

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 26 April 2024

Public Authority: Wokingham Borough Council
Address: Shute End
Wokingham
Berkshire
RG40 1WH

Decision (including any steps ordered)

1. The complainant requested information from Wokingham Borough Council ("the Council") relating to the future of a leisure centre. The Council withheld the requested information, citing section 43(2) of FOIA (commercial interests) and section 36 of FOIA (effective conduct of public affairs) as its bases for doing so.
2. The Commissioner's decision is that the Council was entitled to rely on sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) of FOIA to withhold all of the withheld information. He has therefore not gone on to consider the Council's application of section 43(2).
3. The Commissioner does not require further steps.

Request and response

4. On 18 September 2023, the complainant wrote to the Council and requested information in the following terms, regarding St Crispin's Leisure Centre:

"What discussions have been held, Heads of Terms or agreements made (signed or otherwise) between the Council (Councillors or staff) & St Crispins [sic] school or the Circle Trust charity running the school regarding its ownership (current and future) and/or use."

5. The Council responded on 16 October 2023. It refused to provide the requested information citing section 43(2) of FOIA (commercial interests) and section 36 of FOIA (effective conduct of public affairs) as its bases for doing so.
6. Following an internal review the Council wrote to the complainant on 23 October 2023. It maintained its original position.
7. The Council has confirmed to the Commissioner that it has applied both exemptions cited to all of the withheld information.

Reasons for decision

Section 36 – Prejudice to the effective conduct of public affairs

8. Section 36(2) of FOIA states:

“(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,

(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.”

9. Unlike other exemptions in FOIA, an exemption in section 36(2) can only be applied where a public authority has consulted with a qualified person, as defined in the legislation, and it is the qualified person’s opinion that the harm stated in the exemption would, or would be likely to, arise through disclosure of the requested information.
10. To find that any limb of section 36(2) is engaged, the Commissioner must be satisfied not only that a qualified person gave an opinion on the likelihood of the prejudice cited in the exemption occurring, but also that the opinion was reasonable in the circumstances. This means that the qualified person must have reasonably concluded that there is a link between disclosure and a real and significant risk of the prejudice that the relevant exemption is designed to protect against.

11. In this instance, the Council has said that it is relying upon sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) as its bases for withholding the requested information.

Context at the time of the request

12. In June 2023 the Council announced it would be carrying out a consultation on the future of St Crispin's Leisure Centre.¹ The consultation period ran from 10 July 2023 to 4 September 2023.
13. At the time of the request, which was made on 18 September 2023 and responded to on 16 October 2023, this consultation period had concluded. However, no decision had been made in relation to the future of the leisure centre. The decision about its future was made at an Executive meeting on 30 November 2023 and published on 1 December 2023.²

The withheld information

14. The withheld information constitutes copies of a draft collaboration agreement between the Council and The Circle Trust, copies of emails exchanged between the Council and The Circle Trust regarding the terms of their agreement in relation to the leisure centre, a copy of a proposed statement on behalf of The Circle Trust and details of a meeting arranged between the Council and The Circle Trust.

The opinion of the qualified person

15. The Council advised the Commissioner that the qualified person in this instance is Andrew Moulton, Assistant Director for Governance.
16. The Commissioner is satisfied that, the person consulted about the request meets the definition of a qualified person set out by section 36(5) of FOIA.
17. The view of the qualified person was that disclosure of the withheld information:
 - would be likely to inhibit the free and frank provision of advice (section 36(2)(b)(i)).

¹ <https://www.wokingham.gov.uk/news/2023/council-considering-future-st-crispins-leisure-centre>

² <https://wokingham.moderngov.co.uk/mgIssueHistoryHome.aspx?IID=44611&Opt=0>

- would be likely to inhibit the free and frank exchange of views for the purposes of deliberation (section 36(2)(b)(ii)).
 - would be likely otherwise to prejudice the effective conduct of public affairs (section 36(2)(b)(c)).
18. The opinion of the qualified person regarding how disclosure would be likely to otherwise prejudice the effective conduct of public affairs, that is why they considered section 36(2)(b)(c) to be engaged, was that premature disclosure of the information would prejudice the effective conduct of public affairs by not allowing a safe space for staff to consider policy making without public scrutiny at that stage. They noted that the public would have an opportunity to scrutinise the decision at a later stage.

The Commissioner's view

19. When considering whether the exemption at section 36(2) 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:
- a. 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;
 - b. the nature of the information and the timing of the request; and
 - c. the qualified person's knowledge of, or involvement in, the issue.
20. In determining whether the opinion is a reasonable one, the Commissioner takes the approach that 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. The qualified person's opinion does not have to be the most or only reasonable opinion that could be held: it only has to be a reasonable opinion.
21. Both the qualified person's opinion and the arguments made to the Commissioner by the Council emphasise the timing of the request. Given that this was at the time a live issue, the Commissioner accepts that it is a reasonable opinion that disclosure of the withheld information at that time would have been likely to inhibit the free and frank provision of advice, inhibit the free and frank exchange of views for the purposes of deliberation and that the lack of a safe space for deliberation of the issue away from public scrutiny would be likely to prejudice the Council's

ability to conduct these deliberations and its decision making process effectively.

22. The Commissioner accepts that the qualified person's opinion about withholding the information is one a reasonable person might hold. He therefore finds that the Council is entitled to rely on section 36(2)(b)(i), (ii) and 36(2)(c) to withhold all the information.
23. The Commissioner will go on to consider the public interest test associated with the exemptions.

Public interest test

24. Section 36 is a qualified exemption, which means that, even when the qualified person has given their opinion that the exemption is engaged, the public authority must still carry out a public interest test. The purpose of the public interest test is to decide whether the public interest in maintaining the exemption outweighs the public interest in disclosure. The public interest test is separate from the qualified person's opinion.
25. Whilst the Commissioner accepts that a reasonable opinion that prejudice would be likely to occur has been expressed, he will go on to consider the severity, extent and frequency of that prejudice in forming his own assessment of whether the public interest test favours disclosure.
26. The Commissioner's guidance explains that the qualified person's opinion will affect the consideration of the arguments for withholding the information, and appropriate weight should be given to their opinion that the prejudice or inhibition would, or would be likely to, occur. The weight attached to the qualified person's opinion will be greater if they have decided that disclosure 'would' prejudice or inhibit, rather than if they have concluded, as in this case, that disclosure 'would be likely' to prejudice or inhibit.
27. As with the public interest test for all exemptions, the Commissioner must consider the balance of the public interest at the time of the request.
28. The Commissioner accepts that there is a strong public interest in transparency as regards to changes in the provision of leisure services to the public, how this is agreed by the Council with other stakeholders, in this case The Circle Trust, and the precise terms of the agreement.
29. However, the Commissioner considers that at the time of the request, the public interest in this transparency was outweighed by the public interest in allowing a safe space for deliberations and negotiations to

take place in order to allow the Council to reach a decision without distraction or inhibition of free and frank discussion of the options. This is due to the importance of reaching the best possible outcome for all parties affected by this issue. Due to the timing of the request, the Commissioner considers that the prejudice to the Council's ability to conduct these deliberations and its decision-making process effectively would have been significant had the withheld information been disclosed at that stage.

30. The Commissioner's decision is therefore that the Council was entitled to rely on sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) as its bases for withholding the requested information.
31. He has therefore not gone on to consider the Council's application of section 43(2).

Right of appeal

32. 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

33. 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.
34. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Victoria James
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF