

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 23 January 2019

Public Authority: Telford and Wrekin Council

Address: Darby House
Lawn Central
Telford
Shropshire
TF3 4JA

Decision (including any steps ordered)

1. The complainant requested emails sent and received by two named individuals relating to child sexual exploitation ('CSE') in Telford between specified dates. Some of the requested information was provided by Telford and Wrekin Council (the 'Council') with redactions under section 40 (personal information) of FOIA; the complainant has confirmed that he does not wish to complain about this aspect. However, the Council withheld the remainder of the requested information in its entirety citing section 36(2)(c) (prejudice to effective conduct of public affairs). During the investigation, the Commissioner found that most of the withheld information was out of scope for the reasons explained in this notice.
2. The Commissioner's decision is that the Council has correctly applied section 36 to the majority of the remaining information in scope. However, as also explained in this notice, she finds that some of the emails are not caught by this exemption.
3. The Commissioner therefore requires the Council to take the following steps to ensure compliance with the legislation:
 - Disclose the emails on pages 1 and 27 of the previously withheld information or issue a refusal notice which does not rely on section 36 of FOIA.
4. The Council must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 16 March 2018 the complainant wrote to the Council and requested information in the following terms:

"Please provide copies of all emails sent and received by [name redacted] between (and including) March 11, 2018, and today's date (up to the time of this email) which relate to CSE in Telford;

Please provide copies of all emails sent and received by [name redacted] between (and including) March 11, 2018, and today's date (up to the time of this email) which relate to CSE in Telford."

6. The Council responded, late, on 14 May 2018. It provided some of the requested information, with redactions where it said the information was either not in scope of the request, or was withheld under 40(2) (personal information) of FOIA. In addition, the Council withheld some of the requested information in its entirety citing section 36(2)(c) (prejudice to effective conduct of public affairs).
7. The complainant requested an internal review on 15 May 2018. The Council provided its internal review, late, on 10 July 2018. It maintained its original position but explained that only the names of junior officers below manager level had been withheld under section 40(2) of FOIA, together with some third party names as requested by the third parties themselves.

Scope of the case

8. The complainant contacted the Commissioner on 30 August 2018 to complain about the way his request for information had been handled.
9. During the investigation, the complainant confirmed that he did not wish the Commissioner to investigate the Council's reliance on section 40; therefore, the Commissioner has considered only whether the Council was entitled to rely on section 36(2)(c) to withhold some of the requested information.

The withheld information

10. The Council has provided the Commissioner with a copy of all the emails withheld under section 36 of FOIA. This originally totalled 39 pages, however, some of the emails are duplicated where they have been included as part of an individual's reply and are therefore part of an email chain. The Council explained that it had included the duplicates for

'completeness'. For simplicity, the Commissioner has referred to the emails in line with the same numbering scheme used by the Council.

11. As part of her investigation the Commissioner reviewed the withheld information and asked the Council to revisit whether all of it was in scope of the request. She noted that some of the emails did not seem to relate to CSE in Telford. She also questioned whether emails sent to email groups rather than to named individuals would include the two officers named in the request ie whether those two named individuals were part of any of the email groups.
12. Having revisited the information withheld under section 36, the Council subsequently provided the Commissioner with a table listing all 39 pages of emails individually. It identified that it now considered some of the information to be out of scope of the request for the reasons stated below.
13. The emails on pages 2 and 3 have no direct link to CSE in Telford and are thereby out of scope of the request; the Commissioner agrees that this is the case.
14. The Council has confirmed that the two officers named in the request do not belong to any of the group email addresses used in some of the emails provided. The Commissioner accordingly finds that the emails sent to the group addresses are also out of scope. Therefore, of the original 39 pages, only six remain in scope.
15. The Commissioner will therefore consider whether section 36 of FOIA is engaged in relation to the remaining withheld information.

Reasons for decision

Section 36 - prejudice to effective conduct of public affairs

16. Sections 36(2)(b) and section 36(2)(c) of 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".

17. In this case, the Council has withheld some of the information requested by the complainant in its entirety under 36(2)(c) of FOIA.
18. To find that any part of section 36(2) is engaged, the Commissioner must establish that a 'qualified person' gave an opinion which found that the exemption applied and also that the opinion was reasonable.
19. The Commissioner has issued guidance on section 36 of FOIA¹. With reference to identifying the qualified person, the Commissioner acknowledges that, in order to use section 36, the public authority must establish who their qualified person is.
20. In that respect, her guidance states:

"The qualified person is not chosen by the authority itself. Section 36(5) explains what is meant by the 'qualified person'. Subsections (a) to (n) define who the qualified person is for a number of specific authorities.

