

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 9 May 2016

**Public Authority:** West Sussex County Council  
**Address:** County Hall  
West Street  
Chichester  
PO19 1RQ

#### Decision (including any steps ordered)

---

1. The complainant has requested information about an internal audit report. West Sussex County Council has withheld the information which it says is exempt from disclosure under section 36(2)(b) and 36(2)(c) of the FOIA (prejudice to effective conduct of public affairs).
2. The Commissioner's decision is that West Sussex County Council has correctly applied section 36(2)(c) and that the public interest favours maintaining this exemption. He does not require West Sussex County Council to take any steps.

#### Request and response

---

3. On [date unknown], the complainant wrote to West Sussex County Council ('the Council') and requested information in the following terms:  
*"...I would like to request a copy of the Internal Audit Highways Contract Review, April 2015 by Rob Allen."*
4. The Council responded on 24 August 2015. It refused to disclose the requested information which it said was exempt from disclosure under section 36(2) of the FOIA.
5. Following an internal review the Council wrote to the complainant on 8 September 2015. It maintained its position that the information is exempt under section 36(2). It added that if it had considered the

request under the Environmental Information Regulations (EIR), regulation 12(4)(e) (internal communications) would apply.

6. The Council told the complainant that sections 40 (personal information), section 41 (information provided in confidence) and section 43 (commercial interests), and their EIR equivalents, also apply to the information.
7. The Council clarified to the Commissioner that, during the internal review process, it had considered whether the request came within the scope of the EIR and decided it did not. The Council confirmed that it has considered the request under the FOIA and that it believes that section 36(2) and the other exemptions it cited in the internal review apply to the requested information.

### **Scope of the case**

---

8. The complainant contacted the Commissioner on 4 January 2016 to complain about the way his request for information had been handled.
9. The Commissioner first considered whether the Council was correct to consider the request under the FOIA rather than the EIR. He has considered the requested information. It appears to him that the information is not environmental as it concerns an audit of the management and performance of its highways contract. As such it is one step removed from being information about the environment. Consequently, the Commissioner is satisfied that the FOIA is the correct regime under which to consider the request.
10. The Commissioner has therefore focussed his investigation on whether the Council has correctly applied section 36(2)(b) and/or (c) of the FOIA to the requested information. He has gone on to consider the Council's public interest arguments. If necessary, he has been prepared to consider the Council's application of sections 40, 41 and 43.

### **Reasons for decision**

---

#### **Section 36 – prejudice to effective conduct of public affairs**

11. Section 36(2)(b) of the FOIA says that information that is held by a government department or other public authority is exempt information if, in the reasonable opinion of a qualified person, disclosure 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.

Section 36(2)(c) says the information is exempt if disclosure would, in the reasonable opinion of a qualified person, otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

12. Section 36 differs from all other prejudice exemptions in that the judgement about prejudice must be made by the legally authorised, qualified person for that public authority. The qualified person's opinion must also be a 'reasonable' opinion, and the Commissioner may decide that the section 36 exemption has not been properly applied if he finds that the opinion given is not reasonable.
13. Other than for information held by Parliament, section 36 is a qualified exemption. This means that even if the qualified person considers that disclosure would cause harm, or would be likely to cause harm, the public interest must still be considered.
14. In determining whether the Council correctly applied the exemption, the Commissioner is required to consider the qualified person's opinion as well as the reasoning that informed the opinion. Therefore in order to establish that the exemption has been applied correctly the Commissioner must:
  - ascertain who was the qualified person or persons
  - ascertain when the opinion was given
  - establish that an opinion was given by the qualified person; and
  - consider whether the opinion was reasonable.
15. The information in this case is an internal audit report into a highways maintenance contract, produced in April 2015, in advance of a contract extension or re-procurement. The report seeks to verify the validity of concerns raised about particular contract management arrangements and service delivery.
16. The qualified person (QP) is the Council's Director of Law Assurance and Strategy who, under section 36(5)(o)(iii) of the FOIA is authorised as the Monitoring Officer. The Commissioner is satisfied that the Monitoring Officer is a suitably qualified person. This is because the Monitoring Officer post within a local authority has the specific duty to ensure that the council, its officers and its elected members maintain the highest standard of conduct in all they do. It is one of three posts that local authorities have a legal duty to have, the other two being the Chief Executive and the Director of Finance.
17. The QP's opinion was sought on 24 July 2015 and his opinion was given on 31 July 2015.

