

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 3 August 2021

Public Authority: Ards and North Down Borough Council

Address: Town Hall
The Castle
Bangor
B20 4BT

Decision (including any steps ordered)

1. The complainant requested information relating to an online Book of Condolence opened by Ards and North Down Borough Council (the 'Council') following the death of George Floyd. The Council said it did not hold some of the requested information and refused to provide the remainder, citing section 36, the FOIA exemption for prejudice to effective conduct of affairs. Specifically, it cited 36(2)(b)(ii) for one part of the request and 36(2)(c) for the remaining part. The complainant was only concerned with the Council's reliance on section 36.
2. The Commissioner's decision is that sections 36(2)(b)(ii) and 36(2)(c) are engaged and she finds that the public interest favours non-disclosure of the requested information.
3. The Commissioner does not require the Council to take any steps to ensure compliance with the legislation.

Background

4. The Commissioner understands that the Council agreed to set up a Book of Condolence for Mr Floyd, and due to the Covid-19 pandemic this was made available online.

5. The Council has explained that, at the time of the request, it had no written rules on the moderation of online digital Books of Condolence. Post this request, the Council has developed and published such a policy which is publicly available on its website.¹

Request and response

6. On 16 June 2020, the complainant wrote to the Council via the WhatDoTheyKnow.com website² and requested information in the following terms:

"Recently you put up a book of condolences for George Floyd. On the entry screen it stated that the council would censor the condolence messages.

Under the terms of the FOI Act, I would like to request the following information:

1) The council policy which clearly sets out which rules are applied to the censorship of the contributions

2) a full list of all the rejected condolence messages (the messages - not the name of who made them), a reason for their rejection, and the name of who rejected the comments.

3) minutes of the meeting where the council decided that it would be appropriate for the council to host a book of condolence. However, understandably in this current pandemic, if no meetings were held then I understand this information won't exist

4) copies of all council e-mails relating to the approval of this book of condolence"

7. The Council acknowledged receipt of the request and informed the complainant that there might be a delay in responding due to the impact of the Covid-19 pandemic.

¹ Book_of_Condolence_2020.pdf (ardsandnorthdown.gov.uk)

²

https://www.whatdotheyknow.com/request/book_of_condolence_for_george_fl#incoming-1656129

8. It subsequently apologised for the delay and provided its partial substantive response to parts 1 and 3 of the request on 28 August. The Council explained that as no written rules were in place at the time of the request for moderating online Books of Condolence, it did not hold the information requested for part 1 of the complainant's request. The Council confirmed that no meeting was held and accordingly, no recorded information was held for part 3 of the request. It also said it would respond to the remainder of the request as soon as was possible.
9. On 14 September 2020, the Council responded to the remainder of the request. For part 2, it advised that:

"The Book of Condolence messages not published were deemed unacceptable or irrelevant for inclusion in a Book of Condolence."
10. The Council refused to provide the requested information, citing section 36 of FOIA, the exemption for prejudice to effective conduct of public affairs, specifically section 36(2)(c) for part 2.
11. Additionally, in relation to part 4, the Council told the complainant it had identified three emails in scope between the Council's Chief Executive and two Councillors. It refused to provide them, citing section 36(2)(b)(ii) of FOIA.
12. The Council advised that its Qualified Person had considered the associated public interest tests in respect of both parts 2 and 4 and was satisfied that the requested information should remain withheld.
13. On 18 September 2020, the complainant requested an internal review relating to parts 2 and 4 only of his request, where section 36 had been cited.
14. Following its internal review the Council wrote to the complainant on 13 October 2020. It maintained that section 36 applied to both parts 2 and 4 of the request.

Scope of the case

15. The complainant contacted the Commissioner on 14 October 2020 to complain about the way his request for information had been handled. He told the Commissioner he thought the Council should:

"Provide the information they hold, rather than hiding behind an exemption that is clearly not applicable for questions 2 and 4 as they hold the record of the comments, and as the council have opened this book then they should provide the information, as this clearly was an issue which was going to happen."

16. The Commissioner has considered whether the Council was entitled to rely on section 36 in relation to parts 2 and 4 of the request.

