

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 1 February 2012

Public Authority: West Berkshire District Council
Address: Council Offices
Market Street
Newbury
Berkshire
RG14 5LD

Decision (including any steps ordered)

1. The complainant has requested the names and political parties of the persons who had sat on a particular Assessment Sub-Committee, which was convened to consider a complaint made against another councillor.
2. The Commissioner's decision is that West Berkshire District Council (the "Council") incorrectly refused the request under section 36(2)(c) (prejudice to effective conduct of public affairs) of FOIA.
3. The Commissioner requires the public authority to disclose the requested information to ensure compliance with the legislation.
4. The public authority 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 (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 8 May 2011 the complainant wrote to the Council and requested information in the following terms:
 - 1) Under the Freedom of Information Act I wish to know the names and political parties of the councillors who took the decision (DC1/11).

- 2) I also wish to know what is the West Berkshire policy for dealing with persistent complaints (as mentioned in the decision notice).
 - 3) I wish to know whether I am designated as a persistent complainer and if so what the grounds are for this designation. I also wish to know how many people West Berks Council has listed as persistent complainers.
6. The Council responded on 15 June 2011 by providing some of the requested information. However, it refused to provide the specific information referred to at 1) under section 36(2)(c) of FOIA. It did, though, clarify that the decision-making panel consisted of a district councillor from each political party (Conservative and Liberal Democrat), a parish councillor and an independent member.
 7. Following an internal review the Council wrote to the complainant on 17 November 2011. It stated that it had upheld its original handling of the requests, which included the application of section 36(2)(c).

Scope of the case

8. The complainant initially contacted the Commissioner to complain about the way his requests for information had been handled.
9. During the course of the investigation, though, the complainant has confirmed that the Commissioner can limit his decision to the consideration of the Council's refusal to provide the information requested at 1); that is, the identities of the persons who took the decision on DC1/11.

Reasons for decision

Background to the request

10. The Standards Committee of the Council deals with complaints made about the conduct of an elected councillor. Along with the Monitoring Officer at the Council, the Standards Committee is charged with the aim of promoting, educating and supporting councillors in following the highest standards of conduct. Regarding the process by which complaints are considered, the Council's website states that:

"West Berkshire Council has a Standards Committee, which is made up of District and Parish Councillors and independent representatives. The Standards Committee has below it an Assessment Sub-Committee, which will initially assess the complaint and decide whether or not it should be investigated. All investigations will be managed by the

*Councillor's Monitoring Officer. The results of the investigation and any possible action against the Councillor will be determined by a separate Hearing Panel.*¹

11. The Chair of the Assessment Sub-Committee, the Review Panel and the Hearing Panel must be independent members in each case. The remaining members are allocated according to availability.
12. The requested information in this case refers to the names of the Assessment Sub-Committee members who had decided that a complaint made about a councillor should not be investigated.

Section 36(2)(c) – prejudice to the effective conduct of public affairs

13. Section 36(2)(c) of FOIA states that information is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.
14. Reflecting the findings of the Information Tribunal in *McIntyre* (EA/2007/0068)², the Commissioner considers that section 36(2)(c) will cover information where its disclosure would, or would be likely to, prejudice a public authority's ability to offer an effective public service or otherwise divert the public authority from meeting its wider objectives because of the disruption caused by disclosure.
15. Where any part of section 36(2) is found to be engaged, the Commissioner will then go on to consider the public interest in disclosure.

The opinion of the qualified person

16. The Commissioner considers that the application of section 36(2)(c) is predicated on being able to confirm:
 - who was the qualified person or persons;
 - that an opinion was given by the qualified person;
 - when the opinion was given; and
 - that the opinion of the qualified person was objectively reasonable in substance.

¹ <http://www.westberks.gov.uk/index.aspx?articleid=14356>

² <http://www.informationtribunal.gov.uk/DBFiles/Decision/i99/McIntyre.pdf>

17. The Commissioner has established that the qualified person is the Monitoring Officer at the Council.
18. The Council has informed the Commissioner that the qualified person met with the Scrutiny and Partnership Manager sometime between 31 May and 8 June 2011 to discuss the request. While no formal record of this meeting was kept, the Council considers that its refusal notice summarised the deliberations of the qualified person.
19. In his guidance on the application of section 36 of FOIA³, the Commissioner advises a public authority to retain evidence that demonstrates that the opinion of the qualified person has been expressed, as well as correctly recording what was expressed by them. The Commissioner notes that he has not been provided with any evidence of this nature as part of his investigation.
20. However, the Commissioner has accepted that the first three conditions listed above have been met upon receipt of a signed statement from the qualified person confirming his opinion had been given. This was produced in response to the investigation. The Commissioner has therefore gone on to consider the question of whether the opinion was one that a reasonable person could hold.
21. In the Council's refusal notice, which relayed the opinion of the qualified person, it argued that section 36(2)(c) was engaged on the basis that:
 - the provision of the disputed information would likely lead to a further round of "needless and unreasonable" complaints directed against the members of the Assessment Sub-Committee, which may affect their willingness to perform their public function; and
 - the consideration of escalated complaints are time consuming and expensive to administer.
22. The Council has clarified that the qualified person was already familiar with the decision of the Assessment Sub-Committee at the time the request was made. In addition, the qualified person was provided with details of the previous complaints and correspondence of the complainant, from which the present request was derived.
23. There are two possible limbs of the exemption upon which the reasonable opinion could have been sought: (1) the lower threshold that

