

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

### **Decision notice**

**Date:** 19 March 2019

**Public Authority:** Essex County Council

**Address:** PO Box 11  
County Hall  
Chelmsford  
Essex  
CM1 1LX

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

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1. The complainant has requested a copy of the Kenward Report. Essex County Council has withheld the requested information in reliance on section 36(2) – prejudice to effective conduct of public affairs.
2. The Commissioner's decision is that Essex County Council was correct to apply section 36(2) to withhold the information.
3. The Commissioner does not require Essex County Council to take any steps.

#### **Request and response**

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4. On 22 February 2018 the complainant wrote to Essex County Council ('the council') and made a request for information in the following terms:

*"In the year 2000, Helen Kenward was asked to investigate allegations of historic abuse connected to Essex Council's Children's Services. Ms Kenward conducted a number of interviews and produced a report for the Council, known as the 'Kenward Report'.*

*Within the last two years, this report has been located by Essex Council and shown to Essex police. I am requesting a copy of this report, in digital format."*

5. The council responded on 19 March 2018 and refused to provide the requested information citing the following FOIA exemptions:

Section 36 – Prejudice to the Effective Conduct of Public Affairs

Section 40 – Personal data

Section 41(1) – Information Provided in Confidence

Section 14 – Vexatious requests

6. The complainant requested an internal review on 22 May 2018. He requested that the council *"reviews this decision and releases a redacted copy of the report. With regard to unproven allegations and/or information provided in confidence, I believe that the council should only redact information which identifies either the source, the subject or the alleged victim in relation to any allegation, rather than the nature of the allegation itself."*
7. Following an internal review the council wrote to the complainant on 20 July 2018 and maintained its position. It qualified its position on the issue of providing a redacted report stating: *"We declined to provide a redacted copy based on section 14 of the Act. Due to the complexity of providing a redacted document it would place a burden on the Council which would be out of proportion with the cost, inconvenience and disruption to the public authority as stated in the original FOI response."*

## Scope of the case

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8. The complainant contacted the Commissioner on 23 July 2018 to complain about the way his request for information had been handled. Specifically, regarding the council's use of the cited exemptions to withhold the requested report in its entirety.
9. The complainant attests that identifying information could be removed thereby enabling a redacted form of the report to be released. Furthermore he states *"I have made clear in my correspondence with Essex Council that the most important parts of the Kenward Report, from my perspective, are: i) the early portions, which explain who commissioned the report, why they commissioned it, when they commissioned it, what its scope was and so on; ii) the latter portions, where Kenward gives her conclusions and recommendations."*
10. The Commissioner considers the scope of this case is to establish whether the council has correctly engaged the cited exemptions to withhold the information in its entirety. If it has, then she will consider where the balance of public interest lies.

## Reasons for decision

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### Section 36 prejudice to effective conduct of public affairs

11. Sections 36(2)(b) and 36(2)(c) of the FOIA state that:

*"2) 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".*

12. Section 36 operates in a slightly different way to the other prejudice based exemptions in the FOIA. It is engaged only if, in the reasonable opinion of a qualified person, disclosure of the information in question

would, or would be likely to, prejudice any of the activities set out in sub-sections of 36(2).

13. As section 36(2)(c) is worded specifically as “would otherwise prejudice”, it is the Commissioner’s opinion that if a public authority is claiming reliance on section 36(2)(c) of the FOIA the prejudice claimed must be different to that which would fall in section 36(2)(b)(i) and (ii).
14. The Commissioner considers section 36(2)(c) of the FOIA is concerned with the effects of making the information public. It can refer to an adverse effect on the public authority’s ability to offer an effective public service or to meet its wider objectives or purpose. She considers the effect does not have to be on the authority in question; it could be an effect on other bodies or the wider public sector. It may also refer to the disruptive effects of disclosure, for example, the diversion of resources managing the effect of disclosure.
15. 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.
16. The qualified person in this case is the council’s Monitoring Officer. The council has advised the Commissioner that the qualified person’s opinion was sought at the time of the initial request, that he was shown a copy of the withheld information, and gave his opinion on 16 March 2018.
17. The Commissioner is satisfied that the council’s Monitoring Officer is a qualified person for the purposes of section 36(5) of the FOIA.
18. The Commissioner asked the council to provide her with evidence that the qualified person considered the application of section 36 personally. The qualified person did this himself by sending the Commissioner a copy of the document which records the qualified person’s opinion.
19. In view of the document evidencing the qualified person’s opinion, the Commissioner is satisfied that the qualified person did provide his

opinion that the information in question was exempt under sections 36(2)(b) and 36(2)(c).

