

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 4 January 2022

Public Authority: North Yorkshire County Council

Address: County Hall
Northallerton
North Yorkshire
DL7 8AD

Decision (including any steps ordered)

1. The complainant has requested information about an Ofsted inspection and the subsequent ramifications. North Yorkshire County Council withheld the information on the basis of sections 36(2) (prejudice to effective conduct of public affairs), 40(2) (personal information) and 42 (legal professional privilege).
2. The Commissioner's decision is that the council was entitled to withhold the information on the basis of section 36(2).
3. In responding outside of the statutory period of 20 working days, the council breached section 10.
4. The Commissioner does not require any steps.

Request and response

5. On 26 July 2020 the complainant made a request to North Yorkshire County Council ("the council") in the following terms:

"[Redacted]. We are aware of the results of its 2019 Ofsted inspection and the subsequent legal action taken by the school to appeal against the outcome of the inspection. The decision by the school to take legal action has been criticised in the media. Our understanding is that NYCC supported the school initially in taking legal action, knowing the cost implications at the outset. When the legal process reached the stage of a Supreme Court hearing (which was always a probability) NYCC prevented the school from using their own funds to continue paying for legal representation.

1. Why was the decision taken to stop the school funding legal representation just prior to a Supreme Court hearing?...

2. What is the authority's position on the transfer of schools from local authority to academy trust control?...

3. I would like to be sent copies of all documentation from NYCC to Ofsted and Lady Lumley's School about the 2019 Ofsted inspection and subsequent ramifications."

6. The council responded on 5 November 2020. It provided answers to the first two questions. The council refused to provide the information held in scope of [3] and cited section 36(2)(b) and (c) (prejudice to effective conduct of public affairs) as the basis for doing so. It also cited section 40(2) (personal information) for some information.
7. The complainant requested an internal review on 8 November 2020.
8. The council wrote to the complainant with the outcome of an internal review on 12 February 2021. It upheld its original position to withhold the information in scope of [3] on the basis of sections 36(2) and 40(2).

Scope of the case

9. The complainant contacted the Commissioner on 12 January 2021 to complain about the way his request for information had been handled, and that an internal review had not been completed. The complainant subsequently agreed that the scope of their complaint was that the council had withheld all information in scope of [3].

10. During the course of the Commissioner's investigation, the council advised that it was additionally citing section 42 (legal professional privilege), specifically litigation privilege, to all of the information in scope of [3].
11. The scope of this case and of the following analysis is whether the council was correct to withhold the requested information on the basis of sections 36(2), 40(2) and 42.

Background

12. The council has provided the following information as background to this case. It advised that the source is from its own press releases on the matter.
13. The council worked with Lady Lumley's School ("the School") for a number of months after its most recent Ofsted inspection. On hearing some concerning reports from Ofsted that children did not feel safe, the council conducted a full safeguarding review and an exercise to interview students about their experiences.
14. Furthermore the council commissioned an independent review of issues raised, which was carried out by a specialist education consultancy.
15. At the time of the request, the council was in the process of setting up an Interim Executive Board ("IEB") to oversee governance at the School and working with the Regional Schools Commissioner to find an academy sponsor as it moves towards academisation.
16. The council remains in the process of setting up an IEB to take over governance of the school. The costs for the legal action came from the school's own budget. The council's decision to intervene was made as a result of both the Ofsted inspection and information from the school regarding the likely cost of court action, which prompted the council to immediately put in place spending restrictions for the school, along with an application to set up an IEB.

Reasons for decision

Section 36 prejudice to effective conduct of public affairs

17. Sections 36(2)(b)(ii) 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”.

18. 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, result in inhibition or prejudice relevant to any of the activities set out in the sub-sections of 36(2).
19. Section 36 is unique in that its application depends on the opinion of the qualified person that the inhibition or prejudice 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.
20. The qualified person, in this case, is the Assistant Chief Executive and Monitoring Officer of the council. 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 7 September 2020.
21. The Commissioner is satisfied that the council's Assistant Chief Executive and Monitoring Officer is a qualified person for the purposes of section 36(5) of the FOIA.
22. The Commissioner asked the council to provide him with evidence that the qualified person considered the application of section 36 personally. The council provided the Commissioner a copy of the document which records the qualified person's opinion and is attributed to them.
23. 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).

