Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 31 October 2018

Public Authority: Rotherham Metropolitan Borough Council
Address: Riverside House
Main Street
Rotherham
S60 1AE

Decision (including any steps ordered)

1. The complainant requested information from Rotherham Metropolitan Borough Council ("the Council") relating to briefing notes prepared for liaisons or quarterly meetings with local MPs. The Council withheld the information under section 36(2) of the FOIA because it considered that disclosure would prejudice the effective conduct of public affairs.

2. The Commissioner's decision is that the exemption at section 36(2) of the FOIA is engaged in respect of all of the withheld information. However, the public interest favours disclosure of some of the information that has been withheld.

3. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation.

    - Subject to paragraph 96 and 97, disclose the information which has been highlighted in green on the confidential schedule of documents provided to the Council by the ICO with this notice.

4. The Council 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

5. On 3 August 2017, the complainant wrote to the Council to request information of the following description:

> *"Please could you provide copies of all briefings/updates for RMBC's liaison/quarterly meetings with the Rotherham MPs on the below dates* [dates specified]*"*

6. The Council responded on 1 September 2017 and stated that the information was not held.

7. The complainant requested an internal review on 4 September 2017 and explained that some briefing notes could be seen online on a website known as Rotherham Politics.

8. The Council sent him the outcome of its internal review on 28 November 2017. It revised its position and explained that some information which had the potential to be relevant to his enquiry had been identified; specifically, it stated: *"the documents held by RMBC and which fall within the requested information, appear to be briefing papers prepared by officers prior to meetings with local MPs during the relevant period."* The Council explained that it was withholding the information under section 36(2) of the FOIA because disclosure would be prejudicial to the effective conduct of public affairs.

Scope of the case

9. The complainant contacted the Commissioner on 19 December 2017 to complain about the way his request for information had been handled.

10. The Commissioner is aware that the Council, at certain stages in responding to the request and during the investigation, appeared to consider that some of the bundle of information may have fallen outside the scope of the request because it could not be sure whether any or all of the withheld documents were actually provided to the MPs and discussed at the relevant meetings.

11. In responding to the request, as stated above, the Council stated that the information *"appeared to be briefing papers"* but that it did not hold a record to be able to determine whether the information contained in the documents was actually shared at the meetings, or to confirm who actually attended the meetings.

12. In correspondence with the Commissioner, the Council has stated: *"We have no record to clearly or confidently state that the MPs were made aware of these documents"*.

13. The Commissioner has addressed the issue of whether the withheld information was actually provided to MPs for discussion, further on in this notice. However, she does not accept that this lack of certainty is a reason to consider that some of the information is out of scope.

14. The request was for *"briefings/updates for RMBC's liaison/quarterly meetings with the Rotherham MPs"*. The Commissioner considers that the wording of the request covers information which was prepared, or collated, for the meetings, regardless of whether the relevant matters were discussed at those meetings.

15. The Council provided the Commissioner with a bundle of information; it is clear from the titles of some of the documents that they have been prepared for discussion at the relevant meetings. The Council has not specified any particular documents which it considers were not prepared for this purpose.

16. The Commissioner has therefore considered whether the Council has correctly withheld all of the information in the bundle provided to her under section 36 of the FOIA.

Reasons for decision

Section 36(2) – Prejudicial to the effective conduct of public affairs

17. Section 36(2) provides that information is exempt if in the reasonable opinion of the qualified person, disclosure-

    (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 be likely otherwise to prejudice, the effective conduct of public affairs.

18. In this case, the Council has withheld the information requested by the complainant under all three limbs of section 36(2): sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c). It considers that all three limbs apply to all of the withheld information.

19. For the exemption to be engaged, the proper qualified person for the public authority must have given his or her opinion on the application of the exemption, and the opinion must be reasonable.

20. In this case, the Council's Director of Legal Services and Monitoring Officer, Mr Dermot Pearson, provided the opinion. The Commissioner is satisfied that the Council's Monitoring Officer is the qualified person for the purposes of section 36, and so this element of the exemption is met.

21. The Commissioner has issued guidance on section 36 of the FOIA. With regard to what can be considered a 'reasonable opinion' it states the following:

> *"The most relevant definition of 'reasonable' in the Shorter Oxford English Dictionary is 'In accordance with reason; not irrational or absurd'. 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."*

22. It is important to note that, when considering whether section 36 is engaged, the Commissioner is making a decision not on whether she agrees with the opinion of the qualified person, but whether it was reasonable for him or her to reach that opinion.

23. Mr Pearson gave his opinion, which is dated 23 November 2017, that sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) were engaged. In other words, he gave his opinion that disclosing the information would be likely to inhibit the free and frank provision of advice, the free and frank exchange of views for the purposes of deliberation, and otherwise prejudice the effective conduct of public affairs.

