

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

### **Decision notice**

**Date:** **21 February 2024**

**Public Authority:** **Cornwall Council**  
**Address:** **New County Hall**  
**Truro**  
**Cornwall**  
**TR1 3AY**

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

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1. The complainant requested various information regarding the Chief Executive and the Leader of Cornwall Council ('the Council') mentioning the word 'referendum'. The Council provided some information but withheld the rest citing section 40(2) (personal information) and section 36(2)(b)(i) and (ii) and section 36(2)(c) (prejudice to the effective conduct of public affairs). It also confirmed that it had identified all relevant information falling within the scope of the request.
2. The Commissioner's decision is that the Council has not complied with its obligations under section 1(1) FOIA, breached section 10(1) and was entitled to rely on sections 36(2)(b)(i) and (ii) FOIA to withhold the information.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Reconsider the emails identified in the confidential annex attached to this notice, and either disclose them or, to the extent that information is to be withheld, issue a refusal notice in accordance with the requirements of section 17 of the FOIA.
4. The public authority must take these steps 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.

## **Request and response**

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5. On 17 February 2023, the complainant wrote to the Council and requested the following information:

“Please can I have all emails send [sic] to or from the Chief Executive Kate Kennally and the Leader Cllr Linda Taylor mentioning the word “referendum”. Dating from July 1 2022 to today.”
6. The Council responded on 1 June 2023. It provided some information but redacted information under section 40(2). The Council also confirmed that it held additional information which it was withholding by virtue of section 36(2)(b)(i) and (ii) and section 36(2)(c).
7. Following an internal review the Council wrote to the complainant on 13 July 2023. It provided a detailed explanation of how it had determined what information was within the scope of the complainant’s request, and confirmed that it was upholding its reliance on the exemptions specified in its original response.

## **Scope of the case**

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8. The complainant contacted the Commissioner on 2 August 2023 to complain about the way their request for information had been handled. They expressed concerns about the way that the Council had identified the information falling within the scope of the request and whether it had correctly identified all relevant information.
9. The complainant also confirmed that they accepted redactions for personal information of junior members of staff. As the redactions in this case all apply to members of staff below head of department level, the Council’s application of section 40(2) does not therefore form part of this investigation.
10. The scope of the Commissioner’s investigation is to consider whether the Council has complied with its obligations under section 1(1) FOIA and whether it was entitled to rely on section 36(2) FOIA to the bulk of the information.

## Reasons for decision

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### Section 1 – general right of access to information

11. Section 1 of the FOIA states that any person making a request for information is entitled to be informed in writing by the public authority whether it holds information of the description specified in the request and, if that is the case, to have that information communicated to them.
12. In cases where a dispute arises over the amount of information held by a public authority at the time of a request, the Commissioner – following the lead of a number of First-tier Tribunal decisions – applies the civil standard of the balance of probabilities. In essence, the Commissioner will determine whether it is likely, or unlikely, that the public authority holds information relevant to the complainant's request.
13. This will include consideration of the complainant's arguments, and details and evidence of the search conducted by the public authority along with its reasoning as to why it is unlikely that relevant information is held.
14. The Council informed the Commissioner that it went through a number of sifts of potential information before it finalised the information it considered fell within the scope of the request. The complainant accepted the Council's sift from an original potential 1738 page document to 561 pages on the basis that the 1177 pages scoped out referred to local referendums or to other matters not linked to their request.
15. Out of the potential 561 pages, the complainant reclarified their request on 3 March 2023 and what further information the Council could remove from its scope. In accordance with the complainant's instructions the Council removed the following information from the scope of their request:
  - Information they had received in their capacity as Cornwall Councillor.
  - Information that is already known as being within the public domain such as from Member briefings, available on the Council's website.
  - Any and all correspondence to members of local town and parish councils across Cornwall.
  - Correspondence to any members of the public outside of Cornwall Council.