24. 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. Neither is it the case that it has to be the *most* reasonable opinion that could be held; it only has to be *a* reasonable opinion.
25. The Commissioner has also been guided by the Tribunal's indication, in the case *Guardian Newspapers & Brooke v Information Commissioner & BBC1*¹, 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.
26. 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*² 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 v Oxford City Council & The Information Commissioner*³ commented that "*clearly this second limb of the test places a stronger evidential burden on the public authority to discharge*" (paragraph 36).

¹ Appeal numbers EA/2006/0011 & EA/2006/0013

² Appeal number EA/2005/0005

³ Appeal number EA/2005/0026 & 0030

27. The qualified person's opinion records that he had full access to all of the information in scope of the request. It is his opinion that sections 36(2)(b) and 36(2)(c) apply to all documentation from the council to Ofsted and the School about the 2019 Ofsted inspection and the subsequent ramifications.
28. For subsection 36(2)(b) 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.
29. The council confirmed that in reaching his decision the qualified person had considered the following:
 - The Ofsted inspection took place in October 2019 and following the schools unsuccessful court action the report was published on 16 June 2020 with a finding of "inadequate".
 - The council has instigated a statutory process with a view to implementing an IEB to replace the Governing Body to stabilise the governance arrangements of the school.
 - The primary concern of the council is the stability of the day to day running of the school and the education of its pupils.
 - That disclosure of the requested information whilst the statutory process is ongoing could cause disruption to the day to day running of the school, and cause interference and distraction for the IEB.
 - During this process, the council need to be able to have free and frank discussions both internally and with Ofsted and the Regional School Commissioner, and have a safe space to enable decisions about the governance of the school to be made away from external interference and distraction.
30. The council confirmed that the qualified person had been briefed on counter arguments for disclosure of the information. These being that the School's governance and the process of change is a matter of great local interest; therefore disclosure of the information would increase transparency with regard to communications. The school is being investigated for misuse of schools funds in relation to a failed appeal against Ofsted regarding an inspection report, and the use of school funds impacts the staff, pupils and parents of the school.
31. The Commissioner is satisfied that the qualified person's opinion relates to the inhibition referred to in section 36(2)(b) and that the qualified person had an adequate level of knowledge of the issue.

32. The Commissioner considers that the exemption at section 36(2)(b) concerns processes that may be inhibited at the time of the request and in the future, not necessarily inhibition 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, to enable decisions about the governance of the School to be made.
33. The council stated that the opinion of the qualified person was that at the time of the request, the information constituted substantive information fundamental to the progress and final outcome of the matter.
34. The qualified person believed that release of the information would inhibit the ability of officers and others to openly discuss the matter. This is particularly relevant as the investigation is on going. The qualified person's opinion is that the ability of council staff and others to express themselves openly, honestly and completely, or to explore extreme options, is part of the process of deliberation. Disclosure of the information would inhibit the ongoing provision of advice or the exchange of views on an issue which is still live which would ultimately impair the quality of decision making by the council.
35. Having reviewed the withheld information, the Commissioner considers that the parties involved will have expected the information to be held in confidence so it is logical that disclosure would pose a significant risk to ongoing discussions and decisions relating to the School's governance.
36. 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 council officers and external parties relating to decisions about the governance of the School.
37. The complainant advised the Commissioner, that, as of July 2021, the School has transferred from the local authority control to being under the control of a "Trust".
38. The Commissioner, however, must assess the information request and the exemptions cited, in terms of the situation at the time of the request, this being July 2020. The council has advised that the issues were all live at that time.
39. The Commissioner is satisfied that the opinion given by the qualified person that inhibition relevant to sections 36(2)(b)(i) and (ii) would occur as result of disclosure of the withheld information was reasonable, and so finds that the exemption at section 36(2)(b) was correctly

engaged. As the exemption was applied to all of the withheld material the Commissioner has not needed to consider section 36(2)(c).