20. The Commissioner must consider whether this opinion is a reasonable one to hold. The Commissioner will consider the plain meaning of reasonable, that being: in accordance with reason, not irrational or absurd. If it is an opinion that a reasonable person could hold, then it is reasonable for these purposes. This is not the same as saying that it is the *only* reasonable opinion that could be held on the matter. The qualified person's opinion is not rendered unreasonable simply because other people may have come to a different (and equally reasonable) conclusion. It is only not reasonable for these purposes if it is an opinion that *no* reasonable person in the qualified person's position could hold. The qualified person's opinion does not even have to be the *most* reasonable opinion that could be held; it only has to be a reasonable opinion.
21. The Commissioner has also been guided by the Tribunal's indication, in the case *Guardian Newspapers & Brooke v Information Commissioner & BBC*<sup>1</sup>, that the reasonable opinion is limited to the degree of likelihood that inhibition or prejudice may occur and thus 'does not necessarily imply any particular view as to the *severity* or *extent* of such inhibition [or prejudice] or the *frequency* with which it will or may occur, save that it will not be so trivial, minor or occasional as to be insignificant' (paragraph 91). Therefore, when assessing the reasonableness of an opinion the Commissioner is restricted to focussing on the likelihood of that inhibition or harm occurring, rather than making an assessment as to the severity, extent and frequency of prejudice or inhibition of any disclosure.
22. With regard to the degrees of likelihood of prejudice the Commissioner has been guided on the interpretation of the phrase 'would, or would be likely to' by a number of Information Tribunal decisions. In terms of 'likely to' prejudice, the Tribunal in *John Connor Press Associates Limited v The Information Commissioner*<sup>2</sup> confirmed that 'the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk' (paragraph 15). With regard to the alternative limb of 'would prejudice', the Tribunal in *Hogan*

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<sup>1</sup> Appeal numbers EA/2006/0011 & EA/2006/0013

<sup>2</sup> Appeal number EA/2005/0005

*v Oxford City Council & The Information Commissioner*<sup>3</sup> commented that 'clearly this second limb of the test places a stronger evidential burden on the public authority to discharge' (paragraph 36).

23. The qualified person's opinion records that he considered that sections 36(2)(b) and 36(2)(c) apply to the withheld report in its entirety.
24. For each of the cited subsections of section 36(2), the qualified person's opinion is that the claimed inhibition and prejudice 'would' occur if the information was disclosed. Therefore, the Commissioner considers that it is appropriate to apply the stronger evidential test.
25. The council confirmed that in reaching his opinion, the qualified person had access to the full report and held discussions with the Safeguarding Director, the Executive Director for Children and Families and the statutory Director of Children's Services.
26. The council advised that although the qualified person hadn't been provided with contrary arguments supporting the position that the exemption was not engaged, *"he was clearly aware of the strong desire of the press to have this published."*
27. The Commissioner is satisfied that the qualified person's opinion relates to the prejudice in section 36(2)(b) and section 36(2)(c) and also that the qualified person had an adequate level of knowledge of the issue.
28. With regard to section 36(2)(b), the Commissioner considers that the exemption concerns processes that may be inhibited at the time of the request and in the future, rather than harm arising from the content or subject matter of the requested information itself. The key issue in this case is whether disclosure could inhibit the process of providing free and frank advice and views for the purposes of deliberation, in relation to the types of allegations, concerns and issues analysed in the report.
29. The qualified person provided the following background context for the report:
  - it was commissioned to provide senior managers with a view of issues relating to certain individuals; and

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<sup>3</sup> Appeal number EA/2005/0026 & 0030

