

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

Decision notice

Date: 29 November 2016

Public Authority: Middlesbrough Council
Address: PO Box 500
Middlesbrough
TS1 9FT

Decision (including any steps ordered)

1. The complainant has requested a copy of the internal investigation report into the disposal of Acklam Hall. The Commissioner's decision is that Middlesbrough Council has correctly engaged the exemptions at sections 36(2)(b)(i) (inhibition to the free and frank provision of advice), and 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. She has also decided that the exemption at 36(2)(c) (prejudice the effective conduct of public affairs) of the FOIA was incorrectly engaged.
2. The Commissioner requires the public authority to take the following step to ensure compliance with the legislation.
 - Disclose the requested 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 Commissioner understands that allegations were published on social media relating to the sale of the land at Acklam Hall which had generated some negative publicity. The allegations were that the sale

did not achieve value for money alongside suggestions that the deal was not conducted appropriately. As a result, the council's Monitoring Officer of the time undertook a review of the internal decision making processes to examine if the appropriate officer delegations were followed by officers and elected Members. The review culminated into the draft 'Lessons learnt' report which was first requested by the complainant on 7 July 2015 and refused on 4 August 2015 as report was still in formulation stage. A further communication from the complainant requested an update on the information on 21 September 2015 and that request was refused on 2 October 2015, with an internal review maintaining that position on 26 October 2015.

Request and response

5. On 12 February 2016, the complainant wrote to Middlesbrough Council ('the council') and requested information in the following terms:

"It is clear from the response provided in appeal response ref 8812 that more information regarding this matter is in the public domain and that the information provided in your appeal response does not appear to accurately reflect the current position.

Therefore make a fresh request for a copy of the recent and completed internal investigation report into the sale of Acklam Hall."

6. The council requested clarification on 15 February 2016. It said the following:

"As far as I am aware that specific document you requested has never been in the public domain and circumstances in relation to the document have not changed, therefore unless further clarification is received I would be minded to refuse again on the same grounds."

7. On the same day, the complainant provided the following clarification:

"In the appeal letter reference 8812, issued by the council it stated that 'no evidence of any wrong doing was found '. However the Deloittes audit report made available by Middlesbrough Council after this date, now available on the councils website, refers to asset disposal and in particular to Acklam Hall. Their findings do not rest easily against the statement made in the appeal notice 8812, I refer you to pages 24-31 of the Deloittes audit report

Whilst I am aware that I do not need to provide detail as to why I request information I decided to do so that you were of the reasons as

to why I have made a further request for a copy of the internal investigation report into the disposal of Acklam Hall."

8. Having received no response from the council, the complainant requested an internal review on 17 March 2016.
9. On 1 April 2016, the council provided an internal review. It said that the requested report is exempt under regulation 12(4)(e) of the EIR and section 36(2)(b)(c) of the FOIA. It explained the following:

"...it is clear that the report was commissioned and prepared to enable the Council to consider whether, and to what extent, any weaknesses existed in the decision-making process for the land disposal at Acklam Hall or any wrongdoing had taken place (as per the accusations on social media), with a view to establishing appropriate remedies to rectify any weaknesses identified. It is, therefore, clear that the report can reasonably be described as utilising 'thinking room' to seek appropriate remedies, and that its release may inhibit the free and frank provision of advice, or exchange of views for the purposes of deliberation, and may consequently prejudice the effective conduct of public affairs. There was no evidence of wrong doing by any individual, however there were improvements in processes that could be made."

Scope of the case

10. The complainant contacted the Commissioner on 27 May 2016 to complain about the way her request for information had been handled.
11. In its response to the Commissioner's enquiries, the council stated that it wishes to withhold the information under sections 36(2)(b)(i), (ii), and (c) of the FOIA. It explained that the focus of the report was to consider whether the sale complied with its decision-making procedures and ascertain if there was adequate assurance in respect of the sale of the land at Acklam Hall in terms of value for money. It said that there is no consequential link in the report that would have an impact on the conditions of human life or the built environment.
12. The complainant has stated that she is not satisfied that the EIR has any application to the requested report, because the council stated that "it is clear the report was commissioned and prepared to enable the Council to consider whether, and to what extent, any weakness existed in the decision making process for the land disposal at Acklam Hall or any wrongdoing had taken place (as per accusations on social media), with a view to establishing appropriate remedies to rectify any weaknesses identified".

13. Having viewed the requested report, the Commissioner is satisfied that it does not constitute environmental information and that the appropriate access regime is the FOIA.
14. Therefore, the Commissioner has considered whether the council has correctly applied the exemptions at sections 36(2)(b) where disclosure would, or would be likely to, inhibit the free and frank provision of advice, or the free and frank exchange of views for the purposes of deliberation and the exemption at section 36(2)(c) where disclosure would, or would be likely to, otherwise prejudice the effective conduct of public affairs.

