuals or organisations in respect of whom the debts relate, so it is meaningless.
44. As regards the opinion of the qualified person, he takes issue with the fact that the qualified person's opinion was not given to the Commissioner.
45. The Appellant raises some other points in his grounds of appeal (for example in paragraphs 12 and 13), which fall outside the Tribunal's jurisdiction.

## **Findings**

### **The Disputed Information**

46. It may be helpful if we first describe the disputed information. In line with the Supreme Court's decision in **Bank Mellat v Her Majesty's Treasury [2013] UKSC 38**, we will say as much as we reasonably can, about that information, without undermining the purpose of this appeal. We have also kept in mind the Court of Appeal's guidance in **Browning v Information Commissioner and the Department for Business, Innovation and Skills [2014] EWCA Civ 1050**, as regards closed material generally.
47. The disputed information comprises 3 pages. Pages 1 and 2 consists of a table headed "Calculations Underpinning Adult Social Care Accounting Provisions 2015-16". There are 4 columns, with the following headings:
  - Opening balance as at 1 April 2015;
  - Debtor;
  - Movement in year; and
  - Closing balance as at 31 March 2016.
48. There are about 50 potential debtors listed in the 2<sup>nd</sup> column. Only 5 are named individuals; 11 are NHS Trusts. The rest comprise local authorities and other organisations. There is no indication of the cause or nature of the debt. The opening and closing balances range from a few hundred pounds to several hundred thousand pounds.
49. Page 3 is an extract from the Council's letter to the Commissioner dated 7 December 2017. A redacted version of this letter is at page 79 of the open bundle. That has two paragraphs redacted. The same page in the closed bundle is unredacted.
50. In the unredacted version, the Council explains the nature of some of the debts and why they may be disputed. The Council also explains that a small number of the debts relate to private businesses. All the debts were cleared during the year, either because they were paid, or negotiations resulted in agreement that the debts should be revised or written off. The Council also provides an explanation for why the "doubtful debt" provision nearly doubled in a year from April 2015 to March 2016. It has explained, even in the



redacted version, that the provision of social care can involve difficult and sensitive negotiations regarding who is responsible for meeting the costs of that care. The Council says that this is (or was at the date of the request), a live issue, and that disclosure could prejudice the Council's ability to negotiate.

*Should the Council have been allowed to rely on section 36?*

51. The Appellant challenges the Commissioner's decision to allow the Council to rely on section 36, when this exemption had not been relied upon by the Council when refusing the Request.
52. On receiving a complaint that a public authority has refused to disclose information under FOIA on the basis of one or more exemptions, the Commissioner is not limited to considering only the exemptions which are relied on by the public authority. Indeed, it may sometimes be appropriate for the Commissioner to consider other exemptions. The settled principle is that information should not be disclosed just because an exemption that is properly engaged has not been invoked.
53. In short, the Council's failure to rely on section 36 at an earlier stage did not bar the Council from invoking it later, and the Commissioner was not wrong in allowing the Council to do so.

*Is section 36(2)(c) engaged?*

54. The next question is whether section 36(2)(c) is in fact engaged. Would disclosure be likely to prejudice the effective conduct of public affairs? This is an assessment that must be made as at the date of the Request.
55. It is not necessary to show that the prejudice would be significant (although the extent of the prejudice is relevant to the public interest balance). However, disclosing the information must have "a very significant and weighty chance" of causing prejudice that is "real, actual or of substance": **Hogan and Oxford City Council v the Information Commissioner (EA/2005/0026 and EA/2005/0030); Department for Work and Pensions v the Information Commissioner and FZ [2014] UKUT 0334 (AAC); and R (Lord) v Secretary of State for the Home Department [2003] EWHC 2073 (Admin).**
56. The exemption in section 36 is unique in that it requires the opinion of a "qualified person" to the effect that prejudice to the effective conduct of public affairs would, or would be likely to occur, from disclosure. That opinion must be objectively reasonable.
57. When assessing reasonableness, it is necessary to consider all relevant factors, including the nature of the information, and the qualified person's knowledge of, or involvement in, the matters relied upon.
58. The Council has provided the opinion of Victoria McNeill, its Monitoring Officer. There is no dispute that the Monitoring Officer is indeed a qualified person. The Appellant's argument that the opinion was not valid because it was not given to the Commissioner, is misconceived. The opinion is in no

way rendered invalid because it was passed to the Commissioner by the Council's Information Compliance Manager.