³http://www.ico.gov.uk/for_organisations/guidance_index/~/_media/documents/library/Freedom_of_Information/Detailed_specialist_guides/section_36_prejudice_to_effective_conduct_of_public_affairs.ashx

disclosure 'would be likely' to have a prejudicial effect or (2) the higher threshold that disclosure 'would' be prejudicial.

24. In this case it has remained unclear what limb of the exemption the qualified person believes applies. The Commissioner has therefore found it appropriate to consider the lesser test, namely that disclosure is thought to be likely to cause the prejudice described at section 36(2)(c) of FOIA. Nevertheless, it should be borne in mind that the prejudice test is not a weak test and "likely to prejudice" means the possibility of prejudice must be real and significant.
25. To reach his opinion that the exemption is engaged, the qualified person has observed the pattern of correspondence previously received from the complainant and the likelihood that disclosure would result in the harassment of the persons who made the decision on DC1/11.
26. In particular, reference has been made to a previous attempt of the complainant to progress a complaint, despite having exhausted the Council's corporate complaints procedure, by contacting the officer who had originally dealt with his concerns. In addition, it has been noted that the complainant has repeatedly sought to escalate complaints to senior officers where a local resolution of a complaint could not be achieved. It is the qualified person's belief that the release of the names of the members would likely lead to the complainant contacting these individuals directly about the complaint considered under DC1/11.
27. This avenue of communication would, according to the qualified person, harass the members of the Sub-Committee.
28. To support his view that the disputed information would likely be "misused" by the complainant, the qualified person has cast doubt on the purpose behind the request itself. Specifically, the qualified person has rejected the complainant's argument that he requires the disputed information in order to ensure there was no political bias in the decision of the Assessment Sub-Committee.
29. This is on the grounds that the complainant has already been informed of the political make up of the Sub-Committee, which should allay any concerns he has of bias. Therefore, the qualified person has concluded that the only reason the complainant could have for seeking the names of the panel members is so that he can escalate his complaint with them directly.
30. The Commissioner is aware that the implementation of a formal complaints process is designed to allow a public authority to effectively manage and co-ordinate concerns raised by members of the public. Based on the representations of the qualified person, the Commissioner is prepared to accept as reasonable the opinion that states that disclosure would be likely to result in the complainant seeking to

progress issues that have already been considered, outside of the complaints process that is already in place.

31. As such, the Commissioner agrees that it was reasonable for the qualified person further to conclude that the Council's ability to provide an effective public service is likely to be prejudiced as a result of the disruption potentially created by the release of the requested information. As he has therefore determined that section 36(2)(c) is engaged, the Commissioner has gone on to consider the public interest associated with the disclosure of the information.
32. When assessing the public interest, the Commissioner has taken on board the qualified person's opinion which says that disclosure of the requested information would be likely to have a detrimental effect. However, the Commissioner has formed his own view as to the severity and frequency of the detriment occurring.

Public interest arguments in favour of maintaining the exemption

33. To disclose the names of the members on the Sub-Committee would, the Council has argued, likely invite complaints about them and open up the possibility that it would have to revisit matters that had already been considered. Ultimately, this could lead to the diversion of the Council's resources from areas that had a greater, and less localised, benefit to the public it serves which would not be in the public interest. Similarly, the Council is of the opinion that it would not be able to operate a process which could be shown to be free of bias if the members of an Assessment Sub-Committee could be approached directly and repeatedly by a complainant, and that this would not be in the public interest.
34. The Council has also argued that it has a duty of care to those persons who work with and for it. As such, steps should be taken to protect individuals from harassment as far as it would be reasonable to do so. This has particular resonance where an individual has been asked to judge on a complaint because of the probability that the complaint will not be resolved to everyone's satisfaction.

Public interest arguments in favour of disclosure

35. The Council has agreed that there is a need for transparency in its decision making processes. Yet, it has argued that this transparency has been achieved by the publishing of the names of all the members of the Standards Committee, from which the relevant members of the Assessment Sub-Committee are drawn. Furthermore, the complainant has been informed of the political balance of the Assessment Sub-Committee.

36. Therefore, the Council considers that the public interest in transparency and accountability has been satisfied; to go further would in all likelihood only serve to disrupt the Council.