- it draws together information which is un-evidenced in the report, some which is acknowledged as having no evidential basis at all;
  - it *"expresses opinions without explaining the basis for that opinion or the information upon which it is based. It also reports the alleged opinions of third parties, without the basis for their opinion being made clear"*;
  - whilst it was intended to be as factual as possible, the report sought to comprehend and analyse information even where there was little evidence in order to *"ensure that everything was looked at as far as possible"*;
  - the report was unable to reach any concrete conclusions or recommendations.
30. It is the qualified person's opinion that 36(2)(b)(i) and (ii) are engaged because the report was prepared based on an expectation that it would remain confidential. This report, and any future reports of its nature would have to be written differently if there was an expectation to publish:
- it would not be able to name people suspected of wrongdoing, thereby making *"it hard for the report to be passed onto enforcement bodies"*;
  - the *"overall picture of concerns"* would be reduced by excluding matters that could not be proved;
  - it would have to consider the impact on people who are identifiable; and consider defamation law due to *"many allegations which may not be founded and would be likely to cause unwarranted damage to individuals"*;
  - it would need to identify sources and evidence and *"be less opinion based and more fact based"*;
  - that the report *"would be unlikely to be able to be written because it relied on the co-operation of many individuals who would be much less likely to have co-operated had they thought that it would be published"*
31. The qualified opinion states that the council *"was under no duty to commission the report"*, however that advice could not have been given without assembling the un-evidenced information. His opinion is that *"the advice is necessarily tentative but it is nonetheless advice"* and if

the report had not been commissioned *"the advise would not have been given."*

32. In summary the qualified person's opinion is that *"Releasing this report would inhibit the free and frank exchange of views."*
33. The Commissioner concludes from the information provided that the inhibition envisaged, being claimed for sub-sections 36(2)(b), is that disclosure of this information would lead to less informative investigation, analysis and reporting of similar issues in the future. Furthermore that should such investigations be required, then such disclosures would inhibit the deliberation of highly sensitive issues.
34. Having reviewed the report, the Commissioner considers that it could only have been prepared with the co-operation of those providing the information. Contributors will have expected their advice and views to be held in confidence so it is logical that disclosure would pose a significant risk to these frank contributions. The Commissioner is therefore satisfied that in the circumstances, it was reasonable for the qualified person to conclude that disclosure would pose a real and significant risk to the provision of advice and the free and frank exchange of views between the author, the commissioner of the report and the various interviewees and contributors.
35. As previously ascertained, the Commissioner considers that 36(2)(c) of the FOIA is concerned with the effects of making the information public. In support of this exemption, the qualified person's recorded opinion states that:
  - *"a report of this nature cannot easily be destroyed for many decades because records relating to allegations of this nature may have future relevance. The only safe option would be to not commission reports of this nature";*
  - *by not commissioning reports of this kind, the effective conduct of public affairs would be prejudiced in matters such as "providing assurance to senior individuals in the council, promoting the well-being of children and ensuring that we were as well informed about the past as possible";*
  - *the council cannot determine what is identifiable information "it is now entirely impossible for the Council to judge which information could, when associated with material in the public domain or known to other unrelated individuals lead to someone being identified and to legal claims being made against the council";*



- there is a high risk that anyone who could be identified from the report would be associated with allegations. The council is *"simply not in a position to know whether there was any foundation in the allegations or whether the identified persons can fairly be associated with them"*;
36. The Commissioner notes that the report was written in 1998, and identifies people (including alleged victims) organisations and places throughout its contents and appendices. Taking account of the un-evidenced nature of the contents, she accepts that people would inevitably be connected with the allegations and that this would cause distress for them and/or their relatives.
37. Consequently, it was reasonable for the qualified person to conclude that disclosure would put the council at risk of legal claims and also pose a real and significant risk to the council's ability to perform similar investigations in the future.
38. The Commissioner is convinced by the arguments that disclosure could deter the council's senior management from commissioning similar reports in the future thus impacting on its ability to offer an effective public service. She also accepts that, aside from the potential distress caused to the members of the public, the effects of disclosure would be disruptive for the council in terms of legal claims. She is therefore satisfied that the disclosure of this report falls within the ambit of the effective conduct of public affairs envisaged in section 36 FOIA.
39. The complainant stated to the Commissioner *"I ask, therefore, that the council be directed to provide either a redacted copy of the full report, or at least a redacted copy of the introductory pages, the findings and the recommendations."* The Commissioner has reviewed the contents of the report. She notes that the qualified person's opinion relates to the report in its entirety and therefore having found the opinion to be reasonable she accepts the justification for not releasing a redacted version.
40. The Commissioner therefore finds that the exemptions at sections 36(2)(b) and 36(2)(c) were correctly engaged.

