

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 6 December 2016

Public Authority: North Yorkshire County Council

Address: County Hall
Northallerton
North Yorkshire
DL7 8AD

Decision (including any steps ordered)

1. The complainant has requested information relating to the Caedmon College and Eskdale School amalgamation. The Commissioner's decision is that North Yorkshire County Council has correctly engaged the exemptions at section 36(2)(b)(ii) (inhibition to the free and frank exchange of views) of the FOIA but that the public interest in disclosure outweighs the public interest in maintaining the exemption.
2. The Commissioner requires the public authority to take the following step to ensure compliance with the legislation.
 - Disclose the withheld information.
3. The public authority must take this step 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.

Background

4. The council provided the Commissioner with the following information as background to the request and the current situation:

"The request relates to a recent proposal by the Council to amalgamate two schools in Whitby. Prior to the applicant's request, the Council had undertaken a public consultation on the proposed amalgamation, during which time a webpage was set up to share information with the

public (www.northyorks.gov.uk/eskdalecaedmonproposal). There were several public consultation meetings which gave members of the public the opportunity to ask questions and express their views on the proposal. In addition members of the public were invited to provide written submissions to the Council regarding the proposed amalgamation.

The Council was due to provide a report to the Executive on 26 April 2016 regarding the outcome of the consultation and making recommendations on the future education provision in Whitby for the Executive to approve. However on 13 April 2016 circumstances changed and the Council's decision-making process was suspended.

The applicant then submitted the request for a copy of the report which would have been submitted to the Executive on 26 April 2016, had the process not been suspended. At the time of the request the Council held a first draft report. The draft report was essentially the initial views of a single officer and the draft would have been subject to review by a number of senior officers and other services, for example legal services, prior to publication and submission to the Executive. However because the decision-making process was suspended the report was not subject to any such review or finalised.

At the present moment the Council's decision-making process remains suspended as one of the schools awaits a decision from the Regional Schools Commissioner on their application to become an academy. Should their application be rejected the Council's decision-making process could resume. Depending on the timescales involved at that stage the Council would at the very least need to revisit the draft document and update it in light of subsequent events, before proceeding with the review procedure for the draft document. It is possible that further consultation would be undertaken in which case the current draft would be set aside and a new report drafted."

Request and response

5. On 19 April 2016, the complainant wrote to North Yorkshire County Council ('the council') and requested information in the following terms:

"Please can I request; Under the Freedom of Information Act 2000 that I can be sent copies of any reports and feedback to executive members regarding the Caedmon College and Eskdale School amalgamation that would have been part of the decision making and be presented to the executive on the 26th April 2016 (I am aware of the suspension in

decision making) and the official minutes of the consultation meetings on the 14th and 15th of March 2016.”

6. The council responded on 28 April 2016 and refused to provide the requested report under the exemption at section 22 of the FOIA. In relation to the notes of the consultation meetings on 14 and 15 March 2016, the council said that these will be made available publicly on its website once they have been finalised.
7. On 28 April 2016, the complainant requested an internal review.
8. The council provided an internal review response on 6 June 2016. It revised its position, retracting its reliance on section 22 and said that the report is exempt under sections 36(2)(b) and 36(2)(c) of the FOIA. It did not refer to the requested minutes.

Scope of the case

9. The complainant contacted the Commissioner on 31 May 2016 to complain about the way her request for information had been handled.
10. During the investigation, the council informed the Commissioner that the requested minutes have been published on its website¹ and that it would write to the complainant to advise her of the publication and apologise for the delay. As these minutes are now in the public domain, the Commissioner has not found it necessary to consider the application of the exemption at section 22 of the FOIA to the requested minutes.
11. The council also informed the Commissioner that in light of the amount of time which has passed since the initial request it has reconsidered its position. It said that there has been a shift in relation to the potential impact of any disclosure of the requested information as although the question of future education provision in Whitby has yet to be resolved, and remains a very sensitive topic, the council considers that the public interest arguments for withholding all of the information have diminished and believes that the public interest would now favour the disclosure of some of the information. At the Commissioner's request, the council provided the complainant with a redacted version of the withheld information. The Commissioner has therefore only considered the remaining withheld information.