18. The QP upheld the view submitted to him that disclosing the requested information would be likely to prejudice the effective conduct of public affairs by inhibiting the full and frank provision of advice and exchange of views. The QP said that internal audit reports rely on the full and frank disclosure of information and the freedom to express opinions on matters of significance and sensitivity to the Council.
19. The QP considered that the audit process relies on complete objectivity and the ability to access and examine information that would often be considered confidential or commercially sensitive. External parties – such as contractors, suppliers and others with a commercial stake in the information under scrutiny – are expected to cooperate with internal audit investigations. This requires their willingness to provide commercially sensitive information. Auditors provide advice to senior officers and to elected members on the findings of their investigations. The QP said that they would expect to do so without the competing demands of challenge from the press or the public on details of their investigations. The QP argued that it would compromise the audit process in terms of investigation and advice giving if, in specific cases or in general, such reports were to become public.
20. In this particular case, the QP said that not only was the contract in question current (ie it was current at the time of the request) but that, at the time of the request, there were current and planned contractual discussions ongoing related to matters addressed in the audit report. The QP said the commercial interests of the Council would be prejudiced by the public disclosure of an internal audit report related to those contractual discussions.
21. The QP maintained that disclosure would prejudice the authority's ability to manage the contractual relationship in the best interests of the Council as the issues to be discussed would become a matter of public or media enquiry. This would divert attention and resources and place the contractor in an unnecessarily difficult position in terms of the commercial information, financial mechanics or trade secrets linked to the contract becoming public.
22. Finally, the QP noted that the contractual plans for this service area – ie highways – were at a critical point in terms of planning of future service provision and the contractual terms for the service in the short and longer term. He said that those plans would be likely to be compromised by the public examination of details that should be the subject of complex commercial negotiations so as to achieve the most beneficial outcome for the Council.
23. To summarise, the Council argues that if the information were to be disclosed:

- Under 36(2)(b)(i) – prejudice would be likely to occur because it would be likely to prejudice the ability of officers to give advice during the audit process in a free and unfettered manner so as to manage most effectively the audit of council business and contractual arrangements.
  - Under section 36(2)(b)(ii) - prejudice would be likely to occur because it would be likely to prejudice the ability of officers to ensure the full and frank exchange of views for the purpose of deliberations with elected members in relation to audit and current contractual arrangements, in a free and unfettered manner so as to meet the longer term commercial and public service interests of the Council.
  - Under 36(2)(c) – prejudice would be likely to occur because the conduct of current and planned contractual dealings would be likely to be compromised by the open discussion of information that is commercially sensitive for both the Council and contractors.
24. The QP has also noted that the request has been submitted by elected members of the Council. It says these members already have the information and are able to use it, by challenging executive members and senior officers albeit within confidential boundaries. The QP says that the expectation of the requestors is that elected members, being accountable to the public, should be able to undertake such a challenge, and hold public officials to account, in a public forum. By doing this they would be able to show that they are discharging their role by sharing any concerns in public.
25. In his initial correspondence to the Commissioner, the complainant has also referred to the fact that the request was for information that he and another individual had seen under privileged conditions as elected members. He told the Commissioner that he believes that the only way to ensure particular issues are addressed is through discussing them in public, hence his FOI request to the Council submitted as a member of the public.
26. In order to determine whether the exemption is engaged the Commissioner must finally decide whether the QP's opinion in this case is reasonable. This involves considering:
- whether the prejudice claimed relates to the specific subsection of section 36(2) on which the Council is relying
  - the nature of the information and the timing of the request; and
  - the qualified person's knowledge or involvement in the issue.

27. The Commissioner has also issued guidance on section 36 of the FOIA. With regard to what can be considered a 'reasonable opinion' it says the following:

*"The most relevant definition of 'reasonable' in the Shorter Oxford English Dictionary is 'In accordance with reason; not irrational or absurd'. 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."*

