

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 23 May 2018

**Public Authority:** Tandridge District Council  
**Address:** Station Road  
East Oxted  
Surrey  
RH8 0BT

#### Decision (including any steps ordered)

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1. The complainant requested advice provided to the senior officers of Tandridge District Council by the chief executive of another nearby local authority, together with supporting documentation. Tandridge District Council refused the request relying on the section 36 (prejudice to the effective conduct of public affairs) and section 42 (legal professional privilege) FOIA exemptions. During the Commissioner's investigation, Tandridge District Council disclosed some of the requested information but continued to withhold part of it.
2. The Commissioner was satisfied that section 36(2) FOIA is engaged in respect of all of the information still being withheld and that the balance of the public interest favoured maintaining the exemption. The Commissioner did not require Tandridge District Council to take any further action.

## Request and response

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3. The information request arose from an incident that occurred during an exhibition which was part of a public consultation arranged by Tandridge District Council (TDC) during autumn 2017 to consult local residents about some of its Local Plan proposals for the district. During the incident, the TDC chief executive had asked the complainant and some colleagues to leave the exhibition area and allegedly threatened them. The complainant said they had found the incident distressing and intimidating and lodged a complaint against the TDC chief executive. TDC had then asked the chief executive of another Surrey council ("the other chief executive") to advise it on how best to address the concerns of the complainant and her complaint against the TDC chief executive.
4. On 5 and 6 October 2017 the complainant wrote to TDC and requested the following information:

*"The advice the council received from [the other chief executive – name redacted], the instructions sent to [the other chief executive – name redacted] and any emails to and from him about this matter, including all the information about the complaints that the council supplied to him, not just emails between council officers and ourselves."*
5. TDC responded on 18 October 2017, and again following an internal review, on 31 October 2017. TDC refused to provide the requested information citing the section 36 (prejudice to the effective conduct of public affairs) and section 42 (legal professional privilege) FOIA exemptions.

## Scope of the case

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6. The complainant contacted the Commissioner on 5 November 2017 on behalf of herself and two colleagues to complain about the way her request for information had been handled. She said, as regards the section 36 FOIA exemption that, if the request for advice and the advice given were unbiased, sensible and correct there could be no reason to withhold the correspondence requested in what was a matter of significant public concern and interest. She added, in respect of the section 42 FOIA exemption that, since no legal proceedings were involved, a claim of legal privilege was not appropriate.
7. The complainant said that there was significant public interest in the matter and a plausible suspicion of wrongdoing by TDC in addition to the

general public interest in transparency. She added that lack of disclosure was undermining public faith in the integrity of the council and its chief executive and had fuelled suspicion of wrongdoing among members of the public.

8. The Commissioner considered the application of the section 36(2) FOIA exemption. She has reviewed the withheld information some of which was disclosed during the course of her investigation. She also received and considered representations from both the complainant and TDC about disclosure of the information still being withheld.
9. On 6 February 2018, during the Commissioner's investigation, TDC offered to disclose the information on the understanding that she would withdraw her complaint to the Commissioner and keep the disclosed information strictly confidential without further disclosure. The complainant declined this offer.
10. Also during the Commissioner's investigation, TDC disclosed some information in accordance with a schedule provided to it by the Commissioner's staff and offered to resolve the matter informally with the complainant on that basis. However, the complainant decided not to accept that offer.
11. For the avoidance of doubt the Commissioner makes clear that her sole remit is to consider whether or not TDC complied with FOIA in withholding the undisclosed parts of the requested information. She has no locus in either the substantive planning matter or the exhibition incident and she has not considered them.

## Reasons for decision

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### **Section 36 – prejudice to the effective conduct of public affairs**

12. 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, ...*
13. The section 36 FOIA exemption is unique in that its application depends on the opinion of a qualified person (QP) that the prejudice or inhibition

envisaged would, or would be likely to, occur. To determine whether the exemption was correctly engaged, the Commissioner is required to consider the QP's opinion as well as the reasoning that informed that opinion.

14. 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.

15. TDC confirmed that its QP, apart from its Chief Executive, who was disqualified from this matter as she was herself an interested party, is its Monitoring Officer. The Commissioner saw, by reference to the relevant guidance published in 2009 by the then Department for Constitutional Affairs<sup>1</sup>, that this was appropriate.

16. The Commissioner received evidence from TDC that the QP's opinion was, in the first instance, based on an oral discussion. She also received a statement from the QP, dated 8 February 2018, which set out the basis for his opinion and the underlying reasoning.

17. The Commissioner also considered whether it was reasonable for the QP to hold this opinion. She noted that it was not necessary for her to agree with the opinion of the QP 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, ie that it is an opinion that a reasonable person could hold.