¹ http://www.northyorks.gov.uk/media/35026/Notes-of-public-consultation-meetings/pdf/Notes_of_public_consultation_meetings.pdf

12. The council's response to the Commissioner's enquiries did not include reliance on the exemption at section 36(2)(c) where disclosure would, or would be likely to, otherwise prejudice the effective conduct of public affairs. Therefore the Commissioner has only considered whether the council has correctly applied the exemption at section 36(2)(b)(ii) where disclosure would, or would be likely to, inhibit the free and frank exchange of views for the purposes of deliberation.

Reasons for decision

Section 36

13. Section 36 states that information is exempt where, in the reasonable opinion of a qualified person, disclosure would or would be likely to prejudice the effective conduct of public affairs. Section 36 operates in a slightly different way to the other prejudice based exemptions in the FOIA. Section 36 is engaged, only if, in the reasonable opinion of a qualified person, disclosure of the information in question would, or would be likely to, prejudice any of the activities set out in sub-sections of 36(2).
14. In this case the Commissioner is considering the application of the exemption at section 36(2)(b)(ii).
15. Section 36(2)(b)(ii) provides an exemption where disclosure would, or would be likely to, inhibit the free and frank exchange of views for the purposes of deliberation.

Is the exemption engaged?

16. In order to establish whether the exemptions have been applied correctly the Commissioner has:
 - Ascertained who is the qualified person or persons for the public authority in question;
 - Established that an opinion was given;
 - Ascertained when the opinion was given; and
 - Considered whether the opinion given was reasonable.
17. With regard to the first two criteria, the Commissioner has established that the opinion was given by the council's Assistant Chief Executive (Legal and Democratic Services) and Monitoring Officer. The Commissioner is satisfied that the Assistant Chief Executive (Legal and

Democratic Services), also being the council's Monitoring Officer, is a qualified person for the purposes of section 36(5) of the FOIA.

18. In relation to the third criterion, the council explained that although it did not rely on the exemption at section 36(2)(b)(ii) until the internal review, the qualified person was consulted about, and approved the application of section 36(2)(b)(ii). The council has provided dates when the opinion was sought and given. The Commissioner is satisfied that the opinion was provided after the receipt of the request and before the internal review response on 6 June 2016.
19. With regard to the fourth criterion, in deciding whether an opinion is reasonable the Commissioner will consider the plain meaning of that word, that being: in accordance with reason, not irrational or absurd. If it is an opinion that a reasonable person could hold, then it is reasonable for these purposes. This is not the same as saying that it is the *only* reasonable opinion that could be held on the matter. The qualified person's opinion is not rendered unreasonable simply because other people may have come to a different (and equally reasonable) conclusion. It is only not reasonable for these purposes if it is an opinion that *no* reasonable person in the qualified person's position could hold. The qualified person's opinion does not even have to be the *most* reasonable opinion that could be held; it only has to be *a* reasonable opinion.
20. The Commissioner has also been guided by the Tribunal's indication, in the case *Guardian Newspapers & Brooke v Information Commissioner & BBC*², that the reasonable opinion is limited to the degree of likelihood that inhibition or prejudice may occur and thus 'does not necessarily imply any particular view as to the *severity* or *extent* of such inhibition [or prejudice] or the *frequency* with which it will or may occur, save that it will not be so trivial, minor or occasional as to be insignificant' (paragraph 91). Therefore, when assessing the reasonableness of an opinion the Commissioner is restricted to focussing on the likelihood of that inhibition or harm occurring, rather than making an assessment as to the severity, extent and frequency of prejudice or inhibition of any disclosure.
21. With regard to the degrees of likelihood of prejudice the Commissioner has been guided on the interpretation of the phrase 'would, or would be likely to' by a number of Information Tribunal decisions. In terms of 'likely to' prejudice, the Tribunal in *John Connor Press Associates Limited*

