

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 8 March 2017

Public Authority: Norfolk County Council
Address: County Hall
Martineau Lane
Norwich
NR1 2DQ

Decision (including any steps ordered)

1. The complainant has requested information relating to bad debts identified by the council. The council has applied section 36(2)(c)(prejudice to the effective conduct of public affairs), section 40(2)(personal data), section 41 (information provided in confidence) and section 43(2)(commercial interests) to the information.
2. The Commissioner's decision is that the council has correctly applied section 36(2)(c) to the information. As such she has not found it necessary to consider the application of section 40(2), section 41 or section 43(2) to the information further.
3. The Commissioner does not require the council to take any steps.

Request and response

4. On 28 April 2017 the complainant wrote to council and requested information in the following terms:

"There are specific amounts of money set aside in the accounts for bad debts. I would like to know who these organisations or people are, the amount in money which was set aside for them. The opening amounts organisations and people [sic], and the additional amounts set aside at the year end".

5. The council responded on 24 May 2017. It applied the exemptions in section 43(2) (commercial interests), 40(2) (personal data) and 40(1) (information provided in confidence) to withhold the information.
6. Following an internal review the council wrote to the complainant on 13 June 2017. It said that all of the information was exempt under section 43(2).

Scope of the case

7. The complainant contacted the Commissioner on 10 July 2017 to complain about the way his request for information had been handled. His complaint was that the information should have been disclosed to him.
8. During the course of the Commissioner's investigation the council reconsidered its position and applied section 36(2)(c), section 40(2) and section 41 to the information. These exemptions apply where a disclosure would prejudice the conduct of public affairs, where the requested information is personal data belonging to a third party, and where the information is held under a duty of confidence. It did not provide further arguments in respect of the application of section 43(2).
9. The Commissioner considers that the complaint is that the council was wrong to withhold the information.

Reasons for decision

Background to the request

10. The council said that *"in accordance with international financial reporting standards the Council makes an assessment of its debts and ensures that the statement of accounts includes sufficient provision for bad*

debts. This provision is reviewed throughout the year, but particularly as part of closing of the accounts. There are a number of factors that will determine the level of provision made, but it is a determination based on risk and likelihood of recovery of debt. For example the older the debt the higher the risk and this will be a factor in considering the proportion of aged debt that is considered doubtful and for which provision is made. Legal disputes are another factor”.

11. In essence therefore, the information requested from the council is a list of debts owed to the council, or potentially owed to the council, where the council considers there is a risk that that money may need to be written off and not recovered.

Section 36(2)(c)

12. The council applied section 35(2)(c) to the whole of the information. Section 36(2) of FOIA states that information is exempt if in the reasonable opinion of a qualified person, disclosure of the information –

“(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 purpose of deliberation, or

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

13. Section 36 is unique in that its application depends on the opinion of the qualified person that the inhibition envisaged would, or would be likely to occur. To determine whether the exemption was correctly engaged by the Council, the Commissioner is required to consider the qualified person’s opinion as well as the reasoning that informed the opinion. Therefore the Commissioner must:

- Ascertain who the qualified person is,
- Establish that they gave an opinion,
- Ascertain when the opinion was given, and
- Consider whether the opinion was reasonable.

14. The Commissioner has issued guidance on section 36, which is available from https://ico.org.uk/media/for-organisations/documents/1175/section_36_prejudice_to_effective_conduct_of_public_affairs.pdf.