24. The Commissioner has considered whether it is reasonable for the qualified person to hold the view that the prejudice relates to all of the cited three limbs of section 36(2).

25. In this case, the withheld information comprises notes, reports and correspondence, dated between 2012 and 2016 inclusive. The information covers a broad range of topics.

26. The Council has provided the Commissioner with a record of the Qualified Person's opinion which shows that his considerations took place between 20 and 23 November 2017. The record shows that the withheld information was both described and shown to Mr Pearson.

27. Mr Pearson therefore was aware of the nature and contents of the withheld information.

28. The qualified person's opinion may be summarised as comprising two main parts. Firstly, Mr Pearson was of the opinion that the Council could not be sure whether any or all of the information was ever provided to the MPs or discussed at the relevant meetings, and he considers that disclosure may be misleading to the public. Secondly, his opinion was that disclosure of the information would prejudice the ability to share information in a 'safe space'. These opinions are set out in greater detail, and considered, below.

29. The record of the qualified person's opinion states that there is a *"lack of certainty about which information was shared in the meetings and which was not* [which] *means that it is not clear how subsequent decisions or actions on the part of the local authority could be tracked back to specific meetings"*.

30. The record continues: *"There are no minutes taken at the meetings in question and therefore there is no record of whether the planned meetings actually occurred. Furthermore, if the meetings did occur we do not know i) what was discussed, ii) who attended,* [or] *iii) what documents, if any, were used"*.

31. The Council expanded on this reasoning in correspondence with the ICO, commenting:

> *"The release of this information may… misinform the public, as the content may have the potential to conflict against current policy and procedures (based on officer documents that may never have been finalised or agreed for discussion)… RMBC does not hold the information necessary to determine whether the information contained within the briefing documents was actually shared with MPs or to confirm who attended the individual meetings."*

32. The Commissioner considers that this line of argument is relevant to section 36(2)(c), since it is concerned with a general prejudice to the effective conduct of public affairs, rather than relating either to the exchange of views or to the provision of advice.

33. With regard to Mr Pearson's second argument, the Commissioner notes that he stated that disclosure of the documents would be likely to *"inhibit the discussion of important issues between the Council and the local MPs* [and] *the provision of advice by MPs to the Council"*. Explaining that *"the meetings also provide the opportunity for free and frank exchange of views for the purpose of deliberation"*, he argues that *"it is likely that the Council and MPs would not engage in discussion and deliberation about important issues if the documentation is likely to be disclosed… the process is continual and allows the local authority to test*

its ideas with the local MPs as stakeholders". This is known as the 'safe space' argument.

34. The Commissioner considers that this line of argument is relevant to subsections 36(2)(b)(i) and 36(2)(b)(ii) of the FOIA, since it concerns the likelihood of prejudice both to the free and frank provision of advice, and to the free and frank exchange of views.

35. The Commissioner must therefore consider whether, in relation to all of the withheld information, it is reasonable for the qualified person to consider that disclosure would be likely to be prejudicial in the ways specified, based on his view firstly that it would be misleading for the public to gain the impression that local MPs were fully appraised of any or all of the contents of the briefing notes, and secondly the 'safe space' argument.

36. In the Commissioner's view, the withheld information in this case is unusual in that it is extremely broad-ranging, both in terms of dates and the contents.

37. The information comprises notes on a wide variety of topics, prepared both by external individuals and by council officers, depending on the subject matter. They have apparently been prepared, or collated, for consideration at forthcoming meetings with local MPs, and the Commissioner is aware that there would not have been an expectation of disclosure into the wider world. The notes are intended to provide some background information and relevant facts and figures about the various matters, with a view to the issues being discussed and progressed at the forthcoming meetings.

38. The Commissioner has considered the qualified person's first argument. As explained previously, she considers that this is relevant to the exemption at section 36(2)(c) and not to the other two cited limbs of section 36(2). Regardless of whether or not the quarterly meetings took place, who attended them and whether the matters contained in the briefing notes were discussed, as explained in her guidance[1] on the public interest test, the Commissioner considers it irrelevant for a public authority to argue that information is *"misleading… because it consists of notes reflecting only part of a discussion or because it may be inaccurate or out of date."*

[1] https://ico.org.uk/media/for-organisations/documents/1183/the_public_interest_test.pdf

39. The guidance explains that this is because the FOIA *"provides a right to information that public authorities hold; it does not require that information to be complete, accurate or up to date."*

40. The guidance also goes on to explain that a public authority *"should normally be able to publish some context or explanation with the information it releases"* which in this case would mitigate the risk of the public drawing misleading conclusions from the contents of the information.