² Appeal numbers EA/2006/0011 & EA/2006/0013

*v The Information Commissioner*³ confirmed that 'the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk' (paragraph 15). With regard to the alternative limb of 'would prejudice', the Tribunal in *Hogan v Oxford City Council & The Information Commissioner*⁴ commented that 'clearly this second limb of the test places a stronger evidential burden on the public authority to discharge' (paragraph 36).

22. The record of the qualified person's opinion states that the claimed inhibition and prejudice 'would' occur if the information was disclosed. Therefore, the Commissioner considers that it is appropriate to apply the stronger evidential test.
23. At the Commissioner's request, the council provided a copy of the qualified person's opinion. The Commissioner notes that the qualified person had access to the withheld information and that the officer who wrote the report outlined the reasons why the exemption is engaged. The qualified person also discussed the issue with the Corporate Director of Children and Young People's Service.
24. The reason given for the engagement of the exemption is that in order for officers in the council's strategic planning department to carry out their function they must be able to hold free and frank discussions and draft reports for consultation internally without fear that those initial drafts may be published. The council said it needs the ability to draft initial reports, express opinions and share ideas which could be extremely contentious, and ultimately not progressed. It said that although it appreciates that the fact that a particular course of action was not progressed is not a reason in itself to withhold details of that course of action, it does believe that it should have the ability to disclose such information publicly in the appropriate manner at the appropriate time, for example in the course of the council's official business at meeting of the Executive.
25. The council also said that staff would be concerned if their initial views and drafts were disclosed to the public as soon as they were written, without appropriate quality assurance, which in turn would restrict the candour and frankness of report drafting and therefore limit the quality of the reports. It said that this would clearly have a negative impact on its decision-making process, and possibly the quality of its decisions. It

³ Appeal number EA/2005/0005

⁴ Appeal number EA/2005/0026 & 0030

explained that this especially applies in this case as the closure of educational establishments, which the proposed amalgamation would have involved, is a particularly contentious area and an area where sensitivities run very high. In addition, the council said that it considers that disclosure would potentially impact similar future discussions not solely in relation to education provision but in other areas of the council.

26. Whilst the Commissioner does not accept that those involved in the process will be put off providing views in full, it is not unreasonable to conclude that information would be less descriptive and couched in a more cautious manner. This would then have a harmful effect on the deliberation process in relation to the provision of education in Whitby. The Commissioner finds that the opinion of the qualified person is a reasonable one in this instance and therefore finds that section 36(2)(b)(ii) is engaged.

Public interest test under section 36

27. Section 36(2)(b)(ii) is a qualified exemption and therefore the Commissioner must consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure of the information. The Tribunal in *Guardian Newspapers & Brooke v Information Commissioner & BBC*⁵ indicated the distinction between the consideration of the public interest under section 36 and consideration of the public interest under the other qualified exemptions contained within the FOIA:

“The application of the public interest test to the s36(2) exemption involves a particular conundrum. Since under s36(2) the existence of the exemption depends upon the reasonable opinion of the qualified person it is not for the Commissioner or the Tribunal to form an independent view on the likelihood of inhibition under s36(2)(b), or indeed of prejudice under s36(2)(a) or (c). But when it comes to weighing the balance of public interest under s2(2)(b), it is impossible to make the required judgment without forming a view on the likelihood of inhibition or prejudice.” (Paragraph 88)

28. As noted above, the Tribunal indicated that the reasonable opinion is limited to the degree of likelihood that inhibition or prejudice may occur and thus ‘does not necessarily imply any particular view as to the *severity* or *extent* of such inhibition [or prejudice] or the *frequency* with which it will or may occur, save that it will not be so trivial, minor or

⁵ Appeal numbers EA/2006/0011 & EA/2006/0013

occasional as to be insignificant' (paragraph 91). Therefore, the Commissioner's view is that whilst due weight should be given to reasonable opinion of the qualified person when assessing the public interest, the Commissioner can and should consider the severity, extent and frequency of prejudice or inhibition to the subject of the effective conduct of public affairs.