16. This initially reduced the potential number of relevant pages of information from 561 to 140. A more thorough sift based on the complainant's above criteria of what could be excluded, scoped out a further 98 pages giving a final total of 42 pages of information falling within the scope of the request. Of the 42 pages, 17 pages were disclosed to the complainant with redactions for personal information of junior members of staff, with the remaining 25 withheld in their entirety.
17. The complainant has expressed concerns regarding the amount of information they have received out of the 561 pages the Council had identified as potentially in scope of their request in the early stages of its sifting process.
18. The Commissioner has considered the details of the Council's sifting process, and the type of information the complainant confirmed could be ruled out of scope of their request.
19. The Commissioner considers it reasonable that following an initial sift, the Council would remove information relating to local referendums and other matters not linked to the request, and notes that the complainant is not disputing this initial sift.
20. The Commissioner also considers that following the clarification of what could be removed from the scope of their request, it is reasonable that this would reduce the 561 further and he has no reason to doubt the reduction to 140. For completeness however, the Commissioner did review the final 98 documents removed from the scope of the request and found a very small number which he considers fall within its scope. The exact pages have been identified in a confidential annex to this notice.
21. As the Commissioner has found a very small number of pages from the final 98 scoped out by the Council that he considers are within scope, he has no option but to record a breach of section 1(1) FOIA.

### **Section 36: prejudice to the effective conduct of public affairs**

22. Section 36(2) of FOIA provides that information is exempt if in the reasonable opinion of a qualified person (QP), 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 otherwise be likely to prejudice, the effective conduct of public affairs.

23. Section 36(5) sets out who may act as the QP in relation to a public authority. In the case of government departments, any Minister of the Crown may act as the QP.<sup>1</sup>
24. The Commissioner has published guidance on section 36<sup>2</sup> which explains that the QP's opinion does not have to be one with which the Commissioner would agree, nor the most reasonable opinion that could be held. The opinion must be in accordance with reason and not irrational or absurd.
25. The Council confirmed that ordinarily its Monitoring Officer would discharge the QP function. However, for legitimate reasons the Monitoring Officer was unable to attend to that in the context of this request. It explained that since January 2023 when the Monitoring Officer joined the Council, the agreed approach between him and the Head of Legal and Governance was that the latter would, as required, be delegated the Monitoring Officer role by way of diary invites that identified the Head of Legal and Governance as the Monitoring Officer to ensure that there is always someone who had the full responsibility of the Monitoring Officer.
26. The delegation to the Head of Legal and Governance was the natural first choice as he is the second most senior lawyer at the Council after the Monitoring Officer and has previously held Monitoring Officer and Deputy Monitoring Officer roles.
27. The Council confirmed that such a delegation was in place at the time the Head of Legal and Governance discharged the QP function in relation to this request.
28. The Commissioner is satisfied that there is a formal delegation in place for when the need arises in respect of the Head of Legal and Governance and that they gave their opinion in respect of this request that the exemptions were engaged.
29. In order to engage a prejudice based exemption such as section 36, there must be the likelihood that disclosure would, or would be likely to,

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<sup>1</sup> Defined at section 8(1) of the Ministers of the Crown Act 1975 as "the holder of an office in [His] Majesty's Government in the United Kingdom".

<sup>2</sup> <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/section-36-prejudice-to-the-effective-conduct-of-public-affairs/>

cause prejudice to the interest that the exemption protects. In the Commissioner's view, three criteria must be met:

- first, 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 the applicable interests within the relevant exemption;
  - secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and,
  - thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice.
30. The Council provided some background information to the Commissioner. It explained that the matter of the negotiations for a level 3 devolution deal with the Government, and the Government's insistence that a requirement for a level 3 deal was a directly elected Mayor, was a matter of considerable public and political interest.
31. The Council's letter dated 17 October 2023 further explained that a devolution deal for Cornwall was still very much a live issue, albeit as a level 2 deal, and without the distraction of a directly elected Mayor. It added that a level 3 deal had not been ruled out and was likely to be revisited in the not too distant future.
32. Whilst the Council did not explain the details of the devolution deals and their various levels, the Commissioner understands that central government started a new process of English devolution for local government in 2014, negotiating various bespoke deals with groups of local authorities. The main differences between the level 2 and level 3 deals are that whilst the former is not led by a directly elected mayor and less of its functions are devolved, the latter provides more expansive powers and requires the adoption of a mayor either as a directly elected leader of a county council, or as a chair of a combined authority.
33. The withheld information is email correspondence from the specified individuals in relation to the subject matter which is the focus of the request. The QP submission argues that disclosure of the requested information would lead to a reluctance among Members and officers of

the Council to freely and frankly exchange views on matters they are progressing, discuss risks faced by the Council or offer or obtain advice on those issues or risks. Some of the emails have been withheld on the basis of section 36(2)(b)(i) and the remainder under section 36(2)(b)(ii).

