

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 2 November 2017

Public Authority: Scarborough Borough Council (the Council)

Address: Town Hall
St Nicholas Street
Scarborough
North Yorkshire
YO11 2HG

Decision (including any steps ordered)

1. The complainant has requested information relating to an investigation into alleged corruption. The Council withheld the requested information under section 22 FOIA.
2. The Commissioner considers that the Council was correct to apply section 22 FOIA.
3. The Commissioner requires no steps to be taken.

Request and response

4. On 23 June 2017 the complainant made the following request for information under the FOIA for:

"Please provide the following information in connection with the investigation, recently completed by Mazars, and provided to Council's party leaders, into alleged corruption. This investigation arose from findings made by an Employment Tribunal judge into the allegations made by a former council employee turned whistle-blower.

- (1). Terms of reference for the investigation.
- (2). The budgeted cost of the investigation
- (3). The actual cost of the investigation
- (4). The investigation report."

5. On 21 July 2017 the Council responded. It refused to disclose the requested information under section 22 FOIA.
6. The complainant requested an internal review on 22 July 2017. The Council sent the outcome of its internal review on 22 August 2017. It upheld its application of section 22 to parts 1 and 4 of the request. It responded to part 2 of the request but said that it did not hold the information requested at part 3 of the request as it has not received the final bill yet.

Scope of the case

7. The complainant contacted the Commissioner on 29 August 2017 to complain about the way his request for information had been handled.
8. During the course of the Commissioner's investigation the Council disclosed the information it had withheld under section 22 FOIA as part of its planned publication process.
9. The complainant considers that the published report does not contain terms of reference and therefore the Council should have confirmed that the information requested at part 1 of the request was not held. The Council has explained to the Commissioner that it considers that the 'terms of reference' are set out under the 'scope' section within the report. As the Council, as the information asset owner, does consider it holds information relevant to part 1 of the request, but originally withheld it under section 22 FOIA, the Commissioner will consider the application of the exemption to the information the Council considers it holds i.e. the 'scope' section of the report.
10. In relation to the application of section 22 FOIA (to the information that has now been disclosed), the complainant has asked the ICO to issue a Decision Notice confirming whether or not the Council was correct to apply section 22 FOIA at the time of the request.
11. The Commissioner confirmed with the complainant that her investigation would therefore look at whether the Council was correct to apply section 22 FOIA to the report which has subsequently been published in line with its planned publication process.

Reasons for decision

Section 22

12. Section 22 FOIA states that information is exempt information if—
- (a) the information is held by the public authority with a view to its publication, by the authority or any other person, at some future date (whether determined or not),
 - (b) the information was already held with a view to such publication at the time when the request for information was made, and
 - (c) it is reasonable in all the circumstances that the information should be withheld from disclosure until the date referred to in paragraph (a).
13. The Council confirmed that there was a settled intention to publish the investigation report at the time of the request being made. It said that a decision to publish the report had been taken by a cross party panel of the Council's Members on 15 June 2017. As part of that decision and prior to publication, the cross party panel of Members instructed that the Council should:
- a. seek permission from Mazars for the publication (as per the terms of the contract);
 - b. hold one to one meetings with each of the Council's Officers who were involved with the investigation, taking them through the report and providing advice and support should they require it, making sure the Council complied with its common law duties towards staff (such as the duty of mutual trust and confidence); and
 - c. seek clarification on a number of matters.
14. It summarised that it had always been the stated intention of the Council that the report would be published and for the above reasons it was reasonable in all the circumstances that the information should be withheld from disclosure until the agreed disclosure date.
15. Based upon the Council's submissions above, the Commissioner is satisfied that the information to which section 22 had been applied was held by the Council at the time of the request with a plan to publish once the steps described at 13 (a-b) above had been undertaken. She is also satisfied that it was reasonable to withhold the information prior to the agreed publication, in particular given that the Council's objective to support and advise Council officer's involved in the investigation prior to

its publication. The Commissioner does therefore consider that section 22 is engaged in this case, however as this is a qualified exemption, she has gone on to consider the public interest test.

Public interest arguments in favour of disclosing the requested information

16. The Council acknowledged that there is clearly a public interest in this information being disclosed into the public domain, which is why the cross party panel determined as much. There is also a public interest in the information being published in a manner that aids understanding.

Public interest arguments in favour of maintaining the exemption

17. In relation to part 1 of the request, the Council said that the public interest exercise is concerned with the scope being published at an earlier time than the rest of the report. It said that given that there was already an amount of incomplete and incorrect information circulating in the public domain about this matter, releasing the scope in isolation from the remainder of the report would have done nothing to assist public understanding, and would have resulted in questions being raised that could be addressed by the content of the complete report. It argued therefore that there is a stronger public interest in the report being released in its complete form (as per the cross party panel's decision) so as to aid the public's understanding, to avoid unnecessary questions being raised, and to avoid further unhelpful speculation and confusion.
18. More generally in relation to the report as a whole, it went on that, there is a strong public interest in the Council operating in a lawful manner – to do otherwise would put the Council at risk of legal challenge and would impact upon the provision of services and the public purse. One relevant aspect of the requirement to operate lawfully is to ensure that the Council complies with its duty of care towards staff, and the common law duty of mutual trust and confidence. In this respect the Council must ensure that it meets such duties towards those staff who have been involved in and may be affected by the matter prior to releasing the report into the public domain.
19. Another aspect of acting lawfully is that the Council has entered into a contractual agreement with the external auditor for the provision of an independent review. As part of that contractual agreement, the external auditor has stipulated that their written permission must be obtained prior to the report being disclosed more widely. To publish the report without obtaining written permission would likely be a breach of contract and put the Council and the public purse at risk, and it is entirely reasonable from a public interest perspective to allow the Council opportunity to comply with this requirement.

20. It went on that the Council entered into discussions and negotiations with Mazars for their permission to disclose the report (which they considered to be confidential). After their third refusal to give permission, the Council determined that the public interest was so strong that it should be disclosed without Mazars' permission.
21. However the delay in disclosure also allowed the Council to meet with those Officers affected to discuss disclosure and any concerns or questions they had, and to understand any support needs they may have. In doing so the Council was able to comply with its common law duty towards those Officers and reduce further risk to the public purse.

Balance of the public interest arguments

22. The Commissioner considers that there is a strong public interest in disclosure of the report into this investigation to inform the public with as much detail as possible to enable them to understand the process and conclusions reached. However in this case the Council made a decision that the report should be published because of the strong public interest in its disclosure but wanted to do this at a time once it had had the opportunity to support and advise staff directly involved in the investigation. The Commissioner does consider that there is a strong public interest in the Council complying with its duty of care towards staff and in order for it to meet its obligations it meant disclosing the report at an agreed time once this had been done.
23. On balance the Commissioner considers that the balance of the public in favour of disclosure is outweighed by the public interest in favour of maintaining the exemption.

Right of appeal

24. 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

25. 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.
26. 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

Gemma Garvey
Senior Case Officer
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Wilmslow
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SK9 5AF