

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 24 January 2024

Public Authority: Devon County Council
Address: County Hall
Topsham Road
Exeter
Devon
EX2 4QJ

Decision (including any steps ordered)

1. The complainant has requested background information relating to a standards committee hearing from Devon County Council ('the council'). The council refused to provide the information, citing section 36(2)(b)(i) and (ii) (prejudice to the effective conduct of public affairs) and section 40(2) (personal data) of FOIA to withhold the information.
2. The Commissioner's decision is that the council was correct to withhold the information under sections 36(2)(b) and section 40(2).
3. The Commissioner does not require the council to take any steps.

Request and response

4. On 16 May 2023, the complainant wrote to the council and requested information in the following terms:

“Please supply copies of all supporting documents related to item 39 in the minutes of Devon County Council Standards Committee which record the proceedings of this committee on 16 March 2023 as per the item details published at

<https://democracy.devon.gov.uk/mgAi.aspx?ID=34039>.

I expect this to include the report of the Devon County Council Assistant Director of Legal Services containing the following items:

- the report prepared for the meeting of DCC's standards committee held on 5 July 2022 regarding this issue, presented in pages 27-126
- the CPS correspondence regarding this issue, presented in pages 127-142
- the correspondence with the subject member, presented in pages 143-176
- the independent person's comments, presented in pages 177-188.”

5. The council responded on 21 July 2023. It applied section 36(2)(b) and section 40(2) of FOIA and withheld the information from disclosure.
6. Following an internal review, the council wrote to the complainant on 25 August 2023. It maintained its position that the information was exempt under the exemptions stated.

Scope of the case

7. The complainant contacted the Commissioner on 26 September 2023 to complain about the way their request for information had been handled.
8. The Commissioner considers that the scope of his investigation is to determine whether the council was correct to withhold the information under the exemptions in section 36(2)(b) and section 40(2) of FOIA.

Reasons for decision

Section 36 – Prejudice to the effective conduct of public affairs

9. The following analysis sets out why the Commissioner has concluded that the public authority was entitled to rely on section 36(2)(b)(i) and (ii) of FOIA to withhold the information from disclosure.
10. Section 36 of FOIA states that information is exempt where, in the reasonable opinion of a qualified person, disclosure would, or would be likely to, prejudice the effective conduct of public affairs.
11. The council applied sections 36(2)(b)(i) and (ii) to withhold information. Arguments under these sections are usually based on the concept of a 'chilling effect'. The chilling effect argument is that disclosure of discussions would inhibit free and frank discussions in the future, and that the loss of frankness and candour would damage the quality of advice and deliberation and lead to poorer decision making.
12. The Commissioner's guidance on section 36¹ states that information may be exempt under sections 36(2)(b)(i) and (ii) if its disclosure would, or 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.
13. The exemptions at section 36 can only be engaged on the basis of the reasonable opinion of a qualified person. The council clarified that the advice of the qualified person was sought and that they provided their opinion in respect of section 36(2)(b)(i) and (ii). The council confirmed that the qualified person at the council is the Director of Legal and Democratic Services and Monitoring Officer. They confirmed that the qualified person had been aware of the circumstances surrounding the request prior to the request being made.
14. The Commissioner is therefore satisfied that a qualified person under section 36(5) of FOIA gave the opinion that the exemption was engaged.

¹ <https://ico.org.uk/media/for-organisations/documents/2260075/prejudice-to-the-effective-conduct-of-public-affairs-section-36-v31.pdf>

15. The qualified person argued that council staff must be able to obtain information, discuss, provide and receive advice and deliberate issues such as code of conduct complaints on a full and frank basis. They considered that if the requested information were to be made public, the council's ability to obtain information, to seek advice and to deliberate matters in a full and frank way would be curtailed in the future. Complainants would be more reluctant to come forward, and officers would feel less able to discuss sensitive issues if their discussions might subsequently be disclosed. As a result, the council's ability to conduct code of conduct complaints and reach fully informed decisions would be curbed.
16. The Commissioner recognises that the issues involved in such cases are often sensitive. There are strong reasons for the standards committee to be able to receive full and frank information in order that it is fully informed about the issues involved when reaching decisions. Any reluctance or hesitation to include sensitive information within the background information used to decide complaints would be likely to make decision-making less informed, and the final decisions therefore less robust.
17. The Commissioner therefore accepts that the qualified persons opinion was reasonable; that there was a need to protect the confidentiality of discussions and deliberations regarding the standards committee hearing. The Commissioner is therefore satisfied that the exemption was engaged correctly.