Reasons for decision

Section 36

15. 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).
16. In this case the Commissioner is considering the application of the exemptions at sections 36(2)(b) and 36(2)(c).
17. Section 36(2)(b) provides an exemption where 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.
18. Section 36(2)(c) provides an exemption where disclosure would, or would be likely to, otherwise prejudice the effective conduct of public affairs.

Are the exemptions engaged?

19. 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.
20. With regard to the first two criteria, the Commissioner has established that the opinion was given by Bryn Roberts, Monitoring Officer. The Commissioner is satisfied that Bryn Roberts, being the council's Monitoring Officer, is a qualified person for the purposes of section 36(5) of the FOIA.
21. In relation to the third criterion, 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 initial response of 1 April 2016.
22. 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.
23. The Commissioner has also been guided by the Tribunal's indication, in the case *Guardian Newspapers & Brooke v Information Commissioner & BBC*¹, 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.

¹ Appeal numbers EA/2006/0011 & EA/2006/0013

24. 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 v The Information Commissioner*² 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*³ commented that 'clearly this second limb of the test places a stronger evidential burden on the public authority to discharge' (paragraph 36).
25. The council did not confirm whether the claimed inhibition and prejudice 'would or would be likely to' occur if the information was disclosed. Therefore, the Commissioner considers that it is appropriate to apply the lesser evidential test of 'would be likely to'.
26. At the Commissioner's request, the council confirmed that the qualified person was provided with the requested report, the previous request and reasons for refusal which included the previous qualified person's opinions plus a copy of the external auditor Deloitte's report identified by the complainant.
27. The Commissioner notes that the Monitoring Officer's opinion states that the requested report falls within the scope of section 36(2)(b). The reason given for this was that it is clear that the report was commissioned and prepared to enable the council to consider whether, and to what extent, any weaknesses existed in the decision-making process for the land disposal at Acklam Hall, with a view to establishing appropriate remedies to rectify any weaknesses identified and it is therefore clear that the report can reasonably be described as utilising 'thinking room' to seek appropriate remedies, and that its release may inhibit the free and frank provision of advice, or exchange of views for the purposes of deliberation, and may consequently prejudice the effective conduct of public affairs.
28. The council's response to the Commissioner clarified that the requested report is being withheld under the exemptions at sections 36(2)(b)(i), (ii), and (c).

² Appeal number EA/2005/0005

³ Appeal number EA/2005/0026 & 0030

29. In relation to sections 36(2)(b)(i) and (ii), whilst the Commissioner does not accept that those involved in the process will be put off providing advice and 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 provision of advice and the deliberation process in relation to the identification of weaknesses and establishment of appropriate remedies for the council's decision making process. 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) is engaged.
30. The Commissioner's approach to section 36(2)(c) is that this should only be cited where none of the other exemptions in part II of the FOIA are relevant. Because section 36(2)(c) uses the phrase "otherwise prejudice", it means that it relates to prejudice not covered by sections 36(2)(a) or (b).
31. In other words, information may be exempt under both 36(2)(b) and (c) but the prejudice claimed under (c) must be different to that claimed under (b).
32. The Commissioner considers that the qualified person's opinion fails to explain how disclosure would, or would be likely to, otherwise prejudice the effective conduct of public affairs (section 36(2)(c)). She notes that the council's submission in this case states that it has previously experienced a number of negative claims and accusations through draft information and proposals being released that some requesters then use on social media as fact, when in reality those proposals were never agreed or implemented, and that this has a knock on effect in staffing resources having to review information released to explain to others sometimes at a much later date. However, as the Commissioner has not seen evidence that this is the opinion of the qualified person, she does not find that section 36(2)(c) is engaged.

Public interest test under section 36

33. Sections 36(2)(b) 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*⁴ indicated the distinction between the consideration of the public interest under section 36 and consideration of

⁴ Appeal numbers EA/2006/0011 & EA/2006/0013

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)

34. 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 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

35. The council said it recognises there is a general public interest in disclosing information that promotes accountability and transparency and evidence of the decision making processes in order to maintain the confidence and trust of the public and that giving access to this document may further that public trust.

36. The complainant submitted that;

"public interest arguments in favour of disclosure of the report would be likely to include promotion of the general public interest in transparency, accountability, public understanding and involvement in the democratic process; public interest in the issue, which has the potential to adversely affect all council tax and business rate payers, if the Council ought to have disposed of Acklam Hall for "millions"; public interest in disclosing the Report; public interest in transparency where there the Council suspected there was or may have been wrongdoing, but now seem to imply that the disposal of Acklam Hall greatly under value was as a result of incompetence."

37. 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. In this particular case, disclosure would aid transparency as to how the council made a decision regarding the sale of land at Acklam Hall.

