

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 16 October 2020

Public Authority: Mendip District Council
Address: Cannards Grave Road
Shepton Mallet
Somerset
BA4 5BT

Decision (including any steps ordered)

1. The complainant requested from Mendip District Council ("the Council") information regarding the Council's current Strategic Risk Register. The Council withheld the information under sections 44(1) (prohibitions on disclosure), 43 (commercial interests), 36(2)(b)(ii) and 36(2)(c) (prejudice to effective conduct of public affairs) of the FOIA.
2. The Commissioner's decision is that the Council correctly withheld the information under the exemptions cited. Therefore, the Commissioner does not require the Council to take any steps as a result of this decision.

Request and response

3. In October 2019 the complainant wrote to the Council and requested information in the following terms:

"In accordance the Freedom of Information Act I wish to request the following information.

1. *The type of impact and likelihood matrix (e.g. a 4x4, 5x5 etc) that the Council uses when assessing risks*

2. *Either an electronic copy or link to your Risk Management Strategy and/or Framework and/or Policy*
3. *An electronic copy or link to your current Strategic Risk Register."*
4. On 22 November 2019 the Council responded. It answered question 1 of the request and to part 2 of the request, it provided a copy of the Council's Risk Management Strategy. With regards to part 3, the Council asserted that this document is defined as Exempt Information under Schedule 12A of the Local Government Act (1972) and that this information is therefore exempt from disclosure under section 44(1)(a) (prohibitions on disclosure) of the FOIA.
5. On 10 January 2020 the complainant asked the Council for an internal review into its decision not to provide the information at part 3 of his request.
6. On 30 January 2020 the Council provided its internal review outcome and maintained its original position that the requested information at part 3 of the request is exempt from disclosure under section 44(1)(a) of the FOIA. The Council stated that two further exemptions should have been applied to the request; sections 43 (commercial interests) and 41 (information provided in confidence) of the FOIA. It explained why it considered the exemptions applied within its refusal notice.

Scope of the case

7. The complainant contacted the Commissioner on 7 March 2020 to complain about the way his request for information had been handled. Specifically, the complainant argued the Council's refusal of the information at part 3 of the request, under the exemptions cited, as he believed that the Council had not provided appropriate grounds to refuse the request.
8. During the Commissioner's investigation, the Council withdrew its reliance on section 41 and applied section 36 (prejudice to the effective conduct of public affairs) of the FOIA to the withheld information.
9. The following analysis focuses on whether the exemptions at sections 44(1)(a), 43, 36(2)(b)(ii) and 36(2)(c) of the FOIA were cited correctly to the information at part 3 of the request.

Reasons for decision

Section 44 – Prohibitions on disclosure

10. Section 44 of the FOIA states that:

“(1) Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it –

(a) is prohibited by or under any enactment,”

11. The task for the Commissioner here is, therefore, to consider whether the disclosure of the information requested is prohibited by law; if this is the case, this exemption will apply.

12. Section 44 is an absolute exemption, which means that, if information is covered by any of its subsections, it is exempt from disclosure. It is not subject to the public interest test.

Is disclosure prohibited by or under any enactment?

13. Section 44(1)(a) exempts information if its disclosure is prohibited by other legislation. Such provisions are referred to as statutory prohibitions or statutory bars and they prevent public authorities from disclosing specific types of information.

14. Information is exempt under section 44(1)(a) if its disclosure would breach any of the following:

- primary legislation (an Act of Parliament); or
- secondary legislation (a Statutory Instrument)

15. The position of the Council is that disclosure of the requested information is defined as Exempt Information under Schedule 12A of the Local Government Act (1972)¹ “LGA” and is therefore exempt from disclosure under the provisions of section 44(1)(a) of the FOIA. In this case, the requested information is confidential by virtue of paragraph 3 of part 1 of Schedule 12A to the LGA (1972), namely information relating to the financial or business affairs of any particular person (including those of the Council).