Balance of the public interest arguments

37. The Commissioner recognises that the Standards Committee, including the associated Assessment Sub-Committee, plays an important role in the functioning of the Council. This should not only help safeguard the public's trust in the conduct of councillors but also assist the Council to manage complaints about councillors in a structured and fair way.
38. There is, as a result, a demonstrable public interest in ensuring that the complaints procedure is preserved. This is, firstly, because the complaints process itself allows concerns to be addressed fully and equitably by what should be an impartial panel. Secondly, by implementing a mechanism by which a complaint can be assessed, the Council can expect to address any concerns in a controlled forum.
39. The Commissioner gives some weight to the Council's argument that the public interest would not be served by revisiting matters that have already been considered with the resulting diversion of resources from areas of less localised benefit.
40. The Commissioner does not, however, give any weight to the Council's argument that disclosing this information would not be in the public interest because it would prevent it from operating an unbiased process. Firstly, the Commissioner notes there is no evidence to suggest that this was part of the Qualified Person's opinion in engaging the exemption and he is therefore not obliged to give this particular argument due weight in the public interest test. Secondly, the Commissioner is mindful that the request in this case was only made after the decision of the Assessment Sub-Committee had already been taken.
41. In the Commissioner's view, in order for the decisions of Sub-Committee members to be open to allegations of being unfairly influenced by contact from complainants, such contact would have to be made before the decision had been taken. The Commissioner considers that there is an important difference between providing accountability for decisions that have already been made, and protecting against bias when decisions have not yet been taken.
42. In this case it is apparent that the decision of an Assessment Sub-Committee demonstrates how the Council handles complaints about councillors. To this extent, the identities of the members of a Sub-Committee command a significant level of public interest because the members should be accountable for the decisions they make. In effect, disclosure may enable the public to content itself that it need have no concerns in respect of the fairness or consistency of the decisions made

by members. It may also help satisfy the public that the overall make-up of any individual Sub-Committee is without bias and that no conflicts of interest are apparent. Whilst the Commissioner accepts that the public interest in transparency has been met to some extent by the information that has already been disclosed, he finds that there remains a public interest in disclosure of the requested information as well.

43. The Commissioner considers that the argument that the public interest lies in protecting individuals from harassment for their own sake is not relevant to this exemption. He places some weight on the argument that the Council needs to demonstrate such protection if it is to retain the services of members in bodies such as assessment-sub committees, although he considers the severity of the prejudice argued in this respect to be overstated. In essence, the Council has suggested that if it was not able to offer anonymity it would be impaired in its ability to carry out a statutory duty
44. The Commissioner notes however that when a Hearing Panel, which will consider the findings of an investigation into a complaint made about a councillor, meets, a complainant will be furnished with details of the members of the investigating panel. The Commissioner has not been presented with any evidence to explain why the different panels – namely, the Assessment Sub-Committee and the full Hearing panel – should attract different levels of confidentiality, given that both would be drawn from the same members.
45. To begin with, the Commissioner considers that the members of the Assessment Sub-Committee should have a natural expectation that any decisions they make will be subject to scrutiny. This is because of the influential role they hold. When sitting on an Assessment Sub-Committee, a member is passing judgement on a complaint received from a member of the public, even where that decision only records that a full investigation is not warranted in the circumstances.
46. Secondly the Commissioner considers that, given the level of responsibility and accountability inherent in the role of the Scrutiny Committee, it would be reasonable to expect that the majority of members would be sufficiently robust not to be easily deterred from performing this role. Given the above, and taking particular account of the fact that the Council appears able to retain Hearing Panel members despite releasing their names to complainants, he finds that the prejudice that would be likely to occur in this respect would not be as severe as the Council suggests.
47. Finally, the Commissioner considers that the Council's aim to protect itself from the possible escalation of a complaint by an individual sits uncomfortably with the application of the section 36 exemption. This is because the actions of an individual that are deemed unreasonably

burdensome can be addressed by other mechanisms; whether that is the Council's own complaints procedure or, where appropriate, through the protection afforded to public authorities by section 14 (vexatious requests) of FOIA.

48. Consequently, for the reasons set out above, the Commissioner has found that the public interest in maintaining the exemption does not outweigh the public interest in disclosure and so has decided that the Council incorrectly relied on section 36(2)(c) to withhold the requested information.

Other matters

49. In his recently published guidance on the section 36, the Commissioner states:

"In dealing with a complaint the ICO will expect to see evidence of the qualified person's opinion and how it was reached. The more evidence we have of how the qualified person's opinion was formed, the better we can assess whether it was reasonable."

50. The Commissioner goes on to refer to the information he would expect to see when considering the application of section 36. This would include a record of who gave the opinion, their status as qualified person and the dates when the opinion was sought and given. Furthermore, the Commissioner would consider it helpful to be provided with a copy of the submissions put before the qualified person when forming their opinion.
51. The Commissioner observes in this case that a formal record of the qualified person's opinion was not kept by the Council. Therefore, in future, the Commissioner would expect the Council to record how the qualified person's opinion was reached should it seek to rely on any exemption set out at section 36 of FOIA.

Right of appeal

52. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

53. 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.

54. 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

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