15. The Council confirmed that its qualified person is the council's Monitoring Officer. The Council recorded that the qualified person's opinion was sought on 21 November 2017 and given on 22 November 2017. The qualified person was provided with a copy of the withheld information, together with submissions for and against disclosing the information. She reached her opinion on the basis of the information which was provided to her. The Commissioner is therefore satisfied that the qualified person did provide her opinion that the information in question was exempt under section 36(2)(c).
16. The exemption can be engaged on the basis that the prejudice to public affairs either 'would' or would be 'likely' to occur. In this case the Council has applied the exemption on the basis that disclosing the information in question 'would be likely' to prejudice the conduct of public affairs. This is taken to mean that the qualified person considers the likelihood of the inhibition occurring to be more than a hypothetical possibility; that there is a real and significant risk, even if that risk is less than 50%.
17. The Commissioner firstly needs to consider whether this opinion is a reasonable opinion to hold. It is important to highlight that it is not necessary for the Commissioner to agree with the opinion of the qualified person in a particular case. The opinion also does not have to be the only reasonable opinion that could be held, or even the 'most' reasonable opinion. The Commissioner only needs to satisfy herself that the opinion is reasonable or, in other words, it is an opinion that a reasonable person could hold. The qualified person's opinion can only be considered unreasonable if it is one that no reasonable person could hold.
18. The qualified person applied the exemption to the whole of the information. She considered that publishing the identity of any debtors for whom bad debt provision has been made may discourage those debtors from using every effort to repay their debts. She argued that some of the figures represent amounts set aside to cover debts which the council still hopes to recover but which have been assessed as presenting a high risk. Knowing that their debt is on this list would give those debtors the impression that the debt is likely to be written off and in doing so this would reduce the chances of the council recovering the money.
19. Additionally she considered that where some of the debts relate to individuals, although the names may be redacted under section 40(2) of the act they would be able to identify debts relating to them from the specific amounts disclosed. Again, for the same reasons outlined above, the council considers that individuals might then believe that their debts may be written off by the council and so become reluctant to pay the money they owe.

20. The qualified person also considered that some figures represent disputed debts. She considered that these figures are subject to negotiations, and a disclosure of the information would lead the public to believe that the organisations and individuals owed the money, whereas subsequent negotiations etc. might conclude that they do not.
21. The qualified person also considered that the council works closely with the organisations which are listed. She considered that if these figures were to be disclosed their relationships with these organisations may be damaged as the figures would be construed as unpaid debts when negotiations were still in fact ongoing.
22. Further to this the council considered that a disclosure of the information might hinder the council's negotiations and lead to it recovering less money. She considered that this will affect the council's ability to provide its other services.
23. On the counter side the qualified person did consider the possibility that publishing details of the unpaid debt might leave some debtors embarrassed and therefore more inclined to pay their debts as a result.
24. The Commissioner has considered the qualified person's opinion. The qualified person was aware of the facts and circumstances surrounding the information and was provided with arguments both for and against the information being disclosed. She therefore gave her opinion from an informed basis and the Commissioner accepts that her arguments have merit.
25. As stated, the Commissioner's role in determining whether the exemption has been correctly engaged is simply to determine whether, under the circumstances, the opinion is a reasonable.
26. Given the nature of the information and the issues identified by the qualified person outlined above the Commissioner's decision is that the qualified person's opinion is reasonable under the circumstances. The council was therefore correct to engage section 36(2)(c) under the circumstances.
27. The Commissioner must now consider the public interest to determine whether the information should be disclosed even though the exemption was properly applied. The test is whether the public interest in the exemption being maintained outweighs that in the information being disclosed. If it does not then the information should be disclosed.

28. In making this decision the Commissioner can take into account the factors identified above, together with a determination on the likelihood, harm and the frequency of the issues which the qualified person has identified.

The public interest

The public interest in the information being disclosed

29. The council identified that disclosing the information would provide greater transparency and accountability on decisions taken by them, particularly in the provision of the potential for writing off debt in the future, potentially of significant value.
30. The Commissioner recognises that if money is owed which is subsequently written off this takes funds away from the council and directly affects its ability to provide its services and carry out its functions in the Community. At a time when local authority funding is tight there is a very strong public interest in creating greater transparency on the writing off of debts of potentially significant value.
31. The complainant alleged that the doubtful debt provision had nearly doubled in the year between April 2015 and March 2016. He alleged that if this provision was provided to the same people or organisations that existed at the start of that year then this amounts to a poor use of public money. He argued that a disclosure of the information would assist the public to understand why the debt has continued to grow and create greater transparency on the council's decision making and its use of public money.
32. As noted above, the Commissioner recognises that in the current climate of increasing financial restraint and potential cuts to local authority services, any disclosure of information explaining the spending or loss of public money is in the public interest.

The public interest in the exemption being maintained

33. The qualified person's opinion affects the weight of the public interest arguments for withholding the information. If the qualified person has decided that disclosure 'would' prejudice or inhibit, this will carry a greater weight than if they said disclosure 'would be likely' to prejudice or inhibit. In this case the qualified person expressed the opinion that disclosing the information 'would be likely' to prejudice.
34. The Commissioner accepts that a reasonable opinion has been expressed that prejudice would be likely to occur, but she must then consider the severity, extent and frequency of that prejudice or

inhibition in forming her own assessment of whether the public interest test dictates disclosure.