Reasons for decision

Section 36 – prejudice to effective conduct of public affairs

17. The Council has said section 36(2)(c) applies to part 2 of the request and that section 36(2)(b)(ii) is engaged in respect of part 4.
18. Section 36(2) states that information is exempt from disclosure if, in the reasonable opinion of the Qualified Person, disclosure of the information:
- (b) would, or would be likely to, inhibit—*
 - (i) ...*
 - (ii) the free and frank exchange of views for the purposes of deliberation*
 - (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.*
19. Section 36 is a unique exemption within FOIA in that it relies on a particular individual (the 'Qualified Person') within the public authority giving an opinion on the likelihood of prejudice occurring. It is not for the Commissioner to stand in the shoes of that individual and provide her own opinion. The Commissioner's role in determining whether or not the exemption has been correctly applied is to establish that an opinion has been provided by the Qualified Person, assure herself that that opinion is "reasonable" and to make a determination as to whether there are public interest considerations which might outweigh any prejudice.

The Qualified Person's Opinion

20. In the case of this Council, the Qualified Person for the purposes of section 36 of FOIA is Mr Stephen Reid, its Chief Executive.
21. The Council has furnished the Commissioner with copies of the submission that was made to Mr Reid on 7 September 2020, explaining why section 36 applied to the information. There is also correspondence from Mr Reid, dated 11 September 2020, agreeing to adopt that submission as his Opinion.
22. On the evidence available, the Commissioner is therefore satisfied that an Opinion was given by the Qualified Person on 11 September 2020.

Is the Qualified Person's Opinion reasonable?

23. The Qualified Person identified two limbs of the exemption that he believed were applicable to the withheld information; he said that disclosure would be likely to prejudice the free and frank exchange of views for the purposes of deliberation and otherwise prejudice the effective conduct of public affairs.

24. In the Qualified Person's Opinion, disclosure would prejudice the effective conduct of public affairs (part 2 of the request) because:

"The unpublished messages should be withheld as per section 36(2)(c) of the FOI Act on the basis disclosure would prejudice the effective conduct of public affairs. Factors I have taken into account in reaching this decision include:

- The distraction which would be caused to the Council by disclosure of comments deemed unacceptable or irrelevant to be included in a Book of Condolence*
- The diversion of resources in managing the effect of disclosing those comments*
- Publication of the comments would have the opposite effect of the meaning / intention behind opening a Book of Condolence."*

25. Additionally, in the Qualified Person's Opinion, disclosure would otherwise prejudice the free and frank provision of views for the purposes of deliberation (part 4 of the request) because:

"The three identified emails should be withheld as per section 36(2)(b)(ii) of the FOI Act so as to protect the free and frank exchange of views for the purposes of deliberation. Factors I have taken into account in reaching this decision include:

- Disclosure of emails would inhibit the free and frank exchange of views between the Chief Executive and Councillors*
- It removes a safe space within which the Chief Executive and Councillors can communicate which may impair decision making or undermine the integrity of the Council's decision making process."*

26. Section 36 places the Qualified Person's opinion at the centre of exemption. The Commissioner's approach – supported by case law – is that the threshold to establish that an opinion is reasonable should not be a high one. It is not for the Commissioner to substitute her own

opinion for that of the Qualified Person. For an opinion to be reasonable, it need not be the most reasonable opinion available. It need only be within the range of opinions a reasonable person might hold.

27. The Commissioner considers that an opinion is likely to be unreasonable if it fails to explain why the exemption applies to the particular withheld information, if the explanations do not relate to the limb(s) of the exemption that have been cited, or if it seeks to withhold information that is already in the public domain.
28. During the course of the Commissioner's investigation, the Council revisited the list of withheld comments from the online Book of Condolence (part 2 of the request). The Qualified Person submitted the following additional comments specifically in relation to those comments it deemed 'irrelevant' or 'off topic':

"Further to our email in which I advised that Ards and North Down Borough Council's [department details redacted] considered four comments to be irrelevant [list of comments redacted]), the Council's Chief Executive as the Qualified Person, considers that the moderation process regarding Books of Condolence is in place to determine what the Council would appropriately share with a family in grief. The four comments deemed irrelevant / off-topic in this instance are not meaningful and do not portray any clear message from the writers and as such are deemed irrelevant as contributions to a Book of Condolence. The Council considers it should be able to reserve the right to remove comments that are not in the spirit of a Book of Condolence, including irrelevant or off-topic comments; this is out of respect to each grieving family that will receive or can view the Council's Books of Condolence. The Council therefore considers publication of those comments to the world at large would otherwise prejudice the effective conduct of public affairs as disclosure would be contrary to the purpose of the moderation process, it does not align with [sic] original intention behind the decision to open the Book of Condolence and it would be inappropriate to disclose to the world comments excluded from a Book of Condolence on the basis they were deemed irrelevant/off-topic."