28. It is important to note that when considering whether the exemption is engaged, the Commissioner is making a decision not on whether he agrees with the opinion of the qualified person, but whether it was reasonable for him or her to reach that opinion. The test of reasonableness is not meant to be a high hurdle and if the Commissioner accepts that the opinion is one that a reasonable person could hold he must find that the exemption is engaged.
29. The Council is relying on section 36(2)(b)(i) and (ii) and section 36(2)(c), namely that disclosing the withheld information would, or would be likely to inhibit the free and frank provision of advice and exchange of views for the purpose of deliberation, and would otherwise prejudice, or would be likely to otherwise to prejudice, the effective conduct of public affairs. The QP in this case has said that disclosing the information *would be likely to* (rather than *would*) prejudice the Council's commercial interests, its ability to manage the contractual relationship in question in the best interests of the Council, its longer term strategic planning and the effectiveness of future internal audits.
30. The Commissioner notes that, at the time of the request, the Council says it was in the process of negotiating its commercial contract with a particular external party. He is therefore satisfied that the prejudice the Council is claiming does relate to section 36(2)(b)(i) and (ii) and section 36(2)(c).
31. The Commissioner notes that the information requested concerns the findings of an internal audit on aspects of a service provided to the Council by one of its contractors. Although the Commissioner has not been provided with the date on which the complainant submitted his request for this information, he considers it reasonable to assume that it was submitted in June or July 2015 and therefore not long after the information in question was prepared. As already referenced, at this time, the Council says related negotiations between it and relevant external parties were ongoing or planned.

32. The Commissioner notes that, in August 2015, the QP corresponded with the complainant about his request and the Council's refusal of it. The Commissioner is therefore satisfied that the QP would understand the nature of the matter that is the subject of the internal audit, and would have a good knowledge of the circumstances surrounding the request.
33. Having undertaken the above review of the QP's opinion, the Commissioner is satisfied that, in the circumstances, it is a reasonable opinion ie it is not irrational or absurd. Therefore, the Council has correctly applied the exemption at section 36(2)(b)(i) and (ii) and section 36(2)(c) to the requested information. The Commissioner has gone on to consider the public interest arguments for disclosing the information and for maintaining the exemption.

### **Public interest test**

34. In most cases, even when the QP has given their opinion that section 36(2)(b) and (c) is engaged, the public authority must still carry out a public interest test. The QP's opinion will affect the weight of the argument for withholding the information. If the QP has decided that disclosure *would* prejudice, this will carry a greater weight than if they said disclosure *would be likely to* prejudice.
35. When considering a complaint regarding section 36, if the Commissioner finds that the opinion was reasonable, he will consider the weight of that opinion in the public interest test. This means that he accepts that a reasonable opinion has been expressed that prejudice would, or would be likely to occur, but 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 dictates disclosure.
36. In his guidance on section 36, the Commissioner says that it should always be possible for the public authority to review the public interest arguments. The Commissioner gave the Council the opportunity to do this during the course of his investigation. The Council confirmed on 21 April 2016 that it continues to rely on its arguments from July 2015 and those provided in its correspondence with the complainant in August 2015.

### **Public interest arguments in favour of disclosure**

37. The QP recognises that the public would be interested to know about the use of public money for public services.
38. The QP also says that the public and press should be able to question and seek information about the effective and efficient use for public

funds and that commercial interests should not outweigh the public interest in such information.

39. While audit processes rely on officer cooperation, the QP acknowledges that such cooperation should not be dependent on confidentiality as officers should be publicly accountable.
40. Finally, the QP says that the diversion of resources, referred to at paragraph 19, would either be small or would be reasonable given the public interest in the significant contracts under discussion.
41. The complainant has suggested to the Commissioner that he is not convinced that particular issues raised in the report in question are being sufficiently addressed by the Council and that these matters are more likely to be resolved through discussing them in public. This is the extent of the detail on this matter that the complainant has provided to the Commissioner.
42. The complainant has also queried whether the public interests are being served if officers do not take sufficient steps to address a problem that has been identified. This question does not appear to be one that is within the Commissioner's scope to investigate.

### **Public interest arguments in favour of maintaining the exemption**

43. The Council in this case says that, in order to be effective, internal audits rely on the ability to access and examine confidential or commercial sensitive information. Contributors to the audit process must be willing to cooperate and provide this information, as well as their advice and views. The Council says that disclosing the requested information into the public domain would be likely to compromise the audit process because if participants thought confidential or commercially sensitive information, views or advice would become public, they would be less likely to be willing to contribute fully.
44. In its correspondence with the complainant in August 2015, the Council had provided clarification of its argument. It had explained that its position was not that *all* internal audits should be immune from disclosure. However, the situation with this particular audit report was that first, the report had, indirectly, required the cooperation of the contractor concerned and the supply of financial and contractual information which the contractor would consider to be commercially sensitive. Second, at the time of the request re-negotiations around the possible extension or re-procurement of the service in question were imminent.



45. In this same correspondence, the complainant disputes the Council's suggestion that releasing this report would compromise the success of internal audits in the future, because a number of reports are already published and available on the Council's website. In response, the Council said that it applies criteria for release of material on a case by case basis and the level of public interest in the material, with the starting presumption being for openness.