¹ <https://www.legislation.gov.uk/ukpga/1972/70/schedule/12A>

16. The Council said that it had relied on certain statutory provisions and listed these to the Commissioner. The Council also explained that the information requested in this case *"represents a fundamental summary of the key financial and business affairs of the Council, and the risks that face those affairs."* The Council provided the Commissioner with examples of specific financial and business affairs and associated risks.
17. The Council stated that *"in the event that a Council meeting was held in order to discuss or review this document (or information contained within it), the Council would be required by the Local Government Act to prohibit public access to that meeting (and associated documents) due to its nature as exempt information, being a summary of the key financial and business risks facing the Council."*
18. The complainant argued that a Strategic Risk Register is a high level strategic document, unlikely to ever contain information relevant that would be exempt from disclosure under section 44(1)(a) of the FOIA.
19. The Commissioner has reviewed the withheld information and is satisfied that the requested information in this case was subject to a statutory prohibition on disclosure, provided under Schedule 12A of the LGA. Therefore, it is exempt from disclosure under the FOIA by virtue of the absolute exemption at section 44.

Section 43(2) – prejudice to commercial interests

20. Section 43(2) of the FOIA states that information is exempt if its disclosure would or would be likely to prejudice the commercial interests of any person, including the public authority holding it. This is a qualified exemption and is, therefore, subject to the public interest test.
21. The exemption can be engaged on the basis that disclosing the information either *"would"* prejudice commercial interests, or the lower threshold that disclosure *"would be likely"* to prejudice those interests. The term *"likely"* is taken to mean that there has to be a real and significant risk of the prejudice arising, even if it cannot be said that the occurrence of prejudice would be more probable than not.
22. For the Commissioner to accept that prejudice *would* result, she must be satisfied that this outcome would be more likely than not. The Council considered that disclosure of the requested information *"would be likely"* to prejudice its own commercial interests.

23. The withheld information is the Council's Strategic Risk Register ("SRR") 2019/2020. This document consists of risk descriptions, score history and updates. This represents a summary of the risks posed to the Council's ability to operate. It also contains the advice and guidance received on those risks, and the discussion and deliberation of the risks, and the decision made as a result.
24. The Council stated its position that the information within the risk register is commercial sensitive, and would cause prejudice to the interests of both the Council and third parties if disclosed. The Council provided the Commissioner with a list of the information which it considered commercial sensitive.
25. The Council explained that *"the nature of the document is such that it sets out in detail areas of commercial concern for the Council, and how significant the Council considers those risks to be. Knowledge of the Council's internal position on areas of concern is in itself, likely to cause damage to the Council's ability to protect the services it provides from those risks."*
26. The Commissioner accepts on the basis of this reasoning that the information in question is commercial in nature. The next step is for the Commissioner to consider the prejudice which disclosure would or would be likely to cause and the relevant party or parties that would be affected.
27. For Section 43(2) to be engaged three criteria must be met:
 - Firstly, the actual harm which the public authority alleges would, or would be likely to, occur if the withheld information was disclosed has to relate to commercial interests;
 - Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the withheld information and the prejudice to those commercial interests; and
 - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met, meaning whether there is at least a real and significant risk of the prejudice occurring.
28. With regards to the first criterion, the Commissioner accepts that the prejudice envisaged would likely be to the commercial interests of the parties concerned. Therefore, the Commissioner is satisfied that the first criterion is met. This is not to say that she agrees it will happen; simply that the criterion is met.

Likelihood of prejudice

29. The Council argued that disclosure of the withheld information would be likely to harm the Council's business and reputation. It described that the Council is required to identify and manage risks to its services, in doing so, it sets out its areas of concern. The Council said that if these areas of concerns were publicly available, it would more than likely allow third parties to take advantage of that knowledge to either disrupt or seek to benefit from the Council's own internal assessment of areas of weakness.
30. The Council explained that given its significant role in commercial projects, procuring and providing social services, and emergency preparedness, third parties are likely to have significant interest in obtaining confidential information that can be used to their own advantage. As council services can be controversial, the Council said that opponents and competitors can and often seek to undermine services by exerting pressure on commercial or other risk factors.
31. Therefore, the Council considers disclosure of the information is highly likely to result in prejudice to the Council's commercial interests and policy objectives. It added, *"Council decision can often be marginal or carefully balanced."* It said that *"public knowledge of the risks areas where the Council feels exposed, may be sufficient to render projects or plans non-viable."*
32. Having considered the arguments, together with the withheld information, the Commissioner is satisfied that the Council demonstrated that a causal relationship exists between the potential disclosure of the information being withheld, and the prejudice to its commercial interests. Therefore, the Commissioner considers that the second criterion has also been met.
33. Turning to the third criterion, the Council stated that the risks contained within the withheld information – the SRR, are significant as they include planning for certain political events, emergency preparation and major commercial projects. The Council explained that *"in the event that the Council's plans to deal with those significant issues were undermined or defeated, the effect could be very severe. This could manifest as the failure or delay of a major commercial project or contract renegotiation which would have a significant effect on the public purse. Interference with planning for major political events or emergency plans would be an even more serious issues, as it may impinge on the ability of the Council to react quickly and effectively in a crises or business continuity event."*