### **Public interest test under section 36**

41. Sections 36(2)(b) and 36(2)(c) are qualified exemptions and therefore the Commissioner must consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure of the information. The Tribunal in the aforementioned case of *Guardian*

*Newspapers & Brooke v Information Commissioner & BBC* indicated the distinction between the consideration of the public interest under section 36 and consideration of the public interest under the other qualified exemptions contained within the FOIA:

*"The application of the public interest test to the s36(2) exemption involves a particular conundrum. Since under s36(2) the existence of the exemption depends upon the reasonable opinion of the qualified person it is not for the Commissioner or the Tribunal to form an independent view on the likelihood of inhibition under s36(2)(b), or indeed of prejudice under s36(2)(a) or (c). But when it comes to weighing the balance of public interest under s2(2)(b), it is impossible to make the required judgment without forming a view on the likelihood of inhibition or prejudice."* (Paragraph 88)

42. As noted above, the Tribunal indicated that the reasonable opinion is limited to the degree of likelihood that inhibition or prejudice may occur. Therefore, the Commissioner's view is that whilst due weight should be given to reasonable opinion of the qualified person when assessing the public interest, the Commissioner can and should consider the severity, extent and frequency of prejudice or inhibition to the subject of the effective conduct of public affairs.

#### Public interest arguments in favour of disclosure

43. The council advised that it considered *"there was a public interest in demonstrating to the public that there had been no 'cover up', that it had acted on the finding of the report and that it was being as open and transparent as possible with residents."*
44. Furthermore that *"some people who might have been impacted by the issues mentioned in the report would have wanted to see it."*
45. The complainant contends that:
- *"the possible abuse of children in council care is gravely serious and a matter of the utmost public interest;*
  - *the weight of public interest "in light of revelations about other councils failing to properly tackle abuse, in Rotherham and other areas – is overwhelming";*
  - the public need to know that allegations were properly investigated and acted upon;
  - the public should know whether the council complied with the recommendations made in the report; that failure to do so would

diminish trust in the council and confidence in children's services; and may deter people from seeking the council's assistance in the future;

- there is a precedent for releasing similar reports, for example Helen Kenward has conducted investigations for other councils for which the resultant reports have been made public;

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

46. The council submitted the following arguments:

- *"The Council considered the impact on people named in the report and their relatives of having unfounded or unclear allegations released against them, allegations which, in the absence of new evidence, they would have expected to have been closed twenty years ago. This impact could include extreme embarrassment, financial losses, ostracism and psychological harm, in circumstances where the Council is not in a position to say that any of it is justified.*
- *The Council considered the speculative, conjectural, unproven and un-evidenced nature of the report meaning that there is little concrete information in the report and that it was not designed to have been published.*
- *It is in the public interest to allow for an informal drawing together of information but that would be quite impossible if the resulting report had to be published."*

#### **Balance of the public interest**

47. The council advised that it *"believed that we could demonstrate openness and a desire to ensure that those involved were held to account by the courts if appropriate by showing that we have disclosed the report to the police"*. It concluded that the arguments in favour of maintaining the exemptions outweighed the arguments in favour of releasing the information *"given the harm to the rights and freedoms of individuals, including some individuals who can be identified by others but may not now be identifiable by the council."*

48. In the Commissioner's view, having accepted the reasonableness of the qualified person's opinion that disclosure of the information would have the stated detrimental effect, the Commissioner must give weight to that opinion as a valid piece of evidence in her assessment of the balance of the public interest. However, in order to form the balancing judgment required by section 2(2)(b) of FOIA, the Commissioner is

entitled, and will need, to form her own view as to the severity, extent and frequency of that detrimental effect.

49. The Commissioner considers that the public interest test is concerned with the facts and circumstances a particular case. She therefore does not accept that the release of "*similar reports*" sets a precedent for disclosure.
50. The Commissioner must afford significant weight to the disclosure of recorded information where it would result in greater transparency and accountability of the actions taken by public authorities. This is especially so where the recorded information relates to child welfare. Disclosing the information would enable the public to scrutinise the councils actions in regard to the allegations made.
51. However she considers that the detrimental effect on the welfare of the many people identified in the report, and their relatives is potentially severe. It follows that the council's conduct of public affairs would be inhibited both through dealing with the impact of the disclosure and also in terms of its ability to similarly debate and deliberate such allegations in the future.
52. The Commissioner has therefore concluded that on balance, the public interest in maintaining the exemptions outweighs the public interest in disclosing the withheld information.
53. The Commissioner has not considered the applicability of the remaining exemptions in view of her conclusion above.

## Right of appeal

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54. 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)

55. 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.
56. 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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**Information Commissioner's Office**  
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