Public interest arguments in favour of disclosing the requested information

29. The council said that a principal argument in the public interest is facilitating understanding of its decisions, and enabling public participation in those decisions, and that disclosure of information can promote these factors. It added that disclosure of a draft report can show the workings of officers at all stages of the process and promote transparency.
30. It also said that it is mindful of the fact that, although it is possible that a version of the report will ultimately be published as part of the council's routine processes, if the council's decision-making process is not resumed, it is equally possible that no version of the document will ever be published.
31. The Commissioner considers that the 'default setting' of the FOIA is in favour of disclosure. This is based on the underlying assumption that disclosure of information held by public authorities is in itself of value because it promotes better government through transparency, accountability, public debate, better public understanding of decisions and informed and meaningful participation of the public in the democratic process.
32. In this particular case, disclosure would aid transparency as to the reorganisation of secondary education in Whitby.

Public interest arguments in favour of maintaining the exemption

33. The council considers that the public interest favours robust decision making in decisions taken in relation to education establishments, which is dependent on officers being able to exchange views and hold discussions (either in person or in writing) in a free and frank manner.
34. It explained that the request came at a very emotive time on the part of stakeholders and the council has to be mindful of the potential impact of such a disclosure. It said that changes to education provision are always controversial and this particular proposal generated a level of interest unprecedented in recent years therefore it was concerned that disclosure would potentially divert resources from its regular functions by disclosing an unapproved report with unapproved recommendations,

which would have been particularly unproductive as, at the time, the council's decision-making process was suspended.

35. The council also said that it did not consider that the disclosure of this early draft document would promote transparency, accountability or participation in council decision making as the draft had not gone through the usual checks and balances. It explained that the requested information was an initial draft and it is natural for such a document to go through several permutations before being finalised, including being reviewed by the legal services team. It said that the document had not been subject to any sort of quality control or fact checking and that it is difficult to see how the public interest could favour the disclosure of such information which had not been subject to proper review and check.
36. The council explained that a public consultation had already been held by the council which enabled the public to access information and to express their opinion. It said that it had been proactive in publishing information during the consultation process and that, were the council's decision-making process on the matter to be resumed, it would follow its established processes, which include provision for the public participation in the form of attendance at the Executive meeting and potentially a further 28 day representation period if the proposal were advanced. The council said that it was not clear how this disclosure could enhance the quality of discussions or decision-making generally.
37. The council also considered whether the disclosure of this information would assist students/parents plan their education in the future as there was already a substantial amount of information in the public domain to enable parents to make a fully informed decision. It believed that this disclosure could in fact have led to parents/students making decisions about their education based on recommendations contained in the report which may never come to fruition. It said that it appreciates that when disclosing requested information which could potentially mislead the public the best practice recommendation is to provide a disclaimer to that effect, along with any additional explanation but said that it is difficult to see how the public interest could favour the disclosure of a potentially misleading draft report, particularly when the final version may subsequently be subject to publication. It said that regardless of any disclaimer or explanation, human nature is generally to take note of council documents. It further explained that there would be a very real danger that information and recommendations in the document, which had not been subject to a fact checking exercise or legal view would be relied on by parents/student in their decision making around education, which would be potentially detrimental to those young people and could also de-stabilise education provision in the local area.