The public interest test

18. Section 36 of the FOIA is a qualified exemption and is subject to the public interest test. The Commissioner must consider whether, in all of the circumstances of the case, the public interest in the exemption being maintained outweighs that in the information being disclosed. If it does not, then the information should be disclosed despite the exemption being correctly engaged.

The public interest in the information being disclosed

19. The complainant argues that is that the council's decision did not take into account the wider public interest in disclosure. The complainant therefore argues that the requested information should be made public in order to bring to light further details about the committee hearing and its findings.

20. For its part, the council recognised that there is a strong public interest in creating transparency on code of conduct breaches it has identified. It said, however, that in recognising that to be the case, where the Committee finds that the code of conduct has been breached, it publishes details about this in order that the electorate can decide whether to vote for that individual again. It confirmed that this occurred in this instance.

The public interest in the exemption being maintained

21. The qualified person highlighted that there is a strong public interest in protecting the ability of council staff to seek, give and receive advice, and for the issues involved to be presented to the Committee in a full and frank way. The qualified person highlighted that this is a necessity for good government.
22. They argued that a chilling effect would occur as a result of the disclosure of the withheld information, as complainants may be less likely to step forward and provide full and frank statements about events if they believed that the information they were providing may subsequently be disclosed. For the reasons explained above, the qualified person also argued that this would be detrimental to the council's decision-making abilities, and would, overall, prejudice its ability to reach code of conduct decisions on a fully informed basis.

Conclusion of the public interest test.

23. The Commissioner accepts that councillors and officials need a 'safe space' in which to discuss and deliberate evidence, and to provide free and frank advice to the committee in regard to code of conduct complaints. There is a clear risk that a disclosure of such information may have a chilling effect in future such investigations.
24. The information and the deliberations which take place over such issues, may involve sensitive information, which needs to be explained and explored in detail prior to a decision being reached.
25. Disclosing the withheld information in this case may impinge upon the council's ability to provide full and frank advice and to deliberate issues with the required thoroughness, leading to less informed and less robust decisions being reached in the future.
26. The risks of incorrect decisions being made will obviously be greater if the analysis of the details and the evidence cannot occur on a full and frank basis.

27. The Commissioner therefore considers the public interest in protecting good decision-making by the standards committee takes precedence over the public interest in the information being disclosed in this instance.
28. The Commissioner acknowledges the public interest in openness about code of conduct investigations and decisions. However, on balance, there is a stronger public interest in protecting the council's ability to be able to obtain evidence, seek advice, and to analyse and deliberate on all aspects of such cases on a full and frank basis. It is only in this way that the evidence can properly be obtained and considered, and a fully informed decision reached.
29. The Commissioner considers that this ability is of greater public importance in this instance, particularly given the councils position that where breaches of the code are identified, these are published in order that the public is aware of them.
30. Consequently, the Commissioner's decision is that the council was correct to rely on section 36(2)(b)(i) and (ii) of FOIA to withhold the information.

Section 40(2) personal information

31. The following analysis explains why the Commissioner is also satisfied that the public authority was also entitled to apply section 40(2) of FOIA to redact personal data from the information it disclosed.
32. The Commissioner firstly notes that some elements of the information would be likely to fall within the definition of criminal offence data. Criminal offence data is particularly sensitive and therefore warrants special protection.
33. Under section 11(2) of the Data Protection Act 2018 ('the DPA'), personal data relating to criminal convictions and offences includes personal data relating to:
 - (a) The alleged commission of offences by the data subject; or
 - (b) Proceedings for an offence committed or alleged to have been committed by the data subject or the disposal of such proceedings including sentencing.
34. It can only be processed, which includes disclosure in response to an information request, if one of the stringent conditions of Schedule 1, Parts 1 to 3 of the DPA can be met.

35. The Commissioner considers that the only Schedule 1 conditions that could be relevant to a disclosure under FOIA are the conditions at Part 3 paragraph 29 (consent from the data subject) or Part 3 paragraph 32 (data made manifestly public by the data subject).
36. The Commissioner has seen no evidence or indication that the individual(s) concerned have specifically consented to this data being disclosed to the world in response to the FOIA request or that they have deliberately made this data public.
37. As none of the conditions required for processing criminal offence data are satisfied there is no legal basis for its disclosure. Processing this criminal offence data would therefore breach principle (a) and so this information is exempt under section 40(2) of FOIA.
38. As regards the remaining personal information, section 40(2) of FOIA allows a public authority to withhold personal data if one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied. In this case the relevant section is section 40(3A) – would a disclosure of the information contravene any of the data protection principles.
39. In this case the relevant section is section 40(3A); that a disclosure of personal data would contravene one of the data protection principles.
40. The first question for the Commissioner is whether the redacted information is personal data. Primarily, the information relates to the particular individual under investigation. However, it also includes details of complainants and other council staff and officers who have either provided information or taken part in the investigation in some way or other.
41. The Commissioner is therefore satisfied that the requested information is personal data.
42. The next step is to consider whether disclosure of this personal data would be in breach of any of the data protection principles. The Commissioner has focussed here on principle (a), which states:

“Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject.”
43. Personal data is processed when it is disclosed in response to an FOI request. Therefore, the information can only be disclosed if to do so would be lawful, fair, and transparent

44. When considering whether the disclosure of personal information would be lawful, the Commissioner must consider whether there is a legitimate interest in the information being disclosed, and whether that legitimate interest overrides the rights and freedoms of the individuals whose personal information it is. The Commissioner must also decide whether the disclosure is necessary, or whether the legitimate interests identified could be met in another way.
45. The council argues that there is no legitimate interest in the information being disclosed because it has already published details about the committee's decision on a breach of the code of conduct by the individual.
46. The Commissioner accepts this point, but recognises that the complainant, and the wider public, have a legitimate interest in understanding more about what occurred. Councillors are public representatives who play an important role in decision making and democracy; their decisions affect the local community. The public therefore has a legitimate interest in knowing more about councillors' actions in order to reassure themselves that their decisions are taken appropriately and with the best interests of the wider community in mind.
47. Where allegations are made that that councillors have breached the code of conduct, the public therefore has a legitimate interest in knowing and understanding the nature of any complaints made. Greater transparency on the circumstances and the decisions taken would also create greater confidence in the council's decision making as a whole.
48. The Commissioner is therefore satisfied that it would be necessary to disclose the information in order to fully meet the legitimate interests identified.
49. The Commissioner must therefore balance this legitimate interest against the rights and freedoms of the individuals whose data has been withheld.
50. In considering this balancing test, the Commissioner has taken into account the following factors:
 - the potential harm or distress that disclosure may cause;
 - whether the information is already in the public domain;
 - whether the information is already known to some individuals;
 - whether the individual expressed concern to the disclosure; and
 - the reasonable expectations of the individual.

51. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.

Balancing the legitimate interests

52. Having considered the withheld information, the Commissioner has considered whether the condition at section 40(3A)(a) is met as a disclosure of the information would contravene data protection principle (a).
53. He has decided this by assessing whether there is a lawful basis for processing the requested information under Article 6(1)(f) of the UK GDPR.
54. The Commissioner has determined this by balancing the legitimate interest of the complainant against the fact that the individuals concerned would have a reasonable expectation that their information would not be disclosed to the public.
- The central legitimate interest to be met is to create transparency over any breaches of the code of conduct which have been found. The matter has been fully investigated and a breach of the code of conduct has already been decided and the details published.
 - The public has a much lower legitimate interest in knowing about complaints where breaches were found not to have occurred. This would be unfair on the individuals concerned and could lead to unfair reputational damage, despite the individuals being cleared of the allegations made against them.
 - A disclosure of code of conduct complaint details at the level required by the request would not be expected by the individual. They would expect some details of code of conduct complaints to be made public where the committee finds that the code was breached, however their expectation would be limited to the levels of disclosure which the council generally follows in such situations. The information falling within the scope of this request would exceed this level of expectation.

- Because of the level of expectation, and the nature of the allegations, the councillor would be likely to find it distressing if the information was disclosed. As noted above, reputational damage may occur even though the individual was cleared of the allegations.
 - Other individuals would also not expect their details to be disclosed, and there is little legitimate interest in such disclosures taking place.
 - The Commissioner therefore considers that the rights and freedoms of the individuals outweighs the legitimate interests identified.
55. As the Commissioner has concluded that disclosure would not be lawful under Article 6(1)(f) of the UK GDPR, he has not gone on to separately consider whether disclosure would be fair or transparent.
56. The council was therefore correct to apply section 40(2) to withhold the information from disclosure.

Other Matters

57. The Commissioner notes the complainant's purpose in making the request in this case, and recognises that they might argue that there is a special purposes exemption under the DPA which is relevant, and which might allow the disclosure of information in respect of the personal data concerned.
58. However, the relevant test under section 40(2) is whether giving a disclosure to *a member of the public* would contravene the data protection principles. In other words, broadly speaking, FOIA takes no account of who the requestor is, or their motivation in making the request.
59. It is for a data controller, in this case the council, to apply the DPA exemptions in order to disclose the information in response to a request. As it has not chosen to do so, it is immaterial to this case.

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

Ian Walley
Senior Case Officer
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