

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 26 July 2023

Public Authority: Mid and East Antrim Borough Council
Address: 1 – 29 Bridge Street
Ballymena
BT43 5EJ

Decision (including any steps ordered)

1. The complainant requested from Mid and East Antrim Borough Council (the Council) information regarding the score sheet produced by job evaluators [name redacted] when evaluating their role of Leisure Centre Attendant. The Council refused the request and cited sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) (prejudice to the effective conduct of public affairs) of FOIA.
2. The Commissioner's decision is that the Council was entitled to rely on sections 36(2)(b)(i) and 36(b)(ii) of FOIA to refuse the request. However, the Council breached section 10(1) of FOIA as it failed to respond to the request within 20 working days. The Commissioner does not require the Council to take any steps as a result of this decision.

Request and response

3. On 23 February 2023 the complainant wrote to the Council and requested information in the following terms:

"Under current FOI legislation I hereby request a copy of the score sheet produced by job evaluators [name redacted] when evaluating [redacted] role as Leisure Centre Attendant."

4. On 5 June 2023 the Council responded, it withheld the information and cited sections 36(2)(b)(i) and 36(2)(b)(ii) and 36(2)(c) (prejudice to the effective conduct of public affairs) of FOIA.
5. Following a request for an internal review on the same day, the Council provided its review response on 22 June 2023. It maintained its original position to withhold the requested information under the exemptions cited.

Reasons for decision

6. This reasoning covers whether the Council was entitled to rely on sections 36(2)(b)(i) and 36(2)(b)(ii) of FOIA to refuse to provide the requested information. Should the Council not be entitled to rely on these, he will go on to consider section 36(2)(c) of FOIA.

Section 36 - Prejudice to the effective conduct of public affairs

7. Section 36(2) of FOIA states:

“Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of this 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.”

8. The Council applied sections 36(2)(b)(i) and 36(2)(ii) and section 36(2)(c) of FOIA to withhold the requested information in its entirety. Arguments under 36(2)(b) are usually based on the concept of a ‘chilling effect’. The chilling effect argument is that disclosure of discussions would inhibit free and frank discussions in the future, and that the loss of frankness and candour would damage the quality of advice and deliberation and lead to poorer decision-making.

9. The Commissioner's guidance on section 36¹ states that information may be exempt under sections 36(2)(b)(i) and 36(2)(b)(ii) if its disclosure would, or would not be likely to, inhibit the ability of public authority staff, and others, to express themselves openly, honestly and completely, or to explore extreme options, when providing advice or giving their views as part of the process of deliberation.
10. In the Council's submission to the qualified person, it put forward its argument and said that disclosure of this information 'would' inhibit the free and frank provision of advice and exchange of views for the purposes of deliberation around the process of job evaluation.
11. The Council argued that disclosure would have these prejudicial effects for the following reasons:

"Council management and the external consultant used for job evaluations require a 'safe space' for the free and frank provision of advice and exchange of views. The disclosure of this information would create a 'chilling effect' by eliminating this safe space and as such, would inhibit free and frank discussions about job evaluation in the future. The loss of that frankness and candour would damage the quality of advice and deliberation and lead to poorer decision-making around the use of Council resources, including the utilisation of public funds."
12. The qualified person's opinion is if the information requested was disclosed, the prejudice/inhibition specified in the exemptions cited 'would' occur, and they explained the reasons. They said the interest in the topic of job evaluations has already generated several FOI requests.
13. The opinion of the qualified person was also that disclosure of this information would give council officers and the external evaluator the reasonable belief that other material regarding the job evaluation process may also be published. This in turn would create a 'chilling effect' and lead to the inhibition of staff and others to express themselves openly, honestly and completely when providing advice or giving their views as part of the process of deliberation around job evaluations. The effect would damage the quality of advice and deliberation, leading to poorer decision-making.

¹ <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/section-36-prejudice-to-the-effective-conduct-of-public-affairs/>

14. Therefore, the qualified person is of the opinion that a 'safe space' is required for officers and external consultants for all processes around job evaluations. They confirmed that the job evaluation process is not opened up for general external comment. The qualified person reiterated their opinion that the disclosure of the information would prejudice both the free and frank provision of advice and the free and frank exchange of views for the purposes of deliberation, as outlined in sections 36(2)(b)(i) and 36(2)(b)(ii) of FOIA.
15. The exemptions at section 36 can only be engaged on the basis of the reasonable opinion of a qualified person. The Commissioner is satisfied the Council's Interim Chief Executive is the qualified person under section 36(5) of FOIA and they gave the opinion that sections 36(2)(b)(i), 36(2)(b)(ii) were engaged.
16. The Commissioner accepts it was reasonable for the qualified person to consider the importance of protecting free and frank discussion within the Council. He also accepts the impact of losing it would adversely affect the ability of the Council to provide optimum service to taxpayers. The Commissioner is satisfied with the qualified person's opinion – that inhibition relevant to those subsections would occur through disclosure of the withheld information, is reasonable. He is therefore satisfied the exemptions have been applied correctly.
17. The complainant refutes the Council's application of section 36 of FOIA to his request. In his correspondence to the Commissioner, he referred to a decision notice regarding a similar information request and which was appealed² to the First-tier Tribunal (Information Rights).
18. The complainant believes this supports his argument that the Council's reliance on the exemption is incorrect, because the Tribunal in the appeal referred to, did not uphold the public authority's decision in maintaining the exemption.

Public interest test

19. As section 36(2) is a qualified exemption, the Commissioner will consider whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

² <https://informionrights.decisions.tribunals.gov.uk/Public/searchresults.aspx>

Public interest in disclosing the information

20. The Council recognises there is inherent public interest in the evidence base used by the Council to decide what measure of public funds are used to pay its staff, and to ensure the Council, as a public authority, is paying its staff fairly. The Council is aware that there is public interest in ensuring there is openness and transparency in how council officers conduct their business.

Public interest in maintaining the exemption

21. The Council stated that there is a need to allow all parties and individuals to have free and frank internal discussions and debates. Also, to permit the proper running of the organisation in accordance with established processes, and to allow decision-makers to take advice, make decisions and those providing advice, to do so in confidence.

Balance of the public interest

22. The Commissioner considers the public interest in good decision-making by the Council to be a compelling argument in favour of maintaining the exemption. While the Commissioner acknowledges that the public interest in openness and transparency would be served if the information was disclosed, on balance, he finds the public interest in protecting the Council's access to unfiltered and frank discussions about job evaluations, to be the stronger argument.
23. The Commissioner is satisfied that, in this case, the public interest favoured maintaining the exemption and the Council was entitled to rely on sections 36(2)(b)(i) and 36(2)(b)(ii) of FOIA to withhold the information.
24. In light of this decision, the Commissioner has not gone on to consider the Council's application of section 36(2)(c) of FOIA.

Procedural matters

25. Section 10(1) of FOIA states that a public authority must respond to a request promptly and "not later than the twentieth working day following the date of receipt".
26. In this case, the complainant submitted his request on 23 February 2023 and the Council issued its refusal notice on 5 June 2023. As this is outside 20 working days and it took 68 working days for the Council to provide its response, it has therefore breached section 10(1) of FOIA.

27. The Commissioner notes that the Council applied both 36(2)(b) and 36(2)(c) together, without distinguishing between the prejudice claimed under each section. The Commissioner reminds the Council that whilst both sections can be applied to the same information, the prejudice claimed under 36(2)(c) cannot be the same as that claimed under 36(2)(b) of FOIA.

Right of appeal

28. 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@justice.gov.uk.

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

29. 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.
30. 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

Joanna Marshall
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