34. The Council argued that outside of the significant events, disclosure of the information would prejudice its position in its day to day completion of policy objectives, and exercise of its duties and powers in relation to the risks which it has identified. The Council considers that this is more likely to occur and is potentially more of a significant risk to the Council as a result. Therefore, the Council believes that there is likely to be actual harm if the withheld information were disclosed.
35. The Commissioner has considered these details and she believes that the Council has clearly demonstrated that the disclosure of the information, would be likely to have a detrimental impact on its commercial activities; specifically, that the failure or delay of a commercial project or contract would be likely to have an effect on the public purse. The loss of revenue would be likely to occur through a wider loss of confidence in the Council's ability to provide its social services. The Commissioner accepts that this would be likely to prejudice the Council's commercial activities in this area.
36. In light of the Council's submissions, it is clear that disclosing the withheld information could result in the Council's plans and preparations being undermined. The consequences of this could be significant not only to the public purse but to the Council's ability to effectively react in business continuity events or a crisis.
37. Having viewed the withheld information and considered the arguments made, the Commissioner accepts that prejudice to the commercial interests of the Council would be more likely than not to result through disclosure of the information in question. She therefore finds that disclosure would result in prejudice to the commercial interests of the Council and, on this basis, section 43(2) of the FOIA is engaged.

Public interest test

38. Having found that the exemption is engaged, the Commissioner has gone on to consider the public interest factors in favour of disclosing the withheld information and of maintaining the exemption. Although the Commissioner has found the section 43(2) exemption is engaged, the information may still be released if the public interest in disclosing it outweighs the public interest in maintaining the exemption.

Public interest arguments in favour of disclosing the withheld information

39. The Council considers that it is in the public interest for the Council to be open and transparent about its management of risks. It said that the disclosure of the requested information would promote accountability, transparency and scrutiny of the Council's activities. It would enable the public to better scrutinise risks identified by the Council and make their own representations or preparations.

Public interest arguments in favour of maintaining the exemption

40. The Council argued that disclosure of the withheld information would have a number of effects detrimental to the commercial interests of the Council. It said that this would include harm to the relationship between the Council and its partner organisations. Also, reputational damage inhibiting future partnership and commercial relationships between the Council and other parties.
41. The Council argued that disclosure would prevent the inability to implement policy to protect the local authority's constituents from risk. The Council said that disclosure of the information would prejudice the ability of the Council to develop policy and procedures. These, it said, are aimed at protecting its constituents from significant risks, and it argued that it would also prejudice continuity of council services in the event of an emergency. The Council considers that *"the potential impact of this is significant as it could fundamentally impinge on the baseline services provided by the Council."*
42. With regards to competition, the Council said that disclosure would reduce its ability to fairly compete in the private marketplace where it seeks to obtain goods or services to mitigate the risks identified in the SRR, as third parties would have inside knowledge of the Council's concerns and need to purchase.
43. The Council considered reputational damage/loss and argued that disclosure of the withheld information would result in a loss of trust between the Council and its partner organisations, and that this would inhibit the Council's ability to enter into similar commercial agreements in the future. It said that information was provided to the Council in good faith and with the reasonable expectation of commercial confidentiality.

