

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 24 September 2020

Public Authority: North East Lincolnshire Council
Address: Municipal Offices
Town Hall Square
Grimsby
North East Lincolnshire
DN31 1HU

Decision (including any steps ordered)

1. The complainant has requested from North East Lincolnshire Council ("the Council") information relating to Impower Consultancy's review of local SEND services. The Council refused this request under section 36(2)(c) of the FOIA (prejudice to the effective conduct of public affairs).
2. The Commissioner's decision is that the Council was entitled to rely upon section 36(2)(c) of the FOIA to withhold the requested information.

Request and response

3. On 17 December 2019, the complainant wrote to the Council and requested information in the following terms:

"Earlier this year, the Council engaged the services of Impower Consultancy to undertake an extensive review of local SEND services.

Please provide copies of any reports or communications issued by or to IMPOWER as a result of this consultation, including initial findings, recommendations and cost of the contract."

4. The Council responded on 20 January 2020. It stated that the, *“parent feedback in relation to the Impower Review, which includes initial findings and recommendations, can be found on the Local Offer site: <https://www.nelincs.gov.uk/children-and-families/send-and-local-offer/#1449741658530-08c73c4a-2636>”*. It disclosed the *“attached the feedback for schools in relation to the Impower Review”* and disclosed the cost of the review. However it withheld the requested report citing section 36 of the FOIA (prejudice to the effective conduct of public affairs).
5. On 23 January 2020, the complainant requested an internal review.
6. The Council wrote to the complainant on 13 February 2020 and provided an internal review within which it maintained its original position.

Scope of the case

7. The complainant contacted the Commissioner on 13 February 2020 to complain about the way her request for information had been handled.
8. In her correspondence to the Commissioner, the complainant stated:

“Our local area, North East Lincolnshire, has refused to provide the inspection reports and recommendations from a publicly commissioned SEND (special educational needs and disability) area-wide survey by IMPOWER. It has followed on from almost four years of heightened public interest, parental anger and campaigning. There is a great deal of mistrust, particularly over diagnosis of neurodevelopmental conditions like autistic spectrum and ADHD. Our local diagnostic figures are now published and they are statistically far lower than our neighbours - by less than half. Parents have been petitioning and attending public Council meetings, making representations to Council & CCG Officers on this issue. There is warranted suspicion of wrongdoing, as there has been a historic lack of commissioned ASC specialist assessments which led to extremely low local rates of diagnosis. A Council working party was set up in 2016 to investigate and report back to Council scrutiny with those recommendations (2018). It was anticipated as part of those recommendations that an area-wide review would be undertaken in 2019. There is that clear trail of public concern and involvement, running through various Council meeting minutes. Members of the public i.e. SEND families, were not invited to participate during the IMPOWER consultation, despite their pressure and petitioning. They did not form part of the investigation and were only invited

to attend at public workshops once the consultant, IMPOWER, had formed its recommendations.”

9. The scope of this investigation is to determine whether the Council was entitled to rely upon section 36 of the FOIA in order to withhold the requested information.

Reasons for decision

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

10. The information withheld under section 36 comprises the report referred to in the wording of the information request. The Council has explained to the Commissioner that the purpose of this report was that the Council asked IMPOWER to undertake a review of SEND support.
11. Section 36(2) of the FOIA states that information is exempt from disclosure under the FOIA if, in the reasonable opinion of a “qualified person”, disclosure of the information:
 - (b) 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, or
 - (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.
12. In order to engage section 36(2), it is necessary for a public authority to obtain the opinion of its qualified person (“QP”), which for the Council would be either its Chief Executive or Monitoring Officer. The opinion must be on whether inhibition or prejudice (relevant to the subsection cited) would be (at least) likely to occur as a result of disclosure of the information in question.
13. The Council confirmed that the QP for the purposes of considering the request was Simon D Jones, Chief Legal and Monitoring Officer.
14. Before responding to this request, the Council sought the QP’s opinion on the application of the exemption. The Council has confirmed to the Commissioner that the QP had sight of the withheld information.
15. As part of the Commissioner’s investigation the Council provided to the Commissioner a copy of the QP’s written opinion. The QP’s written opinion shows that he was consulted about the application of section 36,

but not a particular limb of this exemption. The Commissioner is satisfied that the Council identified its correct QP and that an opinion was sought from that individual.