38. The council expressed concern that the disclosure of the withheld information could prejudice any further consultation on this matter. It said that this rather depends on how long the deliberations of the Regional Schools Commissioner take but it is possible that if the matter is drawn out for more than 12 months, and the application to become an academy is ultimately turned down, the council would have to undertake a second public consultation rather than relying on that which was carried out earlier this year. It is considered that to release the withheld information would potentially prejudice that consultation.
39. Finally, the council submitted that although this matter was of very great interest to a large number of people and organisations in the Whitby area, it is difficult to see how the disclosure of this particular draft report in the circumstances would be of interest to the wider general public.

Balance of the public interest arguments

40. Where, as with this case, a qualified exemption is engaged the information must still be disclosed unless, in all circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing it.
41. Having seen the withheld information, the Commissioner will consider where the balance of the public interest lies. In doing so, she has taken into account the opinion of the qualified person. In accepting that the qualified person has given a reasonable opinion that disclosure would cause the inhibition described, this carries a certain amount of weight through to the public interest test.
42. However, the exact weight that should be given to maintaining the exemption depends on the particular circumstances of the case. This means that while the Commissioner accepts that a reasonable opinion has been expressed that inhibition would occur she will go on to consider the severity, extent and frequency of that inhibition in forming her own assessment of whether the public interest test dictates disclosure.
43. The Commissioner notes that there is a public interest inherent in section 36(2)(b)(ii), that being a prejudice-based exemption, in avoiding harm to the decision making process. She has taken into account that there is automatically some public interest in maintaining this exemption.

44. The Commissioner's guidance on the public interest test⁶ states that arguments in favour of maintaining the exemption must be relevant to the specific exemption as the FOIA provides a right of access to information public authorities hold and the exemptions from that right aim to protect particular, specified interests. Arguments that relate to other exemptions are irrelevant. She notes that the arguments presented at paragraphs 34 (diversion of resources), 37 (danger that information would be relied on by parents/student in their decision making around education) and 38 (prejudice the second public consultation) do not relate to the prejudice the exemption is designed to avoid, that being the free and frank exchange of views for the purposes of deliberation. Therefore the Commissioner's view is that such arguments should not be taken into account when deciding where the balance of the public interest lies.
45. The argument presented in paragraph 33 relates to the concept of a 'safe space'. Public authorities may argue that they need a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction.
46. The Commissioner's guidance on section 36⁷ states that:
- "The safe space argument could also apply to section 36(2)(b), if premature public or media involvement would prevent or hinder the free and frank exchange of views or provision of advice... This need for a safe space will be strongest when the issue is still live. Once the public authority has made a decision, a safe space for deliberation will no longer be required. If it was a major decision, there might still be a need for a safe space in order to properly promote, explain and defend its key points without getting unduly sidetracked. However, this can only last for a short time and the public authority would have to explain clearly why it was still required at the time of the request on the facts of each case. The timing of the request will therefore be an important factor."
47. The Commissioner notes that the decision making process was, and remains, suspended pending the outcome of one of the school's application to become an academy. Therefore although a decision has

⁶ https://ico.org.uk/media/for-organisations/documents/1183/the_public_interest_test.pdf

⁷ https://ico.org.uk/media/for-organisations/documents/1175/section_36_prejudice_to_effective_conduct_of_public_affairs.pdf

not been made on the issue, it may be the case that a decision is never necessary due to the change in circumstances. Furthermore, given the council's explanation that were the decision-making process to be resumed, it would follow its established processes which include provision for the public participation in the form of attendance at the Executive meeting and potentially a further 28 day representation period, rather than relying on the consultation carried out earlier this year, the Commissioner considers that the need for a safe space in relation to the particular withheld information is reduced. Therefore she does not consider that there is a strong safe space argument in relation to the specific information withheld in this case.

48. The argument presented at paragraph 35 is that the information has not been subject to quality control or fact checking and that it is difficult to see how the public interest could favour the disclosure of such information which had not been subject to proper review and check. This appears to encompass the view that the information may be misinterpreted. The Commissioner's aforementioned guidance on the public interest test makes it clear that arguments that the information may be misunderstood are not usually valid arguments for maintaining the exemption. As stated in the guidance this is supported by the comments of the Information Tribunal in Hogan⁸ at paragraph 61:

"While FOIA requires that all the circumstances of the case be considered, it is also implicitly recognised that certain factors are not relevant for weighing in the balance.