59. As to whether the opinion was reasonable, the opinion has been reproduced at pages 93 to 95 of the open bundle. As summarised at paras 27-28 above, the qualified person sets out the considerations for and against disclosure of the information. The Commissioner says, and we agree, that the qualified person was clearly aware of the facts and circumstances surrounding the Request. There is no basis to find that the opinion was anything other than reasonable.
60. The Appellant has rightly pointed out that for the most part, the Council's assertions as to the prejudice that would be likely to arise, has not been supported by evidence. There is no witness statement or other evidence to demonstrate the causal link between the disclosure of the disputed information and the specific prejudice to the effective conduct of public affairs that the Council asserts would be likely to arise.
61. However, we consider that it is unrealistic to expect that assertions as to prejudice can always be supported by evidence. Much depends on the specific exemption being relied upon, the nature of the prejudice being asserted, and whether evidence of the causal link can reasonably be produced.
62. In the present case, we consider it is neither reasonable nor realistic to expect that the Council could provide meaningful evidence as to the prejudice that would likely follow from disclosure, such as statements from its debtors about whether they would be more or less likely to pay the debts in issue if the information was disclosed. It is difficult to see how such statements could be requested without compromising the Council's ability to collect on its debts.
63. The absence of such evidence does not mean that the opinion of the qualified person is not reasonable. For the reasons given, we are satisfied that it is, and that the exemption is engaged.

#### The Public Interest Balance

64. The final question is whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure of the disputed information.
65. Under FOIA, there is, of course, no presumption in favor of disclosure. The burden lies on the Council to establish that the harm that would be likely to be caused by disclosure of the information is such that it outweighs the considerations in favor of disclosure.
66. The correct approach to the application of the public interest balancing exercise, is set out in the Upper Tribunal's decisions in **APPGER v ICO and FCO [2013] UKUT 0560**; **Department of Health v Information Commissioner and Lewis [2015] UKUT 0159 (AAC)**; and **Home Office v IC and Bingham Centre for the Rule of Law [2015] UKUT 0308 (AAC)**. The public interest balance must be undertaken by reference to specific

public interest factors relating to the content of the information. This does not mean that generic factors are not relevant, but they do need to be borne out by the particular information in issue.

67. In relation to section 36 in particular, both the First-tier Tribunal (see **Guardian Newspapers Ltd v IC and BBC [2011] 1 Info LR 854** (at para 93), and the Information Commissioner's own guidance on "Prejudice to the Effective Conduct of Public Affairs" (at paras 68 - 71), advise that when judging the public interest balance, the Commissioner (and by implication, the Tribunal on appeal), must form an independent assessment of the public interest balance. This must include an evaluation of the weight to be attached to the qualified person's opinion. See also **Department for Work and Pensions v IC and FZ [2014] UKUT 334 (AAC)** (at para 55 - 56).
68. There is clearly a public interest in disclosure. In generic terms, it is self-evident that there is a public interest in financial decisions taken by the Council being transparent to promote greater understanding and accountability relating to the use of taxpayers' money.
69. The specific public interest in disclosure of the disputed information as has been put forward by the Appellant, has already been summarized, above. His arguments are anchored particularly on the doubtful debt provision having significantly increased over the relevant financial year. We accept that this heightens the public interest in the decisions taken by the Council in relation to such debts.
70. However, in our view, two factors mean that the public interest in disclosure is not as great as it might have been. First, having considered the disputed information, we find that it does not support the Appellant's concern that the characterisation of certain debts as "potentially owed", implies that there is no contract when there should have been, or that the work or services provided by the Council were inadequate, nor that the Council was in some other way in breach of contract. There is also no evidence of any irregularity or poor management by the Council.
71. Second, this is not a situation where there is no relevant information available to the public. Pages 1 and 2 of the closed material set out potential bad debts – or in other words, debts considered by the Council to be high risk. It does not represent the actual amounts eventually written off for the 2015-2016 year. The total value and number of debts actually written off, with further details of each debt in excess of £10,000, are published. Therefore, there is a level of information publicly available (albeit without the detail the Appellant would like), with which to hold the Council accountable.
72. Against disclosure, in finding the exemption to be engaged, we have already accepted that disclosure would be likely to prejudice the Council's position in negotiating and collecting the debts. In our view, the specific arguments put forward by the Council as summarised at paras 24-28 above, are cogent and reasonable.
73. Taken together with explanations provided by the Council, including in particular in the redacted passages in its letter dated 7 December 2017 to the

Commissioner, we accept it is likely that disclosure of information indicating that the Council had categorised certain debts as potentially bad debts, would indeed give rise to the prejudice alleged.

74. In particular, we find it to be self-evident that disclosure would be likely to damage the prospect of recovery where negotiations are on-going, and act as a disincentive if debtors became aware that the Council may be prepared to write off those debts.

**Decision**

75. For all these reasons, we dismiss this appeal.

76. Our decision is unanimous.

**Signed**  
**Anisa Dhanji**  
**Judge**

**Date: 16 January 2019**  
**Promulgation date: 23 January 2019**