41. As explained previously, the Commissioner's view is that the withheld information falls within the scope of the request. In line with her guidance, she expects a public authority to be able to publish the information with mitigating explanations.

42. She does not, therefore, consider that the disclosure of the information should lead to the public being misled (although there may be a remote possibility of this), as the qualified person has claimed, since the risk of this can be mitigated.

43. The Commissioner therefore does not accept that the qualified person's opinion regarding lack of certainty about whether the briefing notes were ever produced for discussion with MPs at the relevant meetings, and any consequent possibility of misleading the public was reasonable and for this reason, she does not find that the exemption at section 36(2)(c) is engaged.

44. She has then considered the qualified person's second opinion. This relates to the need for a public authority to be able to discuss and formulate ideas and actions in a 'safe space' and away from public scrutiny. The qualified person considers that individuals preparing or collating the briefing notes would be likely to feel restricted as to what to include if the notes were routinely made public, since there may be a number of different reasons why specific parts of the information could be confidential or exempt from disclosure. In turn, any forthcoming discussions between council officers and MPs may be restricted.

45. The Commissioner has considered whether this concern relates to the possibility of prejudice being caused in the ways specified in subsections 36(2)(b)(i) and 36(2)(b)(ii), and whether it is reasonable for the qualified person to have concluded that disclosure of the information would be likely to lead to this prejudice.

46. The Commissioner accepts that the nature of the prejudice claimed relates to the disclosure of the withheld information. The contents of the notes inform the subject matters for discussion at the quarterly meetings and may also inform future decisions and actions.

47. She considers that it is reasonable for the qualified person to have concluded that disclosure would be likely to affect the free and frank provision of advice and the free and frank exchange of views for the purposes of deliberation.

48. The Commissioner has also considered the timing of the request. She notes that the dates specified in the request; that is, the dates of the quarterly meetings which the briefing notes were prepared for, ranged from April 2009 to March 2017. The majority of the information located by the Council covers the period from 2014 onwards.

49. The Commissioner therefore considered whether the age of some of the information may make it less reasonable for the qualified person to conclude that there is a risk of prejudice as described in section 36(2).

50. However, with regard to this, the qualified person argued that the process of preparing notes for meetings is *"continual"* and that he had considered whether *"future discussions between the local authority and the local MPs would be less candid if the briefing materials, whether used or not, were to be subsequently made public*", concluding that they would.

51. The Commissioner agrees that the risk of prejudice is ongoing. She is therefore satisfied that the qualified person's opinion is reasonable with regard to the timing of the request.

52. In summary, the Commissioner is satisfied that it was reasonable for the qualified person to reach his opinion that the disclosure of the requested information 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. She therefore has determined that the exemptions at sections 36(2)(b)(i) and (ii) are engaged.

53. Sections 36(2)(b)(i) and 36(2)(b)(ii) are qualified exemptions and the Commissioner therefore considered the public interest test in the disclosure of the information, balancing the public interest in disclosure against the public interest in maintaining the exemption.

The public interest test

54. The Council has presented certain public interest arguments, which are considered in the analysis below. The complainant did not provide specific arguments, but the Commissioner is aware that he considers that the briefing notes should be in the public domain, in the interests of transparency.

55. As the Commissioner's guidance on the public interest test explains, there is always a public interest in ensuring that a public authority's

statutory obligations are carried out in a transparent manner and consistently with its published policies.

56. Section 36(2), however, is a prejudice-based exemption, which means that the information may be exempt due to the likelihood of harm to a particular interest (in this case, the free and frank provision of advice and free and frank exchange of views). The Commissioner has accepted above that it is reasonable for the qualified person to have the opinion that this prejudice would be likely to occur as a result of disclosure of the requested information. There is a public interest in avoiding that outcome.

57. In other words, when considering complaints about the application of section 36 in cases where the Commissioner finds that the qualified person's opinion is reasonable, she will also consider the weight of that opinion in applying the public interest test. She will consider the severity, extent and frequency of the likely prejudice or inhibition in assessing whether the public interest test dictates disclosure.

The withheld information

58. The information withheld by the Council is very broad-ranging. This is to be expected, since any local council has a very large number of day-to-day areas of responsibility, including such areas as financial planning, the environment, employment matters, and safeguarding vulnerable persons.

59. The Commissioner has determined, as set out above, that it is reasonable for the qualified person to form the opinion that disclosure of any of the information may be prejudicial in the ways specified.

60. In order to consider the public interest in disclosure, the Commissioner's approach has been to categorise the information according to its age and/or its apparent sensitivity. This has led her to consider the public interest of the disclosure of the information in two groups.

61. The Commissioner has provided the Council with a schedule of documents on which she has