

**Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)**

Decision notice

Date: 27 January 2014

Public Authority: Oxfordshire County Council
Address: County Hall
New Road
Oxford
OX1 1ND

Decision (including any steps ordered)

1. The complainant has requested a copy of an email sent with a briefing to councillors at the council about a specific subject. The council confirmed that it held the email but withheld the information on the basis that the exemption in section 30(2)(b) applied (investigations). During the Commissioner's investigation the council also applied section 30(2)(a) (investigations) and section 36(2)(c) to the information (prejudice to the effective conduct of public affairs).
2. The Commissioner's decision is that Oxford County Council was not correct to apply section 36(2)(c), 30(2)(a) or 30(2)(b) to the information and that the public interest rests in the information being disclosed.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - To disclose the information to the complainant.
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 pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 1 February 2013 the complainant wrote to the council and requested information in the following terms:

"On 23rd December [officers name redacted] or a colleague sent a report regarding queries I raised with Cllr Atkins which references me to Oxford & Cherwell Valley College.

I am after a copy of the email that accompanied the report.

If you need to look at this under FOIA conditions then please accept this as a request."

6. The council responded on 27 February 2013. It confirmed that it held the requested information but that this was being withheld under Section 30(2). It also confirmed that it considered that the public interest in maintain the exemption outweighed that in the information being disclosed.
7. Following an internal review the council wrote to the complainant on 20 May 2013. It upheld its earlier decision to apply section 30(2).
8. During the course of the Commissioner's investigation the council wrote to the Commissioner and said that after reconsidering its position the qualified person had also decided that the council should apply section 36(2) to withhold the information in addition to section 30(2).

Scope of the case

9. The complainant contacted the Commissioner 28 July 2013 to complain about the way his request for information had been handled.
10. The Commissioner considers that the complainant's complaint is that the council has withheld the information from disclosure and that the exemption it has claimed was not correct.
11. The complainant stressed to the council that he was only requesting the email which accompanied the report, rather than the report itself. He accepted that the report itself was likely to be exempt.
12. The withheld information which the council provided to the Commissioner includes an email together with further information in the form of some notes and a chronology rather than a 'report' per se.

13. The Commissioner asked the council to confirm whether the chronology and the additional notes which had been sent with the email had formed part of the information which it considered to fall within the scope of the request. He pointed out that the complainant had been clear that he was only asking only for a copy of the email rather than the report.
14. The council confirmed to the Commissioner that its response to both the complainant and the Commissioner related to the email and not to the chronology or the notes. The council had simply provided this to the Commissioner in order to provide the background to the Commissioner for the purposes of him making his decision.
15. Whilst it is normally the case that the Commissioner would consider attachments and additional information sent with an email to fall within the scope of a requestors request for information in this case the complainant had clearly excluded any such information from falling within the scope of the information which he was requesting.
16. The Commissioner has therefore not considered either the chronology or the notes which were sent with the email as falling with the scope of this request. He considers that this information was specifically excluded from his request by the complainant, and that the council has confirmed that it has not included these documents as falling within the scope of the request.

Reasons for decision

Section 36(2)

17. Section 36 applies to information where its disclosure would inhibit the effective conduct of public affairs.
18. It is the only exemption in the FOIA that requires a determination by a 'qualified person'. The exemption will only apply if the reasonable opinion of the qualified person is that one of the forms of adverse effect specified in the exemption would follow from disclosing the information.
19. Section 36(2)(c) of FOIA states that "*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 - would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.*"

Did the qualified person make the decision?

20. The Commissioner asked the council to provide evidence that the qualified person had made the decision to apply the exemption in section 36. It is a requirement of section 36 that a designated person, the qualified person, considers that in his or her opinion a disclosure of the information would, or would be likely to prejudice the conduct of public affairs. The qualified person cannot delegate the application of section 36 to other officers within the authority. In this case the council has applied the test for 'would be likely' to prejudice the conduct of public affairs.
21. The council provided a copy of the information which the qualified person had in front of him when making his decision to apply section 36. The qualified person had a copy of the email together with the associated attachments. The council also provided the Commissioner with a copy of the qualified person's opinion.
22. Taking this into account the Commissioner is satisfied that the decision to apply section 36 was made by the qualified person. He is also satisfied that he had taken that decision with knowledge of the facts, arguments and circumstances surrounding information. The opinion was reasonable for the purposes of the Act. The exemption in section 36(2)(c) was therefore engaged.
23. As section 36 was correctly applied the Commissioner must carry out a public interest test to decide whether the information should be disclosed in spite of the fact that the exemption is engaged.
24. The test is whether in all the circumstances of the case the public interest in the exemption being maintained outweighs the public interest in the information being disclosed. If it does then the information can be withheld under the exemption.