16. The Council also clarified that aside from the QP's written opinion, verbal discussions also took place between the QP and the Assistant Director of Special Projects.
17. In order to make a finding as to whether any of the subsections of section 36(2) are engaged, the Commissioner must consider whether the QP's opinion was a "reasonable" opinion to hold in respect of those subsections which have been cited.
18. It is important to highlight that it is not necessary for the Commissioner to agree with the opinion of the QP in a particular case. The opinion also does not have to be the only reasonable opinion that could be held, or the most reasonable opinion. The Commissioner only needs to satisfy herself that the opinion was reasonable; in other words, that it was an opinion that a reasonable person could hold.
19. The Commissioner will consider all relevant factors to assess whether the opinion was reasonable. These may include, but are not limited to:
 - Whether the inhibition or prejudice envisaged by the QP relates to the specific subsection(s) of section 36(2) that are being claimed. If the prejudice or inhibition envisaged is not related to the specific subsection, the opinion is unlikely to be reasonable.
 - The nature of the information and the timing of the request; for example, whether the request concerns an important ongoing issue requiring the free and frank provision of advice.
 - The QP's knowledge of, or involvement in, the issue.
20. The Commissioner will also consider the level of likelihood of prejudice that has been cited by the QP.
21. In its response to the Commissioner, the Council confirmed that it intended to rely upon sections 36(2)(b)(i) (inhibition to the free and frank provision of advice), 36(2)(b)(ii) (inhibition to the free and frank exchange of views) and 36(2)(c) (other prejudice to the effective conduct of public affairs).
22. The withheld information is in the form of a report dated May 2019 and its related appendix. This report contains information following IMPOWER's review of SEND support. The report outlines the challenges and opportunities regarding services provided and information regarding

the Council's budget. This report discusses in detail the key findings and themes of the review.

23. The second part of the withheld information is the appendix containing the "proposed workplan and recommendations". This explains each workstream plan and sets out any suggested actions.
24. The Commissioner has reviewed the QP's opinion and his reasoning. The Council cited section 36(2)(c), which provides an exemption where disclosure would, or would be likely to, prejudice the effective conduct of public affairs in a way other than specified elsewhere in section 36. The Commissioner's approach is that section 36(2)(c) should be cited only where the prejudice identified would not be covered by any of the other exemptions in Part II of the FOIA. This is explained in paragraph 56 of the Commissioner's published guidance on section 36¹. The Commissioner accepts that it was a reasonable approach for the Council to turn to section 36(2)(c) in relation to prejudice identified by the QP.
25. As to whether the QP's opinion was reasonable on the level of likelihood of that inhibition and prejudice occurring, the QP's opinion was that disclosure of the information "*would*" prejudice the effective conduct of public affairs in the ways specified.
26. The submission advised the QP that prejudice *would* result through disclosure, rather than *would be likely* to result. The approach of the Commissioner in relation to other exemptions in Part II of the FOIA is that she will accept that an outcome *would* occur where this is more likely than not to come about as a result of disclosure. The question here is, therefore, whether it was objectively reasonable for the QP to hold the opinion that prejudice in the manner described in the submission would be more likely than not to come about as a result of disclosure of the information in question.
27. The QP's opinion stated that disclosure *would* prejudice internal discussions at the Council regarding the information contained within the IMPOWER review outcome. The submission to the QP stated that the report needed to be considered internally and decisions made without "*the complications and pressures that external scrutiny would bring*".