Balance of the public interest

44. The Commissioner accepts that there is a strong and legitimate public interest in the openness and transparency of public authorities with regard to their decision-making processes. This is because it promotes the aims of transparency and accountability, which in turn furthers greater public engagement and understanding of the decisions taken by public authorities.
45. In this case, the information relates to the Council's planning and preparations for certain events and commercial projects. The Commissioner recognises that the complainant has concerns regarding the content of the SRR. Disclosure of the withheld information would provide an insight into the risks identified by the Council, and would reveal the Council's plans and preparations for certain projects. The Commissioner accepts that disclosing the information would allow third parties to take advantage of the knowledge of the Council's areas of concern, and this could lead to either disrupt or seek to benefit from the Council's internal assessment. She is aware that third parties are likely to have significant interest in obtaining confidential information that can be used to their own advantage. Also, the Commissioner accepts that opponents and competitors can seek to undermine the Council's commercial services.
46. The Commissioner considers that there is a strong and inherent public interest in ensuring fairness of competition, and in her view it would be firmly against the public interest if the commercial interests are harmed. She also considers that protecting the Council's ability to operate effectively within a competitive market, by not disclosing information that competitors could use to its commercial disadvantage, outweighs the public interest arguments for the information's disclosure.
47. Given the level of likelihood that commercial harm would occur should the information be disclosed, the Commissioner has decided that the balance of public interests currently favours maintaining the exemption.

Conclusion

48. The Commissioner's conclusion is that the public interest in disclosure of the withheld information is outweighed by the public interest in maintaining the section 43(2) exemption. Therefore, the Council was not obliged to disclose the requested information.

Section 36 – prejudice to the effective conduct of public affairs

49. 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.
50. 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.
51. The Council confirmed to the Commissioner the information on which opinion was sought, and the date the QP’s opinion was given which was on 25 September 2020. The information requested is a copy of the Council’s Strategic Risk Register (“SRR”) as of October 2019.
52. The Council also confirmed that the QP for the purposes of considering the request was David Clark - the Council’s Monitoring Officer. The Council provided the Commissioner with the QP’s opinion, this was that section 36(2)(b)(ii) and section 36(2)(c) of the FOIA are applicable in this case. The Commissioner is satisfied that the Council identified its correct QP and that an opinion was sought from that individual.
53. 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.
54. 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.

55. 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 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.
56. The Commissioner will also consider the level of likelihood of prejudice that has been cited by the QP.
57. The Commissioner has reviewed the QP's opinion and his reasoning. The QP's opinion is that, if the information requested were disclosed, the prejudice and inhibition specified in section 36(2)(b)(ii) of the FOIA would occur. The QP stated that *"Disclosure of the requested information would lead to a reluctance among Members and Officers of the Council to freely and frankly discuss the risks faced by the Council, or offer or obtain advice on those risks. Disclosure would also negatively affect the willingness of partner organisations and third parties to disclose information vital to the remediation of these risks."*
58. It was explained to the Commissioner *"that it is essential the process can be completed robustly and the "hard issues" dealt with so that the SRR is accurate and helpful, and that appropriate policy can be developed as a result. Disclosing the final document that results from that process is likely to significantly impinge upon it."*
59. The QP also considered that this is reasonable in the broader context of the withheld information ("SRR"), as this risk also relates to the live and ongoing issue of Council crisis management planning. The QP stated that he is familiar with and involved in this process. He said that he recognises that this planning and risk analysis process must be able to operate with the benefit of a free and frank exchange of views and advice. He considers that the absence of that, would be detrimental to the review process, the recording of its conclusions and proposed mitigations, and the conduct of public affairs as a result.