### **Balance of the public interest**

46. Because he has accepted that the exemption is engaged, it follows that the Commissioner has accepted as reasonable the opinion of the QP. He is persuaded by the QP's conclusion that disclosing the withheld information would have been likely to cause prejudice to the Council by inhibiting the free and frank provision of advice and exchange of views ie section 36(2)(b), and by having an adverse effect on its negotiations with the contractor and others ie section 36(2)(c). He considers that both limbs of section 36 are engaged but, in considering the balance of the public interest, has focussed his considerations on section 36(2)(c); that is, the possible adverse effect on the Council's negotiations with the contractor if the information were to be released at the time of the request. This is because the Council's public interest arguments have seemed to focus on the idea of the importance of a 'safe space' in which it could carry out particular negotiations.
47. In the same way that the Council says it considers whether to publish each internal audit report on a case by case basis, the Commissioner considers each complaint about an authority's application of the section 36 exemption on a case by case basis. He is aware that, following similar complaints to him involving audit reports, he has found, in some cases, that the public interest favours disclosing the withheld information once he has considered the balance of the public interest.
48. In [FS50495521](#) the Commissioner found that the findings of the report in question were of particular interest and value. In [FS50559883](#) the Commissioner gave weight to the fact that, at the time of the request, the matters covered in the audit report could not be considered to be still 'live'. In [FS50514631](#), the Commissioner considered the specific information withheld was not of sufficient consequence and that concerns about the subject of the report in question were genuine and of some significance. However, in a number of other cases, such as [FS50491194](#) and [FS50509943](#), the Commissioner found that the balance of the public interest favoured maintaining the exemption.
49. To come to a conclusion on whether or not the public interest in the Council being able to negotiate effectively, in this case, is greater than

that associated with its processes being transparent, the Commissioner has considered the circumstances at the time of the request.

50. At the time of the request, the information in question had been recently produced and related negotiations between the Council and its contractors and other stakeholders were ongoing or imminent. The Council's argues that releasing the information would have been likely to jeopardize those negotiations because it may have attracted media or public attention and may have reduced the willingness of participants to fully engage in those negotiations. Compromising the negotiations risked poorer outcomes for the Council for example in its longer term strategic planning. Although 'would be likely to jeopardize' carries less weight than 'would jeopardize', the Commissioner agrees that this argument nonetheless carries a good deal of weight. The requested information was current, negotiations with the contractor were ongoing or planned and, given that concerns had been raised about the contract in question, releasing the information may well have generated attention that would have been likely to disrupt that negotiation process, or made it more difficult.
51. The complainant has seen the disputed information, under conditions of confidentiality, and appears to have had concerns about it which he considered were not being appropriately addressed through normal Council processes. He therefore wanted to be able to discuss those concerns publicly.
52. The Commissioner notes that, in its August correspondence with the complainant, the Council acknowledged that the complainant had concerns. It said that the Council makes provision for full and open scrutiny through its Select and Audit Committees. The Council explained that there would be further reports on the actions taken in light of the disputed audit report at the next available meeting and that these would be aired at a Regulation, Audit & Accounts Committee (RAAC) scheduled for September 2015.
53. The Commissioner recognises that there is a general public interest in promoting transparency, accountability, public understanding and involvement in the democratic process. The FOIA is a means of helping to meet that public interest, so it must be given some weight. However, the Commissioner is not aware of specific circumstances peculiar to this case that were so pressing that they would have warranted disclosure at the time of the request. It appears to the Commissioner that, in this case, the public interest would be sufficiently served by scrutiny of the material at the Council meetings and Committees referred to above. He notes that, on the basis of RAAC minutes published on the Council's website, the disputed information does appear to have been discussed in subsequent Committees.

54. Having considered all the circumstances of this case, and the Council's and complainant's arguments, the Commissioner accepts that the Council needed a 'safe space' in which to discuss the audit report in question and conduct its negotiations with its contractors and elected members. His view is that the public interest in the Council achieving the best possible outcomes from these negotiations outweighed the public interest in transparency - the Commissioner considers this interest would be sufficiently met through its normal Council processes. In this case, the Commissioner is therefore satisfied that, at the time of the request, the public interest favoured maintaining the section 36 (2)(c) exemption.
55. Because the Commissioner has decided that the Council has correctly applied section 36(2) to the requested information and the balance of the public interest favours maintaining the exemption under section 36(2)(c), it has not been necessary to consider the exemptions under sections 40, 41 and 43, which the Council also applied.

## Right of appeal

---

56. 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@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

57. 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.
58. 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** .....

**Pamela Clements**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**