

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 13 September 2012

**Public Authority:** Ashford Borough Council

**Address:** Civic Centre  
Tannery Lane  
Ashford Lane  
Ashford  
Kent  
TN23 1PL

#### **Decision (including any steps ordered)**

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1. The complainant has requested correspondence between individuals on Great Chart with Singleton Parish Council and the Chief Executive of Ashford Borough Council regarding parish council elections. The council applied section 36(2) to the information and withheld it from disclosure.
2. During the course of the Commissioner's investigation the council also raised a further argument. It stated that the chief executive was at the time of the emails corresponding in his role as a statutory returning officer. It argued that when carrying out this role he is not acting as a council officer and that the role is not considered to be that of a public authority for the purposes of the Act. It therefore argued that some of the information in its possession was not held by the council for the purposes of the Act.
3. The Commissioner's decision is that the majority of the information is held by the council in respect of the support it provided the chief executive in his role as returning officer. However he considers that the council also holds that information and other information for its own purposes and so all this information is subject to the Act. He has however decided that all of the information is exempt under section 36(2)(b)(i).

## Request and response

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4. On 18 May 2011 the complainant wrote to Ashford Borough Council and requested information in the following terms:

*"Under the Freedom of Information Act 2000, I would like to request all correspondence between Ashford Borough Council and Great Chart and Singleton parish clerk [name redacted] and Chairman [name redacted]."*

5. The council responded on 13 June 2011. It stated that the information was held but that it was exempt under section 36(2)(b)(i) and 36(2)(c) of the Act. These exemptions apply where disclosure would prejudice the effective conduct of public affairs by 1) inhibiting the free and frank provisions of advice and 2) where disclosure would otherwise prejudice, or would be likely to prejudice, the effective conduct of public affairs.
6. Following an internal review the council wrote to the complainant on 2 September 2011. It found that the exemption applied for the same reasons.
7. During the Commissioner's investigation the council provided a new argument for withholding the information. It argued that returning officers are appointed under section 35 of the Representation of the People Act 1983. When undertaking their statutory role, returning officers are not acting as council officers. It argued therefore that some of the relevant information is not held for the purposes of the Act. It maintained its argument that section 36 applied for the other correspondence.

## Scope of the case

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8. The complainant contacted the Commissioner to complain about the way his request for information had been handled. He argues that the information which he requested should have been disclosed to him.
9. The withheld information comprises four emails, two sent in the course of a parish council election process and two sent subsequently, concerning the parish council.

## Reasons for decision

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### Background

10. On the night of the meeting at which they should have been inaugurated as parish councillors, a number of successful candidates in elections to Great Chart with Singleton Parish Council declined to take office as parish councillors. They had campaigned to sit on the council on a basis that they would oppose a planned large scale development of the area, including the building of over 5000 houses on currently rural countryside adjoining the village.
11. The majority, if not all of the existing councillors on the parish council believed that, as a development of the area had been part of the Ashford Borough Council's core strategy (the overarching planning document for the Borough) for a number of years, the parish council should simply seek to work to produce the best situation possible for the parish, taking the view that the development was going to occur in any event.
12. The prospective councillors declined to take their seats after the parish council clerk explained to the councillors that they may not be able to vote on matters which related to the development if they had fettered their judgement on that issue. It was also explained it was possible that when the Localism Act was introduced there was a potential that a £5000 fine could be imposed on any councillor who voted on an issue when they should not have done so. This advice was given during the inauguration meeting, shortly before the new candidates were due to formally take office on the council. The chief executive of Ashford Borough Council was present with the clerk at that meeting. He was the returning officer for the elections, responsible for arranging and administering the elections and ensuring that they were carried out appropriately.
13. Seats on the parish council therefore remained vacant, so further elections were subsequently held and different new councillors, also opposed to the development, took those seats. This resulted in the parish council's stance on the development being split. Internal relationships within the parish council were frayed from that point, with no single prevailing view on matters relating to the development and arguments between the factions generally disrupting the parish council's work.
14. Part of the concern expressed by opponents to the development relate to the presence of the chief executive of the Borough council at the inauguration meeting. They question his role when the parish council

clerk provided the information to the prospective councillors about their judgement being fettered. The requests relate to the chairman and the clerk of the parish council's correspondence with the chief executive of the borough council.

Is the information held on behalf of the returning officer?