Subsections (a) to (n) of section 36(5) only specify the qualified person for a limited number of public authorities. Most public authorities will fall under section 36(5)(o). For these authorities the qualified person is either a Minister of the Crown or a person authorised by a Minister of the Crown. A Minister may authorise the public authority itself or any officer or employee of the authority to be the qualified person".

21. In correspondence with the Commissioner, the Council stated that the legally qualified person is its Monitoring Officer and SIRO (Senior Information Risk Owner).
22. Having considered the legislation, and with reference to her guidance, the Commissioner is satisfied that it was appropriate for the Council to regard its Monitoring Officer as the qualified person for the purposes of section 36.

Is the exemption engaged?

23. The Commissioner's section 36 guidance states the following with regard to what can be considered a 'reasonable opinion':

"The most relevant definition of 'reasonable' in the Shorter Oxford English Dictionary is 'In accordance with reason; not

¹ https://ico.org.uk/media/for-organisations/documents/2259713/prejudice-to-the-effective-conduct-of-public-affairs-section-36.docx#_Toc414524781

irrational or absurd'. If the opinion is in accordance with reason and not irrational or absurd – in short, if it is an opinion that a reasonable person could hold – then it is reasonable."

24. It is important to note that, when considering whether section 36 is engaged, the Commissioner is making a decision not on whether she agrees with the opinion of the qualified person, but whether it was reasonable for him or her to reach that opinion. The qualified person's opinion does not have to be the most reasonable opinion that could be held; it only has to be a reasonable opinion.
25. In determining whether the exemption is correctly engaged, the Commissioner must determine whether the qualified person's opinion was a reasonable one. In doing so the Commissioner will consider all of the relevant factors. These may include, but are not limited to:
 - whether the prejudice or inhibition relates to the specific subsection of section 36(2) that is being claimed. If the prejudice or inhibition envisaged is not related to the specific subsection the opinion is unlikely to be reasonable;
 - the nature of the information and the timing of the request, for example, whether the request concerns an important ongoing issue on which there needs to be a free and frank exchange of views or provision of advice; and
 - the qualified person's knowledge of, or involvement in, the issue.
26. The Commissioner has also been guided by the Tribunal's indication in the case of *Guardian Newspapers Ltd and Brooke v Information Commissioner & BBC* (EA/2006/0011 and EA/2006/0013, 8 January 2007), 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.
27. In this case, the Council has advised that the qualified person made his initial decision in a meeting with a number of officers on 13 April 2018. The Council stated that there were no minutes or recorded information about this meeting. It explained that, prior to the meeting, the qualified person was provided with copies of the relevant information. In the first meeting an oral representation was given by the parties whose emails the request mainly related to.

28. The Council told the Commissioner that, once the complainant submitted his internal review request, the matter was again discussed with the qualified person by telephone on 13 June 2018. At this stage the Council said that an independent Information Governance Officer provided a verbal submission to the qualified person, who subsequently provided confirmation of his opinion in relation to section 36(2) in an email on 27 June 2018. The Commissioner has viewed this email.
29. The Commissioner has been guided on the interpretation of the phrase "would prejudice" or "would be likely to prejudice" by a number of Information Tribunal decisions. The Tribunal has been clear that this phrase means that there are two possible limbs upon which a prejudice based exemption can be engaged; ie either prejudice 'would' occur or prejudice 'would be likely to' occur.
30. With regard to likely to prejudice, the Information Tribunal in *John Connor Press Associates Limited v The Information Commissioner (EA/2005/0005)* confirmed that "*the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk*".
31. With regard to the alternative limb of 'would prejudice', the Tribunal in *Hogan v Oxford City Council & The Information Commissioner (EA/2005/0026 & 0030)* commented that "*clearly this second limb of the test places a stronger evidential burden on the public authority to discharge*", and the occurrence of the prejudice claimed "*is more probable than not*".
32. The Commissioner is mindful of the nature of the request in this case. For section 36(2)(c) to be engaged, some prejudice other than that to the free and frank expression of advice or views has to be shown. The Council has argued that some of the information falling under this request involved ongoing police investigations into potential CSE matters and that releasing this information could potentially prejudice ongoing investigations. It was the opinion of the qualified person and the other parties involved, that releasing this information "*could*" jeopardise investigations into some of the most vulnerable individuals in society. As the likelihood has not been specified by the Council, the Commissioner has viewed this as being akin to 'would be likely.'