18. The Commissioner saw that the other chief executive was a neutral party and a senior individual within another nearby council located within the same county as TDC but not adjacent to it geographically. She noted that the other chief executive's council appeared to have no interest in the outcome of the TDC matter.

19. The Commissioner found that the content of the still undisclosed withheld information comprised: a briefing to the other chief executive, sent to him on 15 September 2017 by TDC but not received until 22

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<sup>1</sup><http://webarchive.nationalarchives.gov.uk/20100512160448/http://www.foi.gov.uk/guidance/exguide/sec36/annex-d.htm>

September 2017; and the advice from the other chief executive given to TDC on 28 September 2017.

20. The Commissioner found that the relevant correspondence bore privacy markings making clear the expectation of both TDC and the other chief executive that their views were being exchanged in the expectation of confidence.
21. In his statement of 8 February 2018 the QP said that, on or about 18 October 2017, he had been asked by a colleague to give his opinion as to whether the section 36 FOIA exemption was engaged by the complainant's request. He confirmed that when he considered the matter he had access to the request sent to the other chief executive and also to relevant correspondence. He said he had not been provided with any submissions supporting either the position that the exemption was engaged or that it was not engaged. He believed that his advice was being sought to enable the Leader of TDC to arrive at a conclusion based upon the other chief executive's advice augmented by legal advice sourced from within TDC.
22. The QP said that, having considered the matter, he had come to the conclusion that the section 36(2)(b)(ii) FOIA exemption was engaged. This was because disclosure of the requested information would, or would be likely to, inhibit the free and frank exchange of views; this was an important matter since the recipient of the views and advice was the Leader of TDC and related to a complaint about the conduct of the TDC chief executive.
23. The section 36 FOIA exemption can be engaged on the basis that the prejudice to public affairs either 'would' or 'would be likely' to occur. In this case TDC applied the exemption on the basis that disclosing the requested information 'would be likely' to prejudice the conduct of public affairs by inhibiting the free and frank exchange of views. The Commissioner has taken this to mean that the QP considered the likelihood of the inhibition occurring to be more than a hypothetical possibility, ie there was a real and significant risk of inhibition, even if that risk was less than 50%.
24. TDC said that in the QP's opinion disclosure of the requested information would be likely to inhibit the free and frank exchange of views; it was important to TDC that there should be no such inhibition.
25. The complainant said that, if the request for advice and the advice given were unbiased, sensible and correct there could be no reason to withhold the correspondence requested; the advice given was a matter of significant public concern and interest. She added that it was unjust that those who had made the complaint against the TDC chief executive

were being kept in ignorance of what had been said about them and their complaint.

26. The Commissioner noted that the date when the QP said he gave his opinion, 18 October 2017, was also the date on which TDC had issued its notice refusing the request on the grounds of the section 36 and section 42 FOIA exemptions. The matter and the views given had been very much 'live'. The complainant requested an internal review of her information request on 20 October 2017 which was not completed until 31 October 2017.
27. The Commissioner noted that TDC attached considerable significance to the views being exchanged as they were for the purpose of advising its Leader and related to the conduct of its chief executive. She recognised that live deliberations were in progress and that it was important for TDC that the views given were full and frank. She also found that the exchange of views had taken place in the expectation of confidence between the parties. Accordingly the Commissioner considered that the section 36(2)(b)(ii) FOIA exemption was engaged.

### **Public interest test**

28. Section 36 FOIA is a qualified exemption and so is subject to a public interest balancing test as set out in section 2 FOIA. This means that even when the exemption is engaged, the information can only be withheld if, in all the circumstances of the case, the harm disclosure would cause would outweigh the public interest in disclosure.
29. The Commissioner's approach to the competing public interest arguments draws upon the then Information Tribunal's decision in the case of *Guardian Newspapers Limited and Heather Brooke v Information Commissioner and BBC (the Brooke case)*<sup>2</sup>. The Commissioner noted, and has applied, the Tribunal's conclusion that, having accepted the reasonableness of the QP's opinion the Commissioner must give weight to that opinion as an important piece of evidence in her assessment of the balance of the public interest.
30. Although the Commissioner accepted that the QP's opinion was reasonable, and therefore gave it weight in the public interest balancing test, she has reached her own view on the severity and extent of the inhibition to the exchange of views occurring in this case.