First, and most importantly, the identity and, or, the motive of the applicant is irrelevant ...

Second, the 'public interest' test is concerned only with public interests, not private interests.

Third, information may not be withheld on the basis that it could be misunderstood, or is considered too technical or complex."

49. In the Commissioner's view, the council could address the issue by providing an explanation of the limitations of the requested information at the time of disclosure.
50. The argument presented at paragraph 36 includes the view that there is already information in the public domain on the matter. The Commissioner acknowledges that the public interest in the matter is

⁸ Christopher Martin Hogan and Oxford City Council v Information Commissioner EA/2005/0026 and 0030

met, to some degree, by publically available information. However, she acknowledges that there is public interest in being provided with a full picture.

51. The Commissioner has considered the council's submission that although this matter was of very great interest to a large number of people and organisations in the Whitby area it is difficult to see how the disclosure of this particular draft report in the circumstances would be of interest to the wider general public. However, she has also taken into consideration that the council stated that changes to education provision are always controversial and this particular proposal generated a level of interest unprecedented in recent years. She does not consider that the public interest in disclosure is reduced by the fact that the withheld information relates to the Whitby area only as similar decisions are likely to be being made across the country.
52. As noted at paragraph 25, the council said that it considers that disclosure would potentially impact similar future discussions not solely in relation to education provision but in other areas of the council. This relates to the concept of a 'chilling effect'. The chilling effect argument is that disclosure of information 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.
53. However, when considering the public interest, the Commissioner should give such 'chilling effect' arguments appropriate weight according to the circumstances of the case and the information in question. As stated in the Tribunal case *Department for Education and Skills v the Information Commissioner*⁹ and endorsed as a statement of principle in the *Export Credits Guarantee Department High Court case*¹⁰;

"The central question in every case is the content of the particular information in question. Every decision is specific to the particular facts and circumstances under consideration. Whether there may be significant indirect and wider consequences from the particular disclosure must be considered case by case."

54. Having viewed the withheld information, the Commissioner notes that although some of the information isn't entirely anodyne, she couldn't

⁹ Appeal number EA/2006/0006

¹⁰ 2008 EWHC 638

identify significant content that is so candid it would hinder the free and frank provision of advice or exchange of views so severely or so frequently or extensively that would outweigh the public interest in disclosure.

55. Whilst the Commissioner accepts the qualified person's opinion that a 'chilling effect' leading to poorer quality decision making would occur, knowing that information might be subject to future disclosure under FOIA could actually lead to better quality decisions being made. In this case, being aware that the report regarding reorganisation of secondary education in Whitby could be disclosed in response to a FOIA request could ensure that recommendations are thorough and robust which in turn would ensure that future decisions in relation to the provision of education are improved.
56. The Commissioner has considered the public interest arguments presented in this case. She has given due weight to the opinion of the qualified person and has considered the likely extent, frequency and severity of any impact of disclosure on the free and frank exchange of views for the purposes of deliberation in the context of reorganisation of secondary education. She has given weight to the fact that the deliberation process has been suspended. As the council has itself stated, there is clearly a legitimate public interest in the subject of this information and the public, and parents and students in particular, should be expected to have a real and justified interest in the reorganisation of schools in their area and any information that aids their understanding of this. It is possible that disclosure could highlight any flaws in the council's recommendation which could feed into the potential second public consultation, which could then lead to a better recommendation. The Commissioner has concluded that in the circumstances of this case the public interest in maintaining the exemption does not outweigh the public interest in disclosure of the requested information and therefore the exemption at section 36(2)(b)(ii) has been incorrectly applied.

Right of appeal

57. 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

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

58. 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.
59. 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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