The remaining withheld information

33. Having considered the available information relating to the qualified person reaching and providing his opinion, and having reviewed the withheld information in scope of the request, the Commissioner is satisfied that it was reasonable for the qualified person to reach the view that disclosure would be likely to prejudice the effective conduct of

public affairs by virtue of section 36(2)(c) in respect of most of the withheld information.

34. However, she does not consider that the emails on pages 1 and 27 of the withheld information are caught by section 36 of FOIA, because she does not consider that their disclosure would prejudice the effective conduct of public affairs. This is because they relate to administration around discussions, meetings or support. The Council is therefore required to comply with the step set out at paragraph 3 of this notice in respect of these emails.

The public interest test

35. For those emails caught by section 36, even where the qualified person has concluded that the exemption applies, the public interest test must be applied to the decision whether or not to disclose the withheld information.
36. The Commissioner has therefore considered whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information withheld under section 36.

Public interest arguments in favour of disclosing the requested information

37. The complainant considered that the public interest favoured disclosure. He said:

"The Council has been clear about wanting to be open and transparent about CSE in Telford and how it has dealt with the issue over the years. There is a compelling and significant public interest in disclosure of information showing how a council which has accepted mistakes were made in the past reacted to this story. It is clear that "fact sheet" documents were produced as part of a PR effort to counter the claims made by the newspaper. The public must have confidence that the council is not solely concerned with image and defending reputation, but is true to its word about being transparent about the way it deals with allegations concerning CSE. Disclosure is capable of demonstrating how current executives within the council chose to react to the story and why they responded in the way they did. Providing those officials involved are acting in a fair, impartial and professional manner then the council should have nothing to fear from disclosure."

38. The Council recognised the general public interest in openness and transparency, stating:

"The Council has consistently supported openness and transparency in all areas of CSE. It has made it very clear in public that it is setting up an independent inquiry to look into cases of CSE and the Council's handling of such matters. It is the Council's intention to provide regular public updates on the work of the inquiry body once it is established."

39. It acknowledged the following:

"There is public interest in this subject, it has received high level of media interest and the Council has received criticism in its handling of this subject.

The Council's values state we will be open and honest.

Disclosure would further public interest."

Public interest arguments in favour of maintaining the exemption

40. In favour of maintaining the exemption, the Council submitted the following:

"The information contains personal information of all officers involved and due to the high level of public interest we need to ensure that our staff are not contacted and ensure their health and safety.

As a public authority we must be able to conduct our public duty and be able to exchange views to allow us to conduct our duties.

Some of the information is not relevant to the request and as such should not be released.

Some of the information relates to ongoing investigations and as such to release this information could place a young person at risk. Also this information had been passed to us by a member of the public, we need to make sure that the residents of the borough feel that the information they provide will be treated with confidence.

The Council is organising a full independent inquiry and therefore public disclosure will come from this."

Balance of the public interest

41. In the Commissioner's view, having accepted the reasonableness of the qualified person's opinion that disclosure of the information would be likely to 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.

42. It is important to note that the Commissioner's role in determining a complaint made to her under section 50 of FOIA, is limited to considering the circumstances as they existed at the point that a request was submitted rather than at the point she is making a decision on that complaint.
43. In forming a view on the balance of the public interest in this case, the Commissioner has taken into account the general public interest in openness and transparency.
44. The Commissioner also notes the Council's intention to organise an independent inquiry which will result in public disclosure on this matter.
45. The Commissioner has also borne in mind that CSE is a matter of significant public interest. However, she considers that the welfare of CSE victims outweighs the public interest in premature disclosure of the withheld information, particularly given that investigations were ongoing at the time of the request.
46. In the Commissioner's view, timing is key here. The request was made whilst there were ongoing CSE investigations. Disclosure of the requested information could place vulnerable young people at risk.

Conclusion

47. The Commissioner has therefore concluded that, on balance, the Council is entitled to rely on section 36 for most of the withheld information.
48. However, she has also concluded that the emails on pages 1 and 27 are not exempt under section 36 of FOIA because she does not consider that disclosure would prejudice the effective conduct of public affairs. The Council is therefore required to disclose this information or issue a refusal notice which does not rely on section 36 of FOIA, as set out in paragraph 3 of this notice.

Right of appeal

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

Website: 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

Carolyn Howes
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