29. In this case, the Commissioner accepts that the Qualified Person's Opinion is 'reasonable' in relation to both limbs of section 36 cited by the Council.

Public interest test

30. As the Commissioner has found that sections 36(2)(c) and 36(2)(b)(ii) are engaged, she must next consider whether the balance of the public interest favours maintaining both limbs of the exemption.
31. The Council applied the lower bar that disclosure “would be likely to” cause prejudice to both parts 2 and 4 of the request, meaning that the likelihood of prejudice is less than 50% but is still more than hypothetical.
32. In carrying out a public interest test, the Commissioner must weigh the public interest in preventing the prejudice that she has already decided may occur, against the public interest in disclosure. The lower the likelihood, or the lower the severity, of the prejudice that may occur, the weaker the public interest will be in preventing it from occurring.
33. In line with her guidance on the public interest test³, the Commissioner must consider the situation at the time at which the public authority originally dealt with the request, or the time of the authority’s internal review. Accordingly, in this case, the circumstances to be considered when carrying out the public interest test are those at the time at which the Council refused the request, namely 14 September 2020, and at the time of the internal review, namely 13 October 2020.
34. The Commissioner will first consider the public interest in respect of part 2 of the request; she has viewed all the entries within the Book of Condolence for George Floyd.

Arguments in favour of disclosure – Part 2 of the request

35. In favour of disclosure of the withheld comments from the Book of Condolence for George Floyd, the Council recognised the public interest in disclosure and the importance of the principles of transparency and accountability to assist in better understanding how and why the Council makes its decisions.
36. The complainant did not submit any specific public interest arguments.

³ https://ico.org.uk/media/for-organisations/documents/1183/the_public_interest_test.pdf

Arguments in favour of maintaining the exemption – Part 2 of the request

37. In favour of maintaining the section 36(2)(c) exemption, the Council said:

"However, in regard to this particular request, the Council considers there is a strong public interest in not publishing comments deemed unacceptable or irrelevant as publication would have the opposite effect of the original intention behind the decision to open the book of condolence. There is also a strong public interest in ensuring there is no diversion of resources (particularly within [department details redacted]) to deal with likely additional enquiries regarding the withheld comments, should they be disclosed."

Balance of the public interest arguments – Part 2 of the request

38. The Commissioner accepts that there is a public interest in disclosing the withheld information, particularly in view of the circumstances surrounding Mr Floyd's death. She also accepts the general principles of openness and transparency.

39. The Commissioner notes that the Council has disclosed the reasons why comments were withheld, namely because they were deemed 'unacceptable', 'irrelevant' or 'off-topic'. In her view, this information goes some way to meeting the public interest in disclosure; she accepts that the public would want to know why certain entries have been removed from the online Book of Condolence.

40. However, the Commissioner is mindful that any disclosure under FOIA is effectively a disclosure to the 'world at large'. She must, therefore, balance this against the overall purpose of a Book of Condolence which is to give people the opportunity to express their sympathies and with a view to providing those particularly affected by the death or significant tragedy with some comfort.

41. In this case, the Commissioner cannot see that disclosure of the comments deemed as unacceptable and irrelevant/off-topic would add anything to the public interest. Furthermore, as well as the likelihood of adding to the distress of those grieving Mr Floyd, the Commissioner considers that disclosure of such comments serves to provide a platform for those individuals intent on using the internet to abuse and cause distress to others. Although the Commissioner recognises that distress to grieving individuals is not part of the 'effective conduct of public affairs' exemption *per se*, she is mindful that facilitating those set against utilising the Book of Condolence for the purposes it was created for, would go against the public interest of the effective conduct of public affairs.