¹ https://ico.org.uk/media/for-organisations/documents/1175/section_36_prejudice_to_effective_conduct_of_public_affairs.pdf

28. During the course of this investigation, the Council also provided further arguments to the Commissioner submitted on behalf of the QP. The QP stated that the requested report is only in a draft form and that this report was not finalised or signed off by the consultants, IMPOWER. The Council also said that this report has only been shared with select senior officers. The QP also stated that this report was never intended for publication to a wider audience.
29. Having reviewed the withheld information, the Commissioner accepts that it was reasonable for the QP to hold the opinion that disclosure of this material would result in prejudice to the effective conduct of public affairs. In particular, the Commissioner accepts the QP's reasoning that the Council needed to consider all options and consequences of this review in a closed environment in order to achieve the best outcome. She also accepts the QP's reasoning regarding the effect disclosure may have on the co-operation of third parties when openly engaging with the Council regarding the matters at hand.
30. With this view in mind, the Commissioner has considered whether the opinion of the QP was objectively reasonable; in other words, whether it is an opinion that it is reasonable to hold. In the circumstances of the case, and having reviewed the withheld information, the Commissioner is satisfied that the QP's opinion was objectively reasonable. The Commissioner also notes that the prejudice identified in the submission may not have been covered by any of the other exemptions at Part II of the FOIA and it was therefore appropriate to cite section 36(2)(c). Therefore, her finding is that the exemption provided by section 36(2)(c) is engaged.
31. Since this is a qualified exemption, the Commissioner has considered the balance of the public interest in this case.

The balance of the public interest

32. Having accepted that the opinion of the QP was reasonable, the role of the Commissioner here is not to challenge or reconsider her conclusion on the reasonableness of that opinion. Instead, her role is to consider whether the public interest in disclosure equals or outweighs the concerns identified by the QP.
33. Having found that the QP's opinion was reasonable, appropriate weight must be given to that here. As to how much weight it should carry in the balance of the public interests, the question here is what would be the severity, extent and frequency of the prejudice identified by the QP.

The complainant's view

34. In the complainant's internal review request she argued that the public interest in disclosing the information is greater than the public interest in maintaining the exemption. The complainant referred to petitions which had exceeded 1000 signatures which, *"expressed public concerns about the diagnostic pathways for neurodevelopmental problems such as autism"*. The complainant stated that these issues are of longstanding, heightened public concern and have been raised at public scrutiny meetings by parents.

35. The complainant further argued that the public,

"has a suspicion of wrongdoing on the part of the Local Authority. Parents are publicly complaining that the diagnosis figures of neurodevelopmental conditions are incredibly low and that they are unable to secure an assessment for their children even where symptoms warrant it. This has repeatedly been put to the Local Authority since 2016, and these suspicions have merely been exacerbated by the lack of transparency during the Impower consultation."

36. The complainant acknowledged the Council's argument that it required a safe space to hold open and frank discussions, however she stated that the Council have had ample time for these discussions.

37. She also referred to an Ofsted/CQC Local Area Inspection of July 2018 which on top of the petitions, she argued, demonstrated a recorded, ongoing theme of *"public dissatisfaction threading through the Children And Lifelong Learning Scrutiny meetings in the last few years"*.

38. In terms of timing, the complainant argued that this information/issue, *"may not have been so important five or ten years ago, but accumulating pressure from the public in the last three years favours disclosure at the present point in time"*. She added:

"the pathway has been responsible for identifying a variety of neurodevelopment conditions, including both ASC and ADHD. The Impower consultation also looked at SEND in schools and other wide-ranging services such as health and social care. A good 15%+ of local families are affected by the outcome of the Impower consultation and subsequent policy decisions. I believe it is not in keeping with transparent and accountable government that this information is withheld."

The Council's view

39. In the Council's response to the complainant and to the Commissioner, it set out its public interest arguments. In favour of disclosing the information it stated that it had considered:

- *"The increased confidence and trust the release of the information would give the public.*
- *The increased accountability and transparency disclosure would promote.*
- *The impact that increased scrutiny could have on the issues being discussed."*

40. It took the following arguments in favour of maintaining the exemption into account:

- *"The need to ensure there is a free and frank exchange of views and provision of advice.*
- *The public interest in ensuring that North East Lincolnshire Council can consider all options, including extreme options, and consequences in a closed environment in order to achieve the best outcome.*
- *The need for a 'safe space' for the Council to hold open and frank discussions.*
- *The effect disclosure may have on the co-operation of third parties to openly engage with the Council in discussions."*

41. The Council stated that its primary consideration is to, *"ensure that the report has maximum impact on the development of services. This can only be done if the report can be considered and improvements implemented without the external pressures that release of the information would involve."*

42. The Council stated it had also taken into account that some information has been made available to the requestor and the published information the Council signposted the requestor to includes a summary of some of the findings of the report.