Public interest test

40. Section 36 of FOIA is a qualified exemption, meaning that the Commissioner must consider whether, in all the circumstances of the case, the public interest in maintaining the exemption contained at section 36(2)(b) outweighs the public interest in disclosing the information.
41. The qualified person's opinion was that that disclosure of the requested information "would" cause inhibition, meaning that the likelihood of inhibition is greater than 50%. The Commissioner accepted that the qualified person's opinion on this higher threshold was reasonable. He will factor this into his public interest considerations.
42. In carrying out a public interest test, the Commissioner must weigh the public interest in preventing the inhibition, that he has already decided would occur, against the public interest in disclosure. The higher the likelihood, or the higher the severity, of that inhibition, the stronger the public interest will be in preventing it from occurring
43. In line with his guidance on the public interest test⁴, the Commissioner must consider the situation at the time at which the public authority originally dealt with the request, or the time of the authority's internal review. Accordingly, in this case, the circumstances to be considered when carrying out the public interest test are those at the time of the internal review, namely 12 February 2021.

Public interest arguments in favour of disclosure

44. The complainant states that concerned parents have not been able to obtain information about the subject matter of the request from any official sources including government departments, Ofsted, and local MPs or councillors.
45. The complainant states that many people were very surprised about the Ofsted report, however it is not possible to obtain details, overturn or query the outcome of an inspection.
46. In light of this, the complainant contends that there is a strong public interest in obtaining information which will further the public's

⁴ [the public interest test.pdf \(ico.org.uk\)](https://ico.org.uk/the-public-interest-test.pdf)

understanding of the background "*surrounding what many believe to be a very surprising decision.*"

47. The council said that it considered the transparency in the conduct of public affairs to be very important. It recognised that it is in the public interest that Local Authority processes are shown to be followed and implemented transparently.

Public interest arguments in favour of maintaining the exemption

48. The council provided the following arguments:

- The council had to intervene as a result of both the Ofsted inspection and information from the School regarding the likely cost of action. In combination that means the School is transitioning from a maintained school to an academy and the governing body has been replaced by an IEB.
 - The information requested constitutes substantive information fundamental to the progress and final outcome of the matter. The release of information would prejudice the ability of officers and others to provide or obtain advice, and to openly discuss the matter. This is particularly relevant as the investigation is on going.
 - Whilst it is acknowledged that it is in the public interest that the Local Authority processes are followed and implemented transparently, it is not in the public interest to disclose the documentation requested because of the prejudicial effect it could have on the objective of stabilising the governance arrangement of the school in the interests of parents, staff and students of the school. It is considered that if any detailed information was placed into the public domain, the ongoing statutory process of stabilising the governance of the School could be prejudiced
 - The administrative and organisational burdens on any school in this position are significant, and the effects of the pandemic will only be enhancing that. Disclosure at this stage would damage the stability of this process and may distract staff who need to be working for the benefit of the School.
 - The free and frank discussions that happened as part of this case were also necessary to ensure that the matter was handled appropriately and the disclosure of this information could prevent effective provision in the future.
49. The council stated that this is an ongoing, live process. However the position on disclosure could be reviewed once the process is complete.

Conclusion

50. The Commissioner appreciates the arguments for transparency forwarded by the complainant. There has been significant public monies spent, and impact on students and their parents due to the changing governance arrangements of the School.
51. However the Commissioner is cognisant of the sensitivity of the withheld information during a significant period of transition for the School and ongoing investigation into matters raised.
52. As noted above the Commissioner has taken into account that he accepted as reasonable the qualified person's opinion that disclosure of withheld information *would* result in inhibition, meaning that this outcome would be more likely that not to come about as a result of disclosure of the information in question. The Commissioner has taken into account here that it would not be in the public interest for the activities of the council to be damaged as a result of the participants being inhibited. The Commissioner is also of the view that the impact of this inhibition would be of some severity, given the sensitivities of the subject matter of the information.
53. The Commissioner has therefore concluded that on balance, the public interest in maintaining the exemption at section 36(2)(b) outweighs the public interest in disclosing the withheld information.
54. The Commissioner has not considered the applicability of the remaining exemptions in view of his conclusion above.

Section 10(1) of the FOIA – Time for compliance

55. Section 10(1) of the FOIA requires a public authority to respond in accordance with section 1(1) of the FOIA within 20 working days.
56. The request was made on 26 July 2020, however the council did not respond until 5 November 2020. This is outside of the statutory time period required of 20 working days. Therefore the Commissioner finds that the council has breached section 10(1) of the FOIA.
57. As the response has been provided, the Commissioner does not require the council to take any further steps.

Right of appeal

58. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

59. 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.
60. 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

Janet Wyles
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