

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 February 2024

Public Authority: Cumberland Council
Address: Civic Centre
Carlisle
CA3 8QG

Decision (including any steps ordered)

1. The complainant requested copies of submissions provided to the Independent Remuneration Panel (IRP) for their consideration. Cumberland Council (the Council) refused the request under section 36(2)(b)(ii) (inhibition to the free and frank exchange of views) and section 41 (information provided in confidence) of FOIA.
2. The Commissioner's decision is that the Council was entitled to rely on section 36(2)(b)(ii) of FOIA to withhold some of the requested information.
3. The Commissioner does not require the Council to take any further steps.

Request and response

4. On 7 February 2023, the complainant submitted a request in the following terms:

"I write in reference to the two attached reports by the Independent Remuneration Panel for Cumberland and Westmorland and Furness respectively.

The reports refer to written submissions by political groups, individual councillors and others. They also refer to other background papers and

evidence. Please could you provide all of the submissions and other evidence considered by the panels in reaching their conclusions?"

5. The Council confirmed that it held the information requested, but refused to disclose it on the basis of sections 36(2)(b) and 41 of FOIA. The complainant requested an internal review, following which the Council upheld its original position.

Scope of the case

6. The complainant contacted the Commissioner on 14 August 2023, to complain about the way their request for information had been handled.
7. During the investigation by the Commissioner, some information falling within the scope of the request was disclosed to the complainant. However, the Council continued to withhold some information under sections 36(2)(b)(ii) and 41 of FOIA.
8. The withheld information comprises of a submission to the IRP by each of the two main political parties.
9. Within their request the complainant requested submissions provided by political groups and individual councillors. The Council has confirmed that there was only one submission by an individual Councillor, and that this was in the form of a speech presented at a public council meeting. The Council has confirmed that this submission has been provided to the requester and so it is not covered in the following analysis.
10. Therefore, the scope of the case is to consider if the Council were entitled to apply sections 36(2)(b)(ii) or 41 of FOIA in relation to the withheld information.

Reasons for decision

11. The Council cited sections 36(2)(b)(ii) (free and frank exchange of views for the purpose of deliberation) and section 41 (information provided in confidence) to refuse the request.
12. The exemptions are being applied to the same withheld information, therefore the Commissioner will consider section 36(2)(b)(ii) first and, if this is not engaged, will go on to consider section 41.

Section 36(2)(b)(ii) - the free and frank exchange of views for the purpose of deliberation

13. This section of FOIA states that information is exempt from the duty to disclose:

“...if, in the reasonable opinion of a qualified person, disclosure of the information would, or would be likely to, inhibit the free and frank exchange of views for the purposes of deliberation.”

The qualified person's opinion

14. To find that any part of section 36(2) is engaged, the Commissioner must establish that a qualified person gave an opinion which found that the exemption applied, and also that that opinion was reasonable.

15. The Council confirmed that its qualified person is the Interim Monitoring Officer.

16. The Commissioner is satisfied that the Council's Interim Monitoring Officer is authorised as the qualified person under section 36(5) of FOIA.

Was the opinion reasonable?

17. In determining whether the exemption is correctly engaged, the Commissioner must determine whether the qualified person's opinion was a reasonable one. In determining whether the opinion is a reasonable one, the Commissioner takes the approach that if the opinion is in accordance with reason and not irrational or absurd – in short, if it is an opinion that a reasonable person could hold – then it is reasonable. The qualified person's opinion does not have to be the most or only reasonable opinion that could be held: it only has to be a reasonable opinion.

18. The IRP is an independent panel formed by the Council to recommend a Member scheme of allowances. Having seen the explanation of the qualified person's opinion, the Commissioner is satisfied that the qualified person's opinion was reasonable.

19. There are two main reasons for this. Firstly, representations provided by individuals to the IRP may include sensitive or personal information. The qualified person believed that any indication that such information would be released into the public domain is likely to inhibit those individuals from providing information to the IRP.

20. The second is possible damage to the process. The qualified person believed that it is important that the IRP are able to carry out their role efficiently and effectively and, in order to do this, it needs open and honest representations made to it. Poor quality or a lack of representations would be likely to damage or inhibit its ability to carry out its role effectively.
21. The Commissioner accepts that it was reasonable for the qualified person to be of the opinion that a disclosure of all the submissions to the IRP would be likely to inhibit the free and frank exchange of views for the purposes of deliberation.
22. The Commissioner's conclusion is therefore, that the exemption provided by section 36(2)(b)(ii) is engaged.

The public interest test

23. In considering a complaint regarding section 36, if the Commissioner finds that the opinion was reasonable, the weight of that opinion in the public interest test will then be considered. This means we accept that a reasonable opinion has been expressed that prejudice or inhibition would, or would be likely, to occur but we will go on to consider the severity, extent and frequency of that prejudice or inhibition in forming our own assessment of whether the public interest test favours disclosure.
24. The Commissioner has therefore gone on to consider whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the withheld information.
25. There is a strong public interest in allowing full and frank discussions to take place in order that the panel can provide fully informed recommendations to the Council. If individuals were concerned that their submissions to the panel would be made public, they may be less willing to take part in the process.
26. If individuals felt constrained in submitting their opinions to the IRP, this may harm the panel's effectiveness, leading it to be less able to provide good quality recommendations to the Council and this would not be in the public interest.
27. The IRP is an advisory panel providing recommendations to the Council about the annual allowances paid to members. These recommendations are not binding on the Council.

28. Whilst this advisory status may indicate that the severity, extent and frequency of the inhibition that the qualified person believed would be likely to result is reduced, and hence so is the weight of the public interest in favour of maintenance of the exemption. That the withheld information does not contain anything that has a binding effect upon the Council might also be cited as reducing the weight of the public interest in favour of disclosure.
29. However, the Commissioner is of the opinion that the balance of the public interest lies in favour of withholding submissions provided to the IRP, because doing so will mean it can retain its effectiveness in providing good recommendations to the Council.
30. The Commissioner's conclusion is that the public interest in the maintenance of the exemption outweighed the public interest in disclosure of the withheld information. Therefore the Commissioner's decision is that the Council was entitled to refuse the complainant's request on the basis of section 36(2)(b)(ii).

Section 41 – information provided in confidence

31. The Council applied section 41 of FOIA to the same withheld information. As the Commissioner has found that the Council is entitled to withhold the information under section 36(2)(b)(ii) he has not gone on to consider section 41.

Right of appeal

32. 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

33. 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.
34. 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

Ben Tomes
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