The public interest in maintaining the exemption

25. Allegations of abuse had been made about a college in the area. The media had published stories and asked councillors questions about the allegations and any investigations which the council had undertaken in respect of them. The email was a 'cover' email which introduced a briefing to councillors regarding the facts and circumstances of the situation.

The public interest in the exemption being maintained

26. The council took into account the following public interest arguments in favour of the exemption being withheld.
27. It considered that disclosing the information would jeopardise the Council's ability to inform their county councillors of on-going serious

matters and would be likely to affect the conduct of public affairs if councillors were unable to be kept informed.

28. It said that it is important to have well informed Councillors as public affairs are best served by this. A safe space is essential so that Councillors can be made aware of the facts and issues on particular matters so that they can hold the Council to account for its actions, and if they are contacted by their constituents or by the press they are aware of and can provide responses from a fully informed position.
29. It said that otherwise, Councillors may be misinformed or misled leading to the potential for confusion of activity and an inadvertent disclosure of information by the Councillors. This in itself could prejudice any safeguarding investigations that are on-going.

The public interest in the information being disclosed

30. The email informed councillors of the allegations, of the information which had been received, and of the results of investigations which had been carried out. However the majority of the detail was held in the attachments, not in the covering email itself.
31. The council noted that there is a public interest in ensuring that there are proper, equitable, accountable and effective processes in place to safeguard the public and that the Council's decision making arrangements for achieving this are being conducted fairly and thoroughly.
32. The council also considered that members are entitled to confidential information but that that information should be subject to scrutiny and transparency which is appropriate to the case.
33. The council considered that it is the professional role of officers to give advice to members and therefore some degree of advice would necessarily need to continue in any case. It considered therefore that 'chilling effect' arguments were not as strong as might initially be considered to be the case. The council would still have to report on its finding to councillors in order to prevent councillors being misinformed or inadvertently disclosing information in response to questions asked of them.
34. The Commissioner has taken these arguments into account. Effectively, the main reason for withholding information of this sort would be if the email contained information which was confidential or sensitive in nature, and which was not already in the public domain or relatively obvious in itself.

35. If confidential or sensitive information is disclosed in response to a request this might deter councillors from seeking advice or further information in the future. This could occur if they considered that as a result, requests might be received which would ultimately disclose such information into the public domain. The safe space which they need in order to be informed about matters would be degraded, and as a result a chilling effect would be likely to occur to some extent. This might lead to less informed councillors who cannot hold the council to account for its actions as well as they might, and who may inadvertently mislead constituents or disclosed information to the public which they should not. The Commissioner accepts this is a valid argument. At the least the advice may be sought verbally, which would affect the records kept by the council for audit purposes.
36. However, having considered the contents of the email in this case the Commissioner notes that the information does not provide any specific details about the investigations which were carried out. It does not identify any confidential sources, does not contain confidential information (which is not already known) and does not provide any sort of detailed insight into the allegations or the issues which were involved. It is purely a covering email introducing the attachments. As such the Commissioner questions the sensitivity of the information contained within the document.
37. The email does not name any individuals. It is a cover note which does not specifically identify any of the individuals involved, nor does it identify specifics of any investigations which had been carried out. The information itself is therefore not particularly sensitive given that stories had already been published in the press outlining that allegations had been made.
38. The Commissioner is also satisfied that a disclosure of this information would not provide any information which would be likely to lead to any chilling effect in the future. It would not lead to the council receiving less information of this sort from confidential sources in the future.
39. The Commissioner considers that if the information in this case is not sensitive then its disclosure would not dissuade councillors from seeking advice or further information from council officers over an issue in the future. There is clearly a potential for this to occur if the withheld email contained information on confidential sources, or contained sensitive information which was not already known. In this case however the council has failed to persuade him that this would be the result of a disclosure of this information.

40. He therefore considers that a disclosure of the email would not prejudice councillors' ability to seek further information or advice in the future and would not dissuade them from doing so to any great degree.
41. The Commissioner is therefore satisfied that the information does not contain details which would lead to any specific prejudice, beyond the confirmation that the council had considered the issues and been in contact with other authorities regarding the allegations. This would be obvious and expected in any event. It would also be expected that councillors would be informed of the events in order that they can field questions asked by the media and their constituents given that the press had already been asking questions about the allegations. The Commissioner does not therefore place a great deal of weight on the safe space or chilling effect arguments submitted by the council in this respect.
42. Supporting the public interest in the disclosure of the information, the Commissioner considers that its disclosure would provide evidence that the council had taken the allegations seriously and help to demonstrate whether it had acted appropriately under the circumstances. The press stories in some websites had expressed concerns and reported allegations of a 'cover up' occurring. The disclosure of this email would to an extent demonstrate that the council had reacted to the allegations and would help to alleviate any concerns that the allegations had not been taken seriously.
43. The Commissioner's decision is therefore that the public interest rests with the disclosure of the email. The council was not therefore correct to apply section 36(2)(c) to the information.