The balance of the public interest: the Commissioner's view

43. The next step is to consider the balance of the public interests. Having accepted that the opinion of the QP that prejudice would result was reasonable, the role of the Commissioner here is not to challenge or reconsider her conclusion on the reasonableness of that opinion. Instead, her role is to consider whether the public interest in disclosure

equals or outweighs the concerns identified by the QP. In forming a view on the balance of the public interests, the Commissioner has taken into account the general public interest in the openness and transparency of the Council, as well as those factors that apply in relation to the specific information in question here.

44. Covering first factors in favour of disclosure of the information, the overall public interest in the matter to which the withheld information relates can be cited in favour of disclosure. As the complainant has argued, there is a strong public interest in the Council's decision-making and policies regarding SEND support services. Disclosure of the withheld information would aid public understanding in the decision making processes following the review of the service and provide the public with confidence in how it intends to respond to any challenges faced by the service and recommendations provided following the review.
45. Turning to factors in favour of maintenance of the exemption, having found that the QP's opinion was reasonable, appropriate weight must be given to that here. It would not be in the public interest to harm the ability of the Council to engage in important internal discussions. As to how much weight this should carry in the balance of the public interests, the question is what the severity, extent and frequency would be of the prejudice identified by the QP.
46. In favour of maintaining the exemption, the Commissioner notes that the QP considers that disclosure would prejudice the Council's considerations of the report and its ability to ensure the report has maximum impact on the SEND support service. The Commissioner considers that the frequency of the prejudice identified by the QP has the potential to be significant as the withheld information does not relate to a one-off event but to a review of an entire Council service and the future of the service. If disclosed, the withheld information could cause frequent prejudice should these matters be subjected to the scrutiny of the general public over any given period of time as the topic affects a large number of the Council area population and is an ongoing service.
47. The Commissioner also considers that the severity of the prejudice identified by the QP would be significant as the withheld information relates to analysis of an entire Council service. The Commissioner's view is that there is a weighty public interest in favour of maintenance of the exemption in order to avoid the frequent and severe prejudice to the effective conduct of public affairs that disclosure would bring.
48. The Commissioner also notes that in its initial response to the request, the Council provided the complainant with a link to the Local Offer website, on which the complainant could access the parent feedback following IMPOWER's review. The Commissioner has reviewed the

information provided on this webpage. From the link provided, the relevant information is under the documents tab and titled 'IMPOWER review – Feedback for parents and carers'. This document contains bullet points of the challenges and recommendations following the review. In this the Council states, "*IMPOWER was a review carried out on behalf of NELC to explore SEND services and identify strengths and key areas for development*". In the Council's initial response to the request it also disclosed to the complainant the cost of the review and it attached the feedback for schools which arose from the review.

49. The Council has disclosed to the complainant both the feedback for parents and the feedback to schools. The Commissioner accepts that, as the complainant has argued, there is a need for transparency as these matters impact a significant number of people and families. However, in disclosing the feedback information to the complainant, the Commissioner considers that the Council has fulfilled its obligation to remain transparent and accountable without compromising its ability to undertake any subsequent decision-making processes.
50. In conclusion, the Commissioner recognises that there is a strong public interest in disclosure as this would aid public knowledge and understanding of the Council's decision making-processes following the review. However, the Commissioner is also of the view that there is a very strong public interest in preserving the Council's ability to respond effectively to the findings of this report, without these discussions and decisions being prejudiced by external disclosure, as stated by the QP. Having accepted that the QP was reasonable to hold the opinion that prejudice would result from disclosure, the Commissioner's view is that this tips the public interest balance in favour of non-disclosure. Therefore, the Commissioner's conclusion is that the public interest in the maintenance of the exemption outweighs the public interest in disclosure and as such the Council was not obliged to disclose this information.
51. In view of this finding on section 36(2)(c), it has not been necessary for the Commissioner to also consider sections 36(2)(b)(i) and (ii).

Right of appeal

52. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

53. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
54. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

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