Public interest arguments in favour of maintaining the exemption

38. The council said that its senior officers and investigators need private thinking space, or safe space, to take professional advice, and or debate outcomes if they are going to fully explore all aspects of a review or case without fear that their half formed opinions would be reported in the press or enter the public domain. It said that such concerns may hinder the efficient running of a review or investigation or stop those being interviewed being as candid as they may be, or be less likely to undertake free and frank discussions if they believed their comments, thoughts and opinions would be subject to public scrutiny.
39. It also said that disclosure is likely to have a negative impact on the council and the public in that information may be circulated which has not been agreed or properly formulated and prejudice its ability to conduct meaningful debate and thorough investigations. It explained that it has previously experienced a number of negative claims and accusations through draft information and proposals being released that some requesters then use on social media as fact when in reality those proposals were never agreed or implemented and that this has a knock on effect in staffing resources having to review information released to explain to others sometimes at a much later date.
40. The council explained that officers are aware that they may expect their findings to be made public at a later stage when they represent the fully considered conclusions of the review or investigation but not necessarily all the background information.

Balance of the public interest arguments

41. 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.
42. The council informed the Commissioner that the Monitoring Officer's findings and areas for improvement were shared with auditors who were

commissioned by the council to undertake a review of its decision making processes to ensure that any accusations of impropriety were investigated independently and thoroughly. It said that TVVAS (internal auditors), the Audit and Governance Committee and external auditors Deloitte's reports were made public to ensure the public could have the highest level of confidence in the probity and integrity of decision making and that any investigation was thorough and that the findings and improvements from the requested 'Lesson learnt' report were included in these public documents. Therefore it feels that it has released the information that would satisfy the public interest while still maintaining a balance and allow the safe space needed by officers.

43. It confirmed that it feels the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
44. 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 be likely to cause the inhibition described, this carries a certain amount of weight through to the public interest test.
45. 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 be likely to 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.
46. The Commissioner notes that there is a public interest inherent in section 36(2)(b), 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.
47. The argument presented in paragraph 38 relate 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.

48. The Commissioner's guidance on section 36⁵ 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."

49. The Commissioner notes that the requested report is dated August 2015 and although it carries a 'draft' watermark, she understands that the specific internal investigation to which it relates was complete at the time of the request in this case. Therefore she does not consider that there is a valid safe space argument in relation to the particular internal investigation findings requested in this case.

50. The Commissioner acknowledges the council's submission that improvements and actions to improve the recording and monitoring of decisions are still ongoing and still being fully formulated following this review and a corporate peer review which forms part of its Corporate Improvement Plan. However, she understands that such ongoing improvements relate to future decision making rather than the specific internal investigation in this case and therefore she does not consider that a safe space is required in relation to the requested information. In coming to this decision, the Commissioner has also taken into account the council informing her that the wider improvements /recommendations were considered at the Audit and Affairs Committee and this information is in the public domain.

51. The argument presented in paragraph 38 also 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

⁵ https://ico.org.uk/media/for-organisations/documents/1175/section_36_prejudice_to_effective_conduct_of_public_affairs.pdf

advice and deliberation and lead to poorer decision making.

52. The Commissioner's aforementioned guidance on section 36 states that:

"Chilling effect arguments operate at various levels. If the issue in question is still live, arguments about a chilling effect on those ongoing discussions are likely to be most convincing. Arguments about the effect on closely related live issues may also be relevant. However, once the decision in question is finalised, chilling effect arguments become more and more speculative as time passes. It will be more difficult to make reasonable arguments about a generalised chilling effect on all future discussions."

53. In this case, the specific internal investigation was complete at the time that the information was requested therefore the Commissioner does not consider that there is a valid chilling effect argument in relation to this specific information. However, she accepts the qualified person's opinion that disclosure could lead to information relating to internal investigations being less descriptive and couched in a more cautious manner in future. Although the Commissioner recognises that officers have a duty to be open and honest in investigation processes, she acknowledges that where individuals may be seen to be at fault they may take action to minimise their degree of culpability.

54. 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*⁶ and endorsed as a statement of principle in the *Export Credits Guarantee Department High Court case*⁷ ;

"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."

55. Having viewed the withheld information, the Commissioner notes that although some of the information isn't entirely anodyne, she couldn't identify significant content that is so candid it would hinder the free and

⁶ Appeal number EA/2006/0006

⁷ 2008 EWHC 638

frank provision of advice or exchange of views so severely or so frequently or extensively that would outweigh the public interest in disclosure.

56. The Commissioner acknowledges that, as stated in paragraph 42, there is information on this issue in the public domain, and that this goes some way to meeting the public interest in the matter. However, she considers that the requested information is more detailed than the publically available information and there is public interest in being provided with a full picture.
57. The argument presented in paragraph 39 appears to encompass the view that the information may be misinterpreted. The Commissioner's guidance on the public interest test⁸ 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 Hogan⁹ 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."

58. In her view, the council could address the issue by providing an explanation of the limitations of the requested information at the time of disclosure.
59. 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 provision of advice and exchange of views for the purposes of deliberation in the context of an internal investigation. The Commissioner has concluded

⁸ https://ico.org.uk/media/for-organisations/documents/1183/the_public_interest_test.pdf

⁹ Christopher Martin Hogan and Oxford City Council v Information Commissioner EA/2005/0026 and 0030

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) has been incorrectly applied.

Right of appeal

60. 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

61. 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.
62. 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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