Section 36(2)(b)(i)

34. In relation to the emails from the Chief Executive, acting in their capacity as the most senior Council officer, the QP has argued that she was providing advice and assistance to the Leader of the Council, and other interested parties in the confidence that it can be done in a manner that is protective of their respective roles, and which recognises that councils are political entities that over the longer term have a changing political composition and leadership.
35. The QP submission further argued that given the political and reputational significance of the subject matter, it is important that the information is protected. The Council considers that disclosure would inhibit the ability of the Chief Executive to provide robust and critical advice and the organisation's political leadership would be hampered in taking forwards its policies and mandate. The QP submission added that similarly, it is the role of senior officers within the Council to provide advice to the Chief Executive to help inform them on the discharge of their responsibilities.
36. The QP submission further argued that, although Council officers work in an impartial way to make political decisions on the matters of the day, releasing the withheld information could have a detrimental impact on the interaction between Members and officers, and between officers on the basis that it would have an adverse effect on the benefits of a safe space in which to ensure the free and frank provision of advice.
37. Inhibiting the provision of advice may in turn impair the quality of decision making. The Council explained that the issue of a devolution deal for Cornwall was still very much a live matter and the subject of public debate. It added that this would mean senior officers would be discussing the subject matter in detail as the administration moves forward with its devolution plans, but without the 'distraction' of a directly elected Mayor.
38. The submission considered the matter in the narrow context of the request, but also in the context of the wider issue of how political administrations need to be able to develop their policies and strategies without the glare of interference of others.



39. The QP submission concluded that disclosure of the information would or would be likely to inhibit the free and frank provision of advice between the Chief Executive, the Leader of the Council and other senior stakeholders. As the Council has not confirmed which threshold of prejudice it is relying on the Commissioner has opted for the lower threshold of 'would be likely'.

#### Section 36(2)(b)(ii)

40. In relation to this sub-section of the exemption, the Council stated that it is important that political groups are able to have conversations and exchange views around their political position or approach to matters without fear that that becomes available to opposition groups or the public at large.
41. In relation to the correspondence between the Leader of the Council and those in her political bubble, the QP submission argued that discussions between Members are in relation to politically sensitive material. It added, that as the Council was still in discussions in relation to the subject matter, albeit on a level 2 devolution deal as opposed to a level 3 devolution deal, Members with a political allegiance to the Leader should be afforded a safe space to consider their options and discuss and debate issues around this topic without the fear or distraction of disclosure into the public domain.
42. Inhibiting the exchange of views may in turn impair the quality of decision making. The fact that the negotiation of a devolution deal for Cornwall was still very much a live matter would mean members within the Leader's political bubble would be discussing the subject matter in detail as the administration moves forward with its devolution plans.

#### The complainant's position

43. The complainant argued that the Council has placed the need for 'private deliberation' as more important than transparency on such an important matter as how Cornwall is governed.

#### The Commissioner's view

44. The Commissioner accepts that it was reasonable for the QP to consider that there was a need to protect the free and frank provision of advice and the free and frank exchange of views for the purposes of deliberation in respect of the withheld information. The Commissioner also accepts that it is reasonable to argue that officials and members should have a "safe space" to speak candidly and specifically about various options in relation to the proposed devolution deal, particularly as the matter remained live at the time of the request.



45. Having reviewed the withheld information the Commissioner is satisfied that the reasons outlined by the QP fit substantially with the application of sections 36(2)(b)(i) and (ii). The Commissioner therefore accepts that section 36(2)(b)(i) and 36(2)(b)(ii) are engaged in respect of the withheld information.
46. Section 36(2)(b)(i) and section 36(2)(b)(ii) provide qualified exemptions. The fact that anticipated prejudice has been identified and accepted is not in itself conclusive evidence that information should be withheld. Rather, the public authority must consider whether, in all the circumstances of the case, the public interest in maintaining the exemptions outweighs the public interest in disclosure. The Council confirmed that its public interest arguments applied to both sections 36(2)(b)(i) and (ii).

