

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 18 October 2022

**Public Authority:** Warrington Borough Council  
**Address:** East Annexe  
Town Hall  
Sankey Street  
Warrington  
WA1 1UH

### **Decision (including any steps ordered)**

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1. The complainant has requested Warrington Borough Council (the council) to disclose a letter from Grant Thornton which references various concerns the auditor identified for which it may consider using wider powers. The letter was mentioned during an Audit & Corporate Governance Committee meeting on 22 June 2021. The council refused to disclose the requested information initially citing section 22 of FOIA. At the internal review stage some months later, the council revised its position and refused to disclose the requested information in accordance with section 36(2)(b) and (c) of FOIA.
2. The Commissioner's decision is that the council is entitled to refuse to disclose the requested information under section 36(2)(b) of FOIA. He therefore does not require any further action to be taken.

### **Request and response**

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3. On 27 July 2021, the complainant wrote to the council and requested information in the following terms:

"In connection with the letter that Grant Thornton mentioned at the Audit & Corporate Governance Committee on Thursday 22 June 2021.

Please let me have:

1. A copy of the letter that [name redacted] from Grant Thornton sent to Professor Broomhead about 'various number of concerns', for which the auditor may consider using its 'wider powers'.
2. A copy of any reply from Professor Broomhead to the item above.
3. Any subsequent correspondence about this matter between Professor Broomhead or any other officers.

Please ensure the response is received before the end of the public objection period to the council's 2020/21 accounts."

4. The council responded on 30 July 2021, refusing to disclose the requested information under section 22 of FOIA on the basis that it intended to publish the information at a later date.
5. The complainant requested an internal review on 22 August 2021.
6. The council carried out an internal review on 16 March 2022. It changed its position and advised the complainant that it now considered the requested information was exempt from disclosure under section 36(2)(b) of FOIA.

## **Scope of the case**

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7. The complainant contacted the Commissioner on 21 March 2022 to complain about the way his request for information had been handled. He disagrees that section 36(2)(b) of FOIA applies to the requested information. He stated that the council has failed to confirm who the qualified person is and that their opinion was obtained. Additionally, the complainant considers the circumstances have moved on considerably from the time he initially made the request and the council's internal review response and there is a lesser need for debate and private thinking space.
8. The Commissioner has not had sight of the withheld information in this case. He considers he is able to proceed straight to a decision without it. The Commissioner has considered the council's application of section 36(2)(b) and the following section of this notice will now explain his decision.

## Reasons for decision

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### Section 36 – prejudice to the effective conduct of public affairs

11. 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, prejudice-
    - (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.
9. The council has confirmed to the Commissioner that the qualified person for the council is Mr Matthew Cumberbatch, the Director of Law and Governance. Their opinion was provided on 17<sup>th</sup> February 2022 in connection with a very similar request to the one being considered here.
10. As the council has stated that the two requests are very similar, the Commissioner is satisfied that the council is able to use the qualified person's opinion obtained for one, for both.
11. The council advised that it is the qualified person's opinion that section 36(2)(b) and (c) apply. It stated that disclosure would be likely to inhibit those engaged from freely and frankly offering their advice and views and this could effect its transparency around decision making. In turn, it stated that disclosure would be likely to lead to people not wanting to engage with the council freely and frankly in the future and vice versa and this would have detrimental effects.
12. The Commissioner must first consider whether this opinion is a reasonable opinion to hold. It is important to highlight that it is not necessary for the Commissioner to agree with the opinion of the qualified person 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 himself that the opinion is reasonable or, in other words, it is an opinion that a reasonable person could hold.
13. The Commissioner considers it is a reasonable opinion to hold that disclosure would be likely to prejudice the free and frank provision of advice and the free and frank exchange of views for the purposes of

deliberation. He accepts that it is a reasonable opinion to hold that disclosure would be likely to prejudice the quality of that advice and those deliberations and that this would have a detrimental impact on decision making. He is therefore satisfied that section 36(2)(b) of FOIA is engaged.

14. For section 36(2)(c) to also apply, the council would need to present arguments that demonstrate that disclosure would be likely to, otherwise, prejudice the effective conduct affairs. The Commissioner therefore considers it would need to provide different arguments to those that would be considered to come under section 36(2)(b)(i) or (ii). In this case, the council has not presented any other arguments. Just the need for safe space whilst they deliberate and freely and frankly exchange views, opinions and advice. These appropriately come under section 36(2)(b)(ii).
15. As the council has not presented any arguments to demonstrate why disclosure would be likely to otherwise prejudice the effective conduct of public affairs, the Commissioner does not consider section 36(2)(c) applies.

### **Public interest test**

16. The council advised that it is important to note that the public interest means the public good, not what is of interest to the public, and not the interests of the requester. It argued that it recognised the public interest in openness and transparency of process and furthering the understanding of its business to the wider world. It understood that disclosure would enable the public to understand more clearly the decisions and processes which impact upon council resources and the expenditure of public funds. It agreed that disclosure would facilitate public scrutiny. The council also acknowledged that the subject matter has attracted a lot of public interest.
17. However, the council decided that the public interest rested in maintaining the exemption. It also stated that the auditing process that is underway will provide the necessary scrutiny and accountability in accordance with the statutory framework.
18. The Commissioner considers the public interest test considerations under section 36 of the FOIA require him to consider the extent, severity and frequency of the inhibitions claimed by the public authority.
19. In accordance with the [Upper Tribunal hearing of Brendan Montague vs Information Commissioner and The Department for International Trade \(\[2022\] UKUT 104 \(ACC\)\)](#), the Commissioner considers the competing public interests have to be judged at the date of the council's decision

on the request under Part I of FOIA i.e. the date of the council's decision on a request as set by statutory timeframes for compliance. This means that if a public authority is late in providing a response to the applicant, the time for assessing the public interest is the time when the public authority should have given a response in accordance with the timeframe required by the legislation. It also means that the public interest test does not include the time of the internal review because FOIA does not provide for a statutory review decision making mechanism.

20. The Commissioner recognises the public interest in openness and transparency and allowing members of the public access to information to enable them to understand more clearly any areas of concern, what decisions are being made and why. Disclosure aids public debate.
21. He also acknowledges in this case the subject matter involves the auditing of the council's accounts and where there may be concerns over how public funds have been utilised, there will inevitably be a strong public interest in understanding what those concerns are and what action is being taken.
22. However, in this case the Commissioner notes that the request was made within a month of the Audit & Corporate Governance Committee meeting, where the letter from Grant Thornton to the council about various concerns that may require the use of 'wider powers' was mentioned. At the time of the request the matter was very much live, ongoing and under auditory investigation. Disclosure at the time of the request would be likely to hinder this function and the ability of the council and Grant Thornton to exchange candid, honest and frank advice and deliberation over the concerns identified. This would not be in the wider interests of the public.
23. For the above reasons, the Commissioner has decided that the public interest rests in maintaining the exemption.

### **Other matters**

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24. The Commissioner notes that the council took almost seven months to complete the internal review. Under the section 45 code of practice it is recommended that internal reviews are carried out within 20 working days of receipt. If a request is particularly complex or involves voluminous amounts of information, a public authority is permitted to take longer but no more than 40 working days in total. Seven months is well in excess of the timeframes suggested by the code of practice and is not acceptable. The Commissioner would therefore like to remind the council

of the importance of adhering to the code of practice and ensuring internal reviews are processed in a timely manner in future.

## Right of appeal

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25. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

26. 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.
27. 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

**Samantha Coward**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**