35. The council has identified the main reasons why it believes there is a public interest in the exemption being maintained. A disclosure of the information could make it less likely that money is retrieved, and it could affect its relationships with organisations it is negotiating with to retrieve funds. It could also affect the reputation of organisations it is negotiating with when there is a potential that those negotiations may ultimately decide that no debt is owed. This is likely to damage its relationships with those organisations.
36. The council therefore argues that there is a public interest in allowing it to retrieve funds owed to it, and a result of the disclosure of this information is that it would be less likely to be able to do so. This loss of funding would affect its ability to provide its services and carry out its functions.

The Commissioner's conclusions

37. The Commissioner has accepted the qualified person's arguments that a disclosure might influence those who owe money to the council to be more intransigent about paying off their debt to the council. They might consider that the council has identified their debt as one which may need to be written off in the direct future and decide to hold back repaying the debt with a view to the council ultimately writing it off completely. The Commissioner has also taken into account the additional time and work this would take the council to recover the funds as well as the potential legal costs this might entail.
38. Similarly she accepts that the council's relationships with other organisations and individuals may be damaged if it disclosed details of debts which it considers to be owed when negotiations over the level of debt (or if that debt is in actuality owed) are still ongoing.
39. In the case of individuals, the council has clarified that the majority of debts relate to care services which have been provided to the individuals. If it became known that details of outstanding debts may be disclosed, including the identities of those individuals, this may dissuade some individuals from accepting care which is offered to them by the council. This is a potential barrier to the provision of care. A function of the local authority is to provide care services, and if this is disrupted then the provision of the service has been prejudiced by the disclosure of the information.

40. The Commissioner understands the complainant's point that a doubling of the figure over the period of a year would raise the public's concerns about the financial decisions taken by the council. In cases where negotiations were ongoing however a disclosure of the requested information would only provide figures of debts which are potentially owed. It would not provide the council's explanation for its decisions, explain where negotiations are ongoing nor explain what actions the councils is undertaking to retrieve money. Nevertheless it would allow the public a greater overview of the amounts which could potentially be written off (and therefore lost to the public purse) in the near future.
41. The Commissioner notes however that as the figures are of debts which are only potentially owed, disclosing the information on the list would provide the public with figures which are not necessarily going to be correct once the situation is resolved. A far clearer picture of the issue would be gained from knowing the amounts of debt which the council has actually written off over the course of the year. To this effect the council said that it publishes both the total amount of debts written off, and also individual figures for debts written off yearly where the amounts exceed £10 000, although it clarified that it removes the identities of individuals when publishing this information.
42. Taking all of the above into account, the Commissioner's decision is that the public interest in maintaining the exemption outweighs that in the information being disclosed in this instance. The council was therefore entitled to rely upon section 36(2)(c) to withhold the information.

Section 40(2) and section 40(1)

43. The council also applied section 40(2) (personal data) to the information where individuals are identified as owing a debt to the council. Its argument is that a disclosure of the information would disclose personal data on the individuals which would breach their rights under The Data Protection Act 1998. Its argument is that disclosing the information would breach their rights because a disclosure would not comply with the first data protection principle.
44. Similarly the council also applied section 41 (information provided in confidence) to information where an individual who is now deceased owed money to the council. Its argument is that the duty of confidence owed to individuals who are receiving care from the authority extends beyond their death to cover the details of the debt which their estate now owes the council.
45. The Commissioner has not found it necessary to consider the application of these exemptions further within this decision notice given she has

decided that the qualified person's was correct to apply section 36(2)(c) to the entirety of the information which was withheld.

Section 43(2)

46. The council also applied section 43(2) (commercial interests) to withhold the information. In its internal review it applied section 43(2) to withhold all of the information on the basis that its disclosure would prejudice the commercial interests of either it or the organisations which were named in the information.
47. Again with the Commissioner's decision that the whole of the information was exempt under section 36(2)(c) the Commissioner has not found it necessary to consider the application of this exemption further under the circumstances of the case.

Right of appeal

48. 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

49. 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.
50. 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

Andrew White
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