### **Public interest test**

#### Public interest in disclosure of the information

47. The Council recognised that disclosure of the information would increase access to information held and allow scrutiny of its decisions. It would also promote transparency and accountability in terms of the expenditure of public money and upholding standards of integrity.
48. The Council also recognised that disclosure could contribute to the public debate on the issue, increase public participation in decision making, and safeguard the democratic process.
49. It added that it would allow members of the public to potentially be aware of additional considerations and scrutiny that they were not otherwise privy to, as well as ensuring confidence and trust in that process in what has become a subject matter of much public debate and interest.

#### Public interest in maintaining the exemptions

50. The Council informed the Commissioner that it has a Conservative majority and the Conservative Group has therefore formed the administration. The Council added that it has been as open with opposition Councillors as it considers appropriate in relation to the mayoral and devolution issue.
51. The Council further stated that throughout the process the public and the wider Council Membership had access to information about the devolution deal the administration was pursuing and were able to participate in a number of ways, including:

- asking questions at formal meetings of the Cabinet,
  - attending roadshow events where Members and officers explained the proposals and listened to feedback,
  - responding to consultation,
  - accessing information on the Council's website, and
  - observing formal public Member meetings.
52. The Council further argued that disclosure of the information would have a chilling effect on future decisions as it would inhibit free and frank discussions and advice and deliberation. This in turn would lead to poorer decision making.
53. The Council added that the timing of the request was crucial to the public interest as the devolution deal for Cornwall was still very much a live matter being discussed by senior officers in detail as the administration moves forward with its devolution plans. Disclosure of the information in question would hinder any future negotiations relating to this matter.

#### The balance of the public interest

54. The Council argued that the public interest lies in whether the level 3 deal was proceeding, what the requirements were and what the benefits and disbenefits for Cornwall would be. Whilst it accepted that the public might be interested to know what was being discussed behind closed doors, it considers that this is not the same as what is in the public interest. It considers that the balance of public interest is weighted in favour of maintaining the exemption.

#### The Commissioner's conclusion

55. When considering complaints regarding the application of the exemption at sections 36(2)(b) (i) and (ii) where the Commissioner finds that the qualified person's opinion was reasonable, he will consider the weight of that opinion in applying the public interest test. This means that whilst the Commissioner accepts that a reasonable opinion that prejudice would, or would be likely to, occur has been expressed, he will go on to consider the severity, extent and frequency of that prejudice in forming his own assessment of whether the public interest test favours disclosure.
56. 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 how public authorities make their

decisions and carry out their functions, and in turn fosters trust in public authorities.

57. The Commissioner has already accepted that disclosing the information could lead to a reluctance among Members and officers of the Council to freely and frankly exchange views on matters it is progressing, discuss risks faced by the Council or offer or obtain advice on those issues or risks.
58. The Commissioner is mindful that at the time of the request the devolution matter was live and therefore the provision of advice and the exchange of views remained on-going.
59. The Commissioner has also taken into account the Council's comments concerning the political sensitives of the subject matter associated with the request and the need to protect the free and frank provision of advice and the free and frank exchange of views in relation to the devolution matter
60. In the circumstances of this case the Commissioner is satisfied that there is greater public interest in the Council being able to carry out its role robustly, in order to determine its democratic devolution process.
61. As the Commissioner has found that sections 36(2)(b) and (ii) apply to the withheld information and that the public interest favours maintaining exemption, it has not been necessary for the Commissioner to consider the Council's application of sections 36(2)(c) in this case.

## **Procedural matters**

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### **Section 10(1) – time for compliance with request**

62. Section 10 of the FOIA states that, subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.
63. The Commissioner notes that the complainant submitted their request on 17 February 2023 and did not receive a response until 1 June 2023. The Council clearly therefore breached section 10(1) FOIA in its handling of this request for information.

## **Right of appeal**

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64. 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)

65. 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.

66. 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 .....**

**Catherine Dickenson  
Senior Case Officer  
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Wycliffe House  
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SK9 5AF**