42. Additionally, the Commissioner considers that the high profile nature of this particular case is likely to attract significant interest and that the disclosure of irrelevant or unacceptable comments from this Book of Condolence would be likely, therefore, to result in further correspondence and/or other forms of contact which would be a distraction to the Council.
43. The Commissioner supports the Council's view that such a disclosure would result in the Council having to divert its resources to deal with the resulting impact. Additionally, she considers that revealing the name(s) of those Council officers who assessed which comments should be withheld from the Book of Condolence would be likely to result in that individual(s) being subject to disruption. Although the Council has not cited section 40, the exemption for personal information here, the Commissioner considers it likely that section 40 would also apply to disclosure of the name(s).
44. The Commissioner considers that the public interest in not revealing the withheld information for part 2 of the request is stronger than the public interest in disclosure in the circumstances of this case.
45. The Commissioner has therefore concluded that on balance the public interest in maintaining the exemption outweighs the public interest in disclosing the withheld information for part 2 of the request in all the circumstances of this case.
46. The Commissioner has next examined the public interest considerations for part 4 of the request (the emails). The Council has already told the complainant that there are three emails in scope of the request which it is withholding. The Commissioner has reviewed these emails in their entirety.
47. Again, the Commissioner must consider the prevailing situation at the time of the request and or internal review when assessing the public interest.

Arguments in favour of disclosure – Part 4 of the request

48. The Council again said it recognised the public interest in disclosure and the importance of the principles of transparency and accountability to assist in better understanding how and why the Council makes its decisions.
49. The complainant did not submit any public interest arguments for the Commissioner to consider.

Arguments in favour of maintaining the exemption – Part 4 of the request

50. The Council submitted the following in favour of maintaining the section 36(b)(ii) exemption applied to the three emails:

"The Council considers there is a public interest in not disclosing the emails as it is likely to have a chilling effect on free and frank exchange of views between Councillors and the Chief Executive. This would be likely to inhibit the free and frank exchange of views, which would affect the integrity of future exchange of views between the Chief Executive and Councillors, and Council's decision-making process."

Balance of the public interest arguments – Part 4 of the request

51. 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 their decisions and carry out their functions, and in turn fosters trust in public authorities. Disclosure in this case would allow the public to scrutinise the basis on which the decision to open an online Book of Condolence was reached. She is also mindful of the circumstances surrounding Mr Floyd's death and the inherent public interest in this subject matter.
52. The Commissioner understands the Council's concerns relating to disclosure of the requested information are that disclosure would be likely to inhibit the ability of public authority staff and others to express themselves openly, honestly and completely, or to explore extreme options, when providing advice or giving their views as part of the process of deliberation. The rationale for this is that inhibiting the provision of advice or the exchange of views may impair the quality of decision making by the public authority, about which the Council has also expressed its concern.
53. The Commissioner expects Civil servants and other public officials to be impartial and robust when giving advice, and not easily deterred from expressing their views by the possibility of future disclosure. It is also possible that the threat of future disclosure could actually lead to better quality advice.
54. The Council has argued that disclosure would have a 'chilling effect' on the free and frank exchange of views between its Councillors and its Chief Executive. Whether it is reasonable to think that a chilling effect would occur will depend on the circumstances of each case, including the timing of the request, whether the issue is still live, and the actual content and sensitivity of the information in question.

55. In this case, the Commissioner is mindful of the sensitivities of the subject matter surrounding the request and that the associated discussions between the Council's officers are inextricably linked to the death of Mr Floyd. Although the decision to open the online Book of Condolence had been made a few days prior to the request being received, the matter was very much 'live' in terms of the emails being sent and received within days of Mr Floyd's death. Feelings were, understandably, running high in the immediate aftermath of Mr Floyd's death and media attention was high.
56. The Commissioner considers that the public interest is partly met here by the known outcome of the free and frank exchange of views for deliberation ie the Book of Condolence was opened for Mr Floyd.
57. In the circumstances of this case, the Commissioner considers that the public interest in not revealing the withheld information for part 4 of the request is stronger than the public interest in disclosure.
58. The Commissioner has therefore concluded that on balance the public interest in maintaining the exemption outweighs the public interest in disclosing the withheld information for part 4 of the request in all the circumstances of this case.

Conclusion

59. In this case, the Commissioner finds that both sections 36(2)(c) and 36(2)(b)(ii) are engaged to parts 2 and 4 of the request, respectively. She also finds that the public interest test favours non-disclosure of the requested information for both parts of the complainant's request.

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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.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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