15. Section 3(2) of the Act states that:

*"For the purposes of this Act, information is held by a public authority if –*

*(a) it is held by the authority, otherwise than on behalf of another person, or*

*(b) it is held by another person on behalf of the authority."*

16. Ashford Borough Council argues that it does not hold some of the withheld correspondence for the purpose of its functions as a local authority. It states that it is the private and personal correspondence of the returning officer as a separate legal entity. It argues that as the information is held on behalf of the returning officer it is not held by the council for the purposes of the Act.

17. It is important to note here that the returning officer in this case was the chief executive of Ashford Borough Council. The council appoints the returning officer, who is then responsible for arranging and running the election process. Once appointed as returning officer his role (as regards the election process) is that of a separate and distinct statutory officer, and the actions he takes in that role are not actions of the borough council.

18. The Commissioner agrees that information held purely by or on behalf of the returning officer would be information which would not be held by the council for the purposes of the Act. However if that information was also held by the council for its own purposes then it would be held by the council for the purposes of the Act.

19. In effect, information held by the chief executive acting in his role as chief executive would be held for the purposes of the Act, but information held by the council purely on account of any administrative support it provided to him in his role as returning officer would not be.

20. The Commissioner notes that two emails were sent after the election process had been completed. The council did not claim that these pieces of correspondence were not held for the purposes of the Act. By the time they were written the returning officer's role had ended. For this

information it relied only on the exemption in section 36 of the Act. The Commissioner has considered this further below.

21. As regards the two emails which the council says it holds on behalf of the returning officer the Commissioner has considered the status of the that information further.

Information held on behalf of the returning officer

22. Section 35 of The Representation of the People Act 1983 states that the district council shall appoint an officer to be the returning officer for parish council elections.
23. The Electoral Commission document "Designing a New Electoral Service" (printed June 2008) states at paragraph 2.5

*"2.5 The Returning Officer is responsible for the running of an election and for ensuring that it is run in accordance with the law. The duties of the Returning Officer are separate from their duties as a local government officer, and they are personally liable for the conduct of an election. This is an important distinction and will require, for example, the provision of a suitable insurance policy for any person designated as a Returning Officer."*

24. The authority has no powers as regards the role of the returning officer once the individual has been appointed to the role. The role is independent from the local authority itself.
25. The Commissioner's guidance on information obtained or created by councillors' obligations under the Act is potentially useful in this situation. Councils can hold information which has been created or obtained by councillors but which is not considered to be 'held' for the purposes of the Act in some circumstances. This is in spite of the fact that the council may actually physically hold the information. The guidance is available at [http://www.ico.gov.uk/upload/documents/library/freedom\\_of\\_information/detailed\\_specialist\\_guides/fep109\\_information\\_produced\\_or\\_received\\_by\\_councillors\\_v1.0.pdf](http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/fep109_information_produced_or_received_by_councillors_v1.0.pdf). The Commissioner recognises that the facts of this case are different to that described in the guidance. However they are analogous to councillors acting in their own representative or party political capacity.
26. The guidance states:

*"Information created or received by a councillor but held on a local authority's premises or computer system will be covered if it is held by the authority on its own behalf. It will not be covered by the FOIA if it was produced by the councillor for private or*

*political purposes and the authority is just providing storage, office space or computing facilities."*

27. The emails relate to the election process at Great Chart with Singleton Parish Council. It is correspondence between the chairman of the parish council and the chief executive of the Ashford Borough Council specifically regarding the election process.
28. The borough council stated that after the election it involved itself in a mediation process to try to get two factions on the parish council to reach an agreement to work together. Any correspondence held which addresses the functioning of the parish council would therefore be held by the borough council in its own right for the purposes of this mediation. It is not a function of the returning officer to mediate arguments within parish councils after the election process has been completed.
29. The council clarified that this mediation role is not one of its statutory functions but that it has taken on the role in the interests of the local community. This must therefore have been a role which was being carried out by the chief executive and his senior colleagues as council officers. Information held in this regard will therefore be held by the council in its own right.
30. The Commissioner also notes that the council's initial response to the Commissioner during his investigation seems to have taken into account this information as 'council information' rather than distinct information which it did not hold for its own purposes. The qualified person did not distinguish between the two sets of correspondence. He simply considered the information and decided that section 36 was applicable.
31. However, the Commissioner considers that this distinction is important. If the council holds and uses that information for its own purposes then it is far less likely that that information is held purely on behalf of the returning officer.
32. The Commissioner is satisfied that these two mails were held by the council as a result of the chief executive's role as returning officer, but he also considers that this was information held by the council in its own right due to the ongoing mediation. This information was used by the council for the purposes of this post-election activity which the council had embarked upon voluntarily.
33. The Commissioner's decision is therefore that the council holds this information for its own purposes, not simply on behalf of the returning officer.