Section 30(2)(b)

44. Section 30(2)(b) of the Act states that information

"Information held by a public authority is exempt information if... it relates to the obtaining of information from confidential sources."

45. The council argues that the contents of the information relates to information it has obtained from confidential sources.
46. The council said that it had had regards to the ICO guidance on information obtained from confidential sources and that this had made clear that the email itself does not need to have been obtained from confidential sources but only that it should relate to that.
47. It says that the information contained in the email expressly outlines where the information was obtained from and formed the basis of the details provided in the attachments to the email.

48. It argues that the conduct of investigative processes and procedures by the Council, particularly those which might lead to proceedings are protected and that in relation to such procedures and possible proceedings the maintenance of confidential sources should be respected. In the present case, it considered that the information requested does relate to the obtaining of information from confidential sources and that the processes and procedures of the Council would be weakened in this regard by disclosure. It did not however state how that would be the case.
49. The Commissioner has considered the withheld information and how the above arguments apply to it.
50. It should be noted that there is a difference between confidential sources and confidential information. Under section 30(2) it is the relationship between the public authority and the source that needs to be confidential. Many public authorities will receive confidential information during the course of their investigations but this does not mean that the provider of that information is a confidential source.
51. Whilst the email does identify the sources of information obtained by the council the Commissioner considers that these sources could not be considered 'confidential sources'. He considers that the sources which are mentioned would be reasonably obvious to the public given the nature of the allegations and the media coverage. The Commissioner considers that no sources of information are held within the email which might be considered a 'confidential source'.
52. Whilst the council may have obtained information from other parties which could be considered to be confidential sources, these are not referred to within the email.
53. Any person who read the email would not be able to identify any confidential source from whom the council might have obtained information nor what information the council might have obtained from them.
54. The Commissioner is also satisfied that if any confidential source had provided information and read the email they would be satisfied that it does not identify them or provide details of any specific information which they provided to the council. For this reason a disclosure of the email would also not leave any confidential source in fear of personal repercussions and would not dissuade them from providing further information in the future if they had reason to do so.
55. The Commissioner is therefore satisfied that a disclosure of the information would not cause a 'chilling effect', detrimentally affecting the

likelihood of the council being able to obtain information from confidential sources in the future.

56. When considering the public interest test the council said that it felt that it was in the public interest to respect the maintenance of confidential sources. However given that the information does not provide details of confidential sources this argument cannot be supported or sustained.
57. The council pointed out that the Commissioner's guidance is clear that the information itself does not need to have been obtained from confidential sources but only that it should relate to that. The Commissioner is not however satisfied that the withheld information does 'relate' to information obtained from confidential sources in this instance. The sources named in the email are not 'confidential' and if there were other sources of information these are not identified and details of any information they might have provided is not specified in the email.
58. The Commissioner is therefore satisfied that the council was not correct to apply section 30(2)(b) in this instance.

Other exemptions

59. The council said that in considering this matter afresh due to the Commissioner's correspondence, it also considered that the remainder of s30 would also apply albeit that that was not cited in the original refusal notice. It provided further argument that section 30(2)(a) applies to the withheld information.
60. It said that it considered that section 30(2)(a) applies because the email concerned was 'recorded' by the authority for the purpose of section 30(2)(a)(iii) that is, an investigation that the authority has the power to conduct under Section 31(2).
61. The relevant part of section 31(2) is subsection (a) and (b); an investigation which the council had power to conduct to ascertain whether a person has failed to comply with the law and whether any conduct is improper.
62. The Commissioner has considered the application of section 30(2)(a) further. The relevant section states that information held by a public authority is exempt information if it was obtained or recorded by the authority for the purposes of its functions relating to:

"investigations (other than investigations falling within subsection (1)(a) or (b)) which are conducted by the authority for any of the purposes specified in section 31(2) and either by virtue of Her

Majesty's prerogative or by virtue of powers conferred by or under any enactment"

63. The Commissioner acknowledges that as part of its investigation the council may have obtained information for the purposes outlined within section 31(2). However he does not consider that the withheld information is information which the council has obtained or recorded for the purposes of carrying out its investigation.
64. The information within the email simply briefs councillors as to the circumstances of the case. Any information which might be subject to the exemption is held within the attachments to the email rather than the covering email itself.
65. Whilst the email describes the sources of information and the actions which have taken in response to the allegations it does not provide details of the information which was provided to the council other than in the most cursory sense. For the most part, the information contained within the email is already in the public domain or is already relatively obvious to interested parties in any event.
66. The Commissioner is therefore satisfied that section 30(2)(a) is also not applicable in this case.
67. The council did not provide any further arguments in respect of any of the other sections of section 30.
68. The Commissioner's decision is therefore that the council was not correct to withhold a copy of the email from the complainant in this case.

Right of appeal

69. 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: GRC@hmcts.gsi.gov.uk

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

70. 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.
71. 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

Andrew White
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