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<sup>2</sup> EA/2006/0011; EA/2006/0013

### **Public interest arguments in favour of disclosure**

31. The complainant said that she believed there was an overriding public interest in disclosure. In addition to the general public interest in transparency she considered that there was a plausible suspicion of wrongdoing on the part of TDC. She said that the grounds for suspicion were: TDC's chief executive seeking to prevent some TDC councillors from taking part in an exhibition it had arranged; the chief executive's allegations against some councillors, including dishonesty, which had been neither substantiated nor withdrawn; and, the withholding of correspondence about the investigation into the chief executive's conduct.
32. The complainant added that the matter has demonstratively been of significant public interest and concern. She said that a large number of comments had been posted on a local newspaper's relevant Facebook page over a period of 16 days during October 2017.
33. The complainant said that keeping the information secret fuelled further suspicion of wrong doing and undermined public faith in the integrity of TDC and its chief executive. In her view it would be in the interests of good decision making, justice and fair treatment for the full correspondence to be made public.
34. TDC told the Commissioner it had seen no evidence of general public concern and that it had received no emails or letters other than those from the complainant and her supporters. TDC denied that there had been any wrongdoing by its chief executive or other officers.
35. In her investigation, the Commissioner saw one email which had been sent to TDC supporting the complainant. She also noted that the local newspaper's Facebook pages contained entries from 22 contributors, 20 of them supporting the position of the complainant and two the position of TDC. The Commissioner accordingly concluded that she has seen evidence of some public interest in, and opposition to, the TDC stance in the exhibition incident.
36. Also during her investigation, the Commissioner reviewed the withheld information. She saw within it no evidence of wrongdoing by TDC and concluded therefore that there was no reason on those grounds for disclosure.

### **Public interest arguments in favour of maintaining the exemption**

37. TDC said that in the circumstances of this case it considered that the public interest in maintaining the exemption outweighed the public interest in disclosing the information. There was a need for TDC

members and officers to be able to seek, give and receive advice and deliberate in confidence on occasion.

38. TDC added that the potential 'chilling effect' of knowing in advance that advice could be disclosed would inhibit the future provision of advice to TDC and the free and frank exchange of views. It was important for TDC to receive best advice to ensure high quality decision making by its members and officers. Inhibitions would be likely to arise if officers knew that their advice would be subject to public scrutiny. TDC believed that these inhibitions outweighed any public interest which there might be in releasing the information.

### **Balancing the public interest arguments**

39. The Commissioner considered the public interest arguments of both the complainant and TDC.
40. The Commissioner accepts that there are public interest arguments in openness and transparency favouring disclosure and has given due weight to these. She also recognised the disappointment, concerns and suspicions expressed to her by the complainant.
41. In her deliberations, the Commissioner recalled her published guidance on the application of the public interest test to the section 36 FOIA exemption<sup>3</sup>. This guidance notes that arguments under section 36(2)(b)(ii) are usually based on the concept of the 'chilling effect' that disclosure of exchanges of views would have inhibiting free and frank discussions in the future. The consequent loss of frankness and candour would then damage the quality of advice and deliberation and lead to poorer decision making.
42. In considering 'chilling effect' arguments the Commissioner expects senior public officials to be impartial and robust when giving advice, and to not be easily deterred from expressing their views by the possibility of future disclosure, indeed it is possible that the potential for future disclosure could actually improve the quality of advice. Nonetheless, she recognises that chilling effects do occur and that such arguments cannot be dismissed out of hand.

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<sup>3</sup> [https://ico.org.uk/media/for-organisations/documents/1175/section\\_36\\_prejudice\\_to\\_effective\\_conduct\\_of\\_public\\_affairs.pdf](https://ico.org.uk/media/for-organisations/documents/1175/section_36_prejudice_to_effective_conduct_of_public_affairs.pdf)



43. Whether it is reasonable to think that a chilling effect would occur will depend on the circumstances of each case, including the timing of the request, whether the issue is still live, and the actual content and sensitivity of the information in question.
44. The Commissioner believes that chilling effect arguments operate at various levels. Where, as here, the issue in question is still live at the time of the request, arguments about a chilling effect on those ongoing discussions are likely to be at their most persuasive.
45. In this matter the Commissioner found that the issue was still live and controversial. The advice related to an issue that both the giver and recipient of the advice regarded as sensitive and gave their views in confidence. The Commissioner recognised the need for TDC officials, while the matter was live, to have a safe space in which to consider and reflect upon the content of the advice given and to consider their position.
46. The Commissioner saw that the advice had been given and views exchanged in an expectation of confidence. Breaching that confidence would affect the future relationship between the parties and more widely and would strongly inhibit the provision of such advice to TDC in future ultimately leading to poorer future decision making.
47. The Commissioner found that, although there was some public interest in disclosure, there was a greater public interest in TDC being able to achieve a free and frank exchange of views in private. Accordingly the Commissioner decided that, at the time of the request and still at the time of the internal review, the balance of the public interest favoured maintaining the section 36(2)(b)(ii) FOIA exemption.

#### **Section 42 – legal professional privilege**

48. In the light of her decision regarding the section 36 FOIA exemption, the Commissioner did not proceed to consider the application of the section 42 FOIA exemption to the same withheld information.

## Right of appeal

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

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

50. 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.
51. 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** .....

**Dr R Wernham**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**