34. The Commissioner has therefore considered the application of the section 36 exemption to these two pieces of correspondence along with the other correspondence below.

### Section 36

35. The qualified person applied section 36(2)(b)(i) and 36(2)(c) to the withheld information. This provides an exemption where a disclosure of the information would prejudice the effective conduct of public affairs.

### 36(2)(b)(i)

36. Section 36(2)(b)(i) provides an exemption for information where its disclosure would, or would be likely to, prejudice the free and frank provision of advice.
37. The council indicated that the standard it applied was that disclosure of the information "would" cause prejudice.
38. The Commissioner is satisfied that when making his decision the qualified person took into account the circumstances surrounding the request together with the nature of the information which fell within its scope.
39. The central arguments for applying the exemption relate to the chilling effect which would result from disclosure. The information is correspondence with the chief executive which the borough council considers that parish council chairman would have assumed to be private and confidential.
40. The borough council argues that parish councils look to the chief executive to provide advice and assistance. In order to obtain the best advice available they will often enter into full and frank discussion about parish council issues on what they consider to be a private and confidential basis.
41. Additionally the qualified person argues that disclosure at the time of the request would have caused damage to working relationships between the chief executive of the borough council and the chairman of the parish council. The parish council chairman and the borough council chief executive discuss parish matters on a regular basis. Such contact and discussions usually involve the sharing of concerns along with requests for advice and assistance.
42. The qualified person considered that a disclosure of the information would have been seen by the parish council chairman as a betrayal of the close working relationship which had been developed over the years. He argued that there has always been an assumption that such high

level communications could be free and frank and that they would take place in private and away from public scrutiny. A disclosure would therefore be seen as a betrayal of trust and would affect their relationship in the future.

43. Such a breakdown would prevent the chief executive having informal discussions and providing advice to the parish council chairman. As a result both authorities' decision making would have been detrimentally affected. The council surmises that parish councils might then decide to pay for advice, using their limited resources where previously the council would have provided free advice.
44. Because of the localised nature of parish councils, a disclosure of any correspondence in which contentious issues are discussed in a full and frank manner could increase tensions within the community. The qualified person argued that if this information were disclosed, other parish council chairs might not enter into full and frank discussions, fearing that their comments might subsequently be disclosed. They might decide to seek advice elsewhere or even not seek advice at all. This would be detrimental to good decision making within the parish councils.
45. In this specific case, the issues were still very current when the request was made. At that time the chief executive of the borough council was trying to help broker a solution between two factions which fundamentally disagreed over the proposed development of the area. The qualified person argued that disclosure of the information at that time would have been a distraction to the parties and would have detrimentally affected the council's attempts to broker a satisfactory outcome. It would have entrenched the parties in their opposing positions and made the council's attempts at mediation much more difficult.
46. Having considered the withheld information the Commissioner is satisfied that the qualified person's opinion was reasonable and so the exemption is engaged. He must therefore carry out a public interest test to determine whether the information should be disclosed.

#### The public interest

47. The test to be applied is whether the public interest in maintaining the exemption outweighs that in disclosing the information. If the public interest is evenly balanced then the information should be disclosed.



The public interest in the information being disclosed

48. The council recognised that stories published in the local press discussing the events and several letters to the editor would have raised public concern over the issue within the community. Given the nature of the issue there would also have been raised concerns about the 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. Parish councils are statutory consultees for planning matters and can provide comments on planning applications which affect their area.
49. Press stories highlighted a view amongst parish councillors that the area had been designated for development by the borough council and would therefore be developed. Their argument was that the parish council needed to work with developers to ensure that the best development for the area was obtained. The new councillors however fought their election campaign arguing that the parish council should argue for the borough council's core plan to be changed and fight to retain the area as it is. The new elected councillors had been elected on the basis of their views, but as they had not taken up office they could not formally represent their views against the development on the council.
50. The proposed councillors had decided against taking up their positions on the council based upon their discussion with the clerk and the chief executive of the borough council shortly before their inauguration was due to take place. The chief executive of the borough council provided support to the parish clerk when the clerk spoke to the prospective councillors. It was the clerk's advice that led them not to take up their posts. There has since been further dispute about whether the clerk's advice was actually correct or not. There is a strong public interest in the correspondence being disclosed if it would highlight and clarify any of these issues.
51. The qualified person stated that he had considered, "*both this council and the parish council are funded by tax payers and it is right and proper that the public should generally be able to scrutinise information that the council holds. Being open is all the more important when elections are concerned and in the particular circumstances here, where councillors did not want to take up their seats.*"
52. The Commissioner agrees that this is a strong public interest factor in this case. The council holds information which would shed a degree of light on this situation. The council argues however that the information

would not shed a greater light on why the chief executive attended the meeting in the first instance.