60. The QP considers that section 36(2)(c) of the FOIA would be likely to occur for the following reasons. *"Disclosure of the requested information would be likely to expose vulnerabilities that could be exploited by third parties in ways that would negatively impact the Council's ability to effectively conduct public affairs and ensure business continuity, especially in crisis situations. This would harm both the public interest and the ability of the Council to protect its constituents to significant risks to their safety and welfare."*
61. The QP also considered that this is reasonable in the broader context of the withheld information (SRR), as this risk also relates to the live and ongoing issue of Council crisis management planning, and business continuity in difficult times. The QP stated that he is also familiar with and involved in this process. He said that he recognises that this planning and risk analysis process must be able to operate with the benefit of a free and frank exchange of views and advice. He also considers that the absence of that, would be detrimental to the review process, the recording of its conclusions and proposed mitigations, and the conduct of public affairs.
62. Having reviewed the QP's opinion, the Commissioner is satisfied that the inhibition which he envisages relates to the exemption. That is, the QP envisaged inhibition to the need for the Council to have a safe space for the free and frank provision of advice to take place, and to have free and frank discussions. Also, the QP considered that the effective conduct of public affairs would be prejudiced without this review process.
63. The Commissioner's view is that the QP's reasoning covers sections 36(2)(b)(ii) and 36(2)(c) of the FOIA. She is satisfied too that the QP had knowledge of and involvement in the process in question.
64. With regards to the nature of the information and the timing of the request, the Commissioner is satisfied that the SRR consists of discussions and deliberation of the risks posed, and as the final document that results from the process is still ongoing, it was reasonable for the QP to envisage some inhibition and prejudice.
65. As to whether the QP's opinion was reasonable on the level of likelihood of that inhibition and prejudice occurring, his opinion was that disclosure of the information *"would be likely"* to inhibit and prejudice the effective conduct of public affairs in the ways specified. This is a lower level of probability than *"would"*, but one which is still significant.

66. The Information Tribunal in *John Connor Press Associates v Information Commissioner* (EA/2005/0005, 25 January 2006), stated:

"We interpret the expression 'likely to prejudice' as meaning that the chance of prejudice being suffered should be more than a hypothetical or remote possibility; there must have been a real and significant risk."

67. With this view in mind, the Commissioner has considered the opinion of the QP. In the circumstances of the case, and having reviewed the withheld information, the Commissioner is satisfied that it was reasonable for the QP to hold the opinion that inhibition and prejudice relevant to sections 36(2)(b)(ii) and 36(2)(c) would be likely to occur if the information were disclosed.
68. The Commissioner is therefore satisfied that the exemptions at sections 36(2)(b)(ii) and 36(2)(c) are engaged.

Balance of the public interest

69. In considering a complaint regarding the application of the exemptions at sections 36(2)(b) and 36(2)(c), where the Commissioner finds that the QP's opinion was reasonable, she will consider the weight of that opinion in applying the public interest test. This means that the Commissioner accepts that a reasonable opinion has been expressed that prejudice or inhibition would, or would be likely to occur. However, she will go on to consider the severity, extent and frequency of that prejudice or inhibition in forming her own assessment of whether the public interest test favours disclosure.
70. The Commissioner considers that some weight must always be given to the general principle of achieving accountability and transparency, through the disclosure of information held by public authorities. This assists the public in understanding the basis and how public authorities make its decisions and carry out its functions, and in turn promotes trust in public authorities.
71. The Commissioner accepts that there is a public interest in the Council's decision-making processes and how the Council conducts public affairs. In this case, the Council's planning and risk analysis process. Also, on how the Council implements policy to protect the local authority's constituents from risk. The Commissioner recognises an additional public interest in information which demonstrates that the Council is adequately addressing risk, and that it assures the public that action is being taken regarding that risk.

72. With regard to attributing weight to the public interest in maintaining the exemptions, the Commissioner considers that there is a strong public interest in not disclosing the withheld information. She accepts that disclosure poses a risk of having a chilling effect on free and frank exchanges in respect of the Council's decision-making processes. In reaching this view, the Commissioner notes that the Council relies on its relationship of trust with its partner organisations and third parties, such that it can expect free and frank discussions.
73. The Commissioner acknowledges the withheld information consists of commercially sensitive information, and that disclosure is likely to inhibit the Council in its provision of an effective service to its constituents. It is also likely to prejudice free and frank discussion of public officers. The Commissioner considers disclosure could affect the integrity of future discussions which could negatively impact on this collaborative relationship, resulting in third parties becoming reluctant to share information freely and openly with the Council. This would compromise the Council's ability in its decision-making processes, and disclosure of the withheld information would be likely to prejudice the effective conduct of public affairs.

Conclusion

74. The Commissioner has concluded that on balance, in all the circumstances of this case, the public interest in disclosure of the withheld information is outweighed by the public interest in maintaining the exemptions. Therefore, the Council was not obliged to disclose the requested information.

Right of appeal

75. 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

76. 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.
77. 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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