

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

### **Decision notice**

**Date:** 12 May 2014

**Public Authority:** East Riding of Yorkshire Council  
**Address:** County Hall  
Cross Street  
Beverley  
East Riding of Yorkshire  
HU17 9BA

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

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1. The complainant has requested East Riding of Yorkshire Council's ("the Council") internal audit reports on its Youth Service. The Council relied on sections 36(2)(b)(i) and (ii) to withhold the requested information.
2. The Commissioner's decision is that East Riding of Yorkshire Council's reliance on section 36(2)(b)(ii) was correct.
3. The Commissioner requires the public authority to take no steps following his decision.

#### **Request and response**

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4. On or about 8 April 2013, the complainant wrote to the Council and requested information in the following terms:
  - Copies of the reports produced by the Council's internal audit section since 2009 concerning its Youth Service and successor services, the Youth Support Service and the Youth and Family Support Service
5. On 19 June 2013, the Council provided the complainant with its substantive response. Whilst it held the requested information it relied on section 36(2) FOIA not to communicate it to her. The requested information was identified as three audit reports namely:

- Youth Centre Corporate Compliance Final Report 2010/11.
  - Youth Service Compliance Final Report 2011/12.
  - Youth Support Service Compliance Final Report 2012/13.
6. Though it reviewed its decision, as requested by the complainant, it did not alter its position. This outcome of the review was communicated to the complainant on 2 August 2013.

### **Scope of the case**

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7. The complainant contacted the Commissioner on 4 August 2013 to complain about the way her request for information had been handled.

### **Reasons for decision**

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8. Section 1 of FOIA provides two distinct but related rights of access to information that impose corresponding duties on public authorities. These are:
- the duty to inform the applicant whether or not requested information is held and, if so,
  - the duty to communicate that information to the applicant.

### **Section 36(2)**

9. The relevant parts of section 36(2) state that:

“Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-

(b) would, or would be likely to, inhibit-

(i) the free and frank provision of advice, or

(ii) the free and frank exchange of views for the purposes of deliberation, or

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

10. The Council explained to the Commissioner that the qualified person is the Council's Monitoring Officer and Head of Legal and Democratic

Services and he provided his opinion on 7 June 2013. The Council maintains that the opinion was reached after the qualified person considered the reports and discussed the matter with the Council's Head of Finance. No formal written record was made.

11. The qualified person's view was that both the free and frank provision of advice and the free and frank exchange of views would likely be adversely affected if the reports were released.
12. In particular, he believes, it is likely that it would lead to reluctance on the part of officers from the Service area from expressing their views about the Service in an honest and open manner. This is necessary to ensure that there is an acceptance that steps may need to be taken to improve the Service. It is also necessary to foster discussion to identify appropriate steps to be taken, which will ultimately manifest themselves in tangible improvements to the Service and for its users.
13. In determining whether these exemptions are engaged the Commissioner must decide whether the qualified person's opinion was reasonable. The Commissioner has published guidance which sets out his approach<sup>1</sup>: if the opinion is in accordance with reason and not irrational or absurd, then it is reasonable. It is only unreasonable if it is an opinion that no reasonable person could hold.
14. Taking cognisance of the withheld information and the qualified person's knowledge of the issues, the Commissioner accepts as reasonable his opinion that section 36(2)(b)(ii) is engaged. The Commissioner is of the view that the lower level of prejudice should be applied. That is the prejudice would be likely to occur rather than it would occur.

### **Public Interest Test**

15. Section 36(2)(b)(ii) is a qualified exemption so the public interest test set out in section 2(2)(b) must be applied. That is, though the exemption is engaged, the information can only be withheld if the public interest in maintaining the exemption outweighs the public interest in disclosure.

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[http://www.ico.gov.uk/for\\_organisations/guidance\\_index/~media/documents/library/Freedom\\_of Information/Detailed\\_specialist\\_guides/section\\_36\\_prejudice\\_to\\_effective\\_conduct\\_of\\_public\\_affairs.ashx](http://www.ico.gov.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of Information/Detailed_specialist_guides/section_36_prejudice_to_effective_conduct_of_public_affairs.ashx)