53. As regards this specific information, the Commissioner, having seen it, is satisfied that it would not be particularly useful in shedding light on the events of the night that the councillors declined to take up their seats. The reason for the councillors' failure to join the parish council has already been reported in the press. Nevertheless, disclosure would bring greater transparency to the matter, which is itself a strong public interest factor in favour of disclosure.
54. The Commissioner is mindful of the fact that the FOI Act applies to parish councils as well as borough councils, so an appropriate degree of transparency should be expected. In any event, the Commissioner considers that some of the arguments in favour of withholding the information under Regulation 36(2)(b)(i) are far from overwhelming.

The public interest in the exemption being maintained

55. The council argues that disclosure of the information would damage the relationship of trust which the chief executive had built with the chairman of the parish council, and with the chairs of the other parish councils in the borough.
56. The emails were clearly issued in a private, confidential manner between the parties. The council argues that disclosure might cause the chairman to consider that the chief executive had betrayed a confidence. However the parish council is also subject to the provisions of the Act, so parish council chairmen ought to understand the need for the borough council to comply with its legal obligations in that regard. The Commissioner therefore gives this argument only limited weight.
57. However the Commissioner places more weight on the potential chilling effect. Disclosure might discourage parish council chairmen from entering into a free and frank discussion about contentious issues with the chief executive of the borough council in the future. Clearly any confidence in these communications remaining private would be damaged by the disclosure of this information. This would be likely to be detrimental to decision making and cooperation between the parish councils and the borough council would have less information on what parish councils were doing within the area.
58. The Commissioner recognises the important role that parish councils carry out in representing the people of the parish to borough and county councils. A parish council which is unable to function due to ongoing disputes will not be able to properly represent the community it stands for, and the community's voice may therefore be detrimentally affected.

Re-establishing a functioning parish council would therefore have been a strong priority because it is in the interests of the community. This is therefore a strong argument supporting the public interest in maintaining the exemption in this instance.

59. The council has provided valid arguments as to why a disclosure of this information would have affected its ability to broker a resolution in this case. The close relationship which the chief executive built up with the chairman of the parish council and its clerk has enhanced its advisory position in seeking to re-establish an effective parish council as quickly as possible. This role would be detrimentally affected if the information it gained as a result of that close relationship was disclosed.
60. In order to be able to play a part in resolving the issue the chief executive needed to be able to continue with his informal discussions, providing advice from a position where the parish chairman had confidence that the content of these would not be disclosed further. If the information was disclosed at the time of the request then this informal means of communication would have been damaged and the council's ability to try to broker a solution would have been affected.
61. The Commissioner is also satisfied that a disclosure of the information at the time of the request would have inflamed the situation further, and that this would have made it more difficult for the borough council to try to mediate an agreement between the factions within the parish council. The parish council would have been wary of seeking further advice or discussing the matter so openly with the borough council over this and any other contentious issues in the future.
62. The Commissioner has been provided with evidence that the council continued to seek to resolve the issue at the time. He agrees that the continuation of informal correspondence, borne from the relationship between the parties might have played an important role in resolving the parish council's issues. Borough councils do not regulate parish councils in this respect, and it could not therefore have been as effective in seeking to broker a solution if this informal route had not already been established.
63. Finally, the Commissioner notes that the issues with the parish council continued for some time after this event, and in spite of new individuals being accepted onto the council. This is further evidence that the council's arguments in favour of maintaining the exemption were valid considerations and had substance at the time they were originally considering the request.

The balance of the public interest

64. The Commissioner considers that re-establishing a fully functioning parish council was the primary public interest concern in this case. A disclosure of the withheld information at the time of the request would have inflamed the situation further and would have made a resolution of the issues much more difficult for the parish council.
65. The Commissioner considers that allowing the council to seek to resolve the issue informally and out of the public eye was in the best interests of the community which is served by the parish council. He therefore considers that on balance the public interest in the information being withheld outweighs that in disclosure.
66. The Commissioner's decision is therefore that the council was correct to apply the exemption in section 36(2)(b)(i) of the Act and, in all the circumstances of the case, the public interest in the maintaining exemption outweighs that in disclosing the withheld information.

## Right of appeal

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67. 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: 0116 249 4253

Email: [informationtribunal@hmcts.gsi.gov.uk](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

68. 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.

69. 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 .....**

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