Council submissions favouring maintaining the exemption

16. The submission made as regards the public interest relates to the fact that the internal audit system is an open system within the Council that is designed to improve performance and compliance with Council internal systems. Although some key areas will be identified by Internal Audit to be audited some areas will also be identified by Heads of Service and Directors within their own service area or Directorate to be audited in order that the Head of Service or Director is satisfied that those areas are fully complying with internal systems of control. Such audits may contain recommendations that 'merit attention' such as those contained in the audits the subject of these requests. The purpose of the system is to improve internal controls and this would be hampered if such reports were disclosed.
17. In particular those areas that merit attention are not fundamental or significant failings but areas that have been identified for improvement. The belief that such reports containing such recommendations could be made public could inhibit auditors from suggesting such improvements. The reason for this is that such recommendations are made to improve compliance with internal systems but as their name suggests they are improvements that 'merit attention' rather than demonstrating failings in the system.
18. A report containing a number of 'merits attention' recommendations could give the misleading impression of significant failings when this is not in fact the case. The way in which such matters may be publicised in the press or otherwise would not deal in the subtleties of the matter but with for example x number of failings identified in an internal audit report because the media look for a story that is eye catching and simple to understand. The belief that such recommendations could become public would therefore run the risk that there could be unwarranted damage to the reputation of the Council by simplistic reporting of such findings. This could discourage individuals from identifying such improvements due to the potential for public trust in the organisation to be damaged only because an attempt was being made to improve systems. The reaction may be to shy away from making such recommendations with the result that improvements are not made.
19. There is a public interest in ensuring that public money is well spent and is not wasted. However this does not automatically require disclosure of all internal audits to the public to demonstrate that the use of public money is properly scrutinised. At the level of audits that suggest improvements in practice the public interest points in favour of not releasing such information. This is because it is in the public interest for such systems to be improved on a constant basis. The potential for such improvements not to be identified for the reasons outlined above is not

in the public interest as in such circumstances such improvements may not be made. Improvements may be identified by those within service areas; however the presence of a 'critical friend' looking at the operation of such systems from the outside is a robust challenge mechanism that drives improvements in practice and procedure.

#### Council submissions favouring releasing the information

20. Disclosure of the information would promote transparency of its actions and facilitate public scrutiny of the spending of public money.

#### The Commissioner's Considerations

21. In considering public interest factors, the Commissioner agrees with the approach set out by the Information Tribunal in England & London Borough of Bexley v Information Commissioner EA/2006/0060 & 0066, at paragraph 65 which provides:

"(f) In considering public interest factors in favour of maintaining the exemption, they relate to the particular interest which the exemption is protecting...

(g) The public interest factors in favour of disclosure are not so restricted and can take into account the general public interests in the promotion of transparency, accountability, public understanding and involvement in the democratic process."

22. In carrying out the public interest test the Commissioner considers the circumstances prevailing at the time of the request.
23. The Commissioner recognises there is a general public interest in promoting transparency, accountability, public understanding and involvement in the democratic process. The FOIA is a means of helping to meet that public interest, so it must always be given some weight in the public interest test and it is clearly relevant here. However, in this case the Commissioner is not aware of specific circumstances peculiar to this case which would favour disclosure. Nor that the withheld information itself is of such a nature to particularly warrant or need public dissemination. This reduces the weight afforded to the public interest in disclosure.
24. Having regard, of course, to the information it is clear that the auditors rely heavily on interaction with members of staff employed at or connected to the vary organisations they were auditing. The Commissioner also considers it significant that the auditors often make recommendations on how things could be improved. This function would be hampered if the auditors believed that these "minor" observations and recommendations would be publically disseminated relatively soon

after they had been made. This would be a detriment to the Council in its efforts to improve the service.

25. The Commissioner accepts the Council's point that the withheld information itself consists of "minor observations" rather than information of such magnitude that its release would warrant the inhibition of free and frank exchange of views for the purposes of deliberation. This being the scenario that the qualified person reasonably envisages would likely occur if the withheld information were to be released.
26. On weighing up the varying factors, at the time they fell to be considered by the Council, the Commissioner's decision is that they favour maintaining the exemption. It is apparent, upon reading the withheld information, that the auditors appear to be significantly assisted by the staff co-operation in their investigations. The Commissioner accepts the assertion that releasing the information will likely cause a throttling, to some degree, of this co-operation. This, the Commissioner, feels will be to the detriment of those served by the Council and who ultimately benefit from the audits. The Commissioner stresses that he can only consider public interest matters that prevailed at the time the Council was considering the request. It is likely that with the passage of time the public interest factors for maintaining the exemption lose sufficient weight so as not to outweigh those factors for release.
27. The Commissioner gave thought to whether some of the withheld information should be released. As it is the act of release, rather than the actual content of the withheld information, that brings about the detriment to be avoided the Commissioner view is that it is not feasible to cherry pick what (in these circumstances which are central to this case) can be released.
28. Having decided that the Council's reliance on section 36(2)(b)(ii) was correct the Commissioner did not go on to consider the applicability of section 36(2)(b)(i).

## Right of appeal

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29. 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: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

30. 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.
31. 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 .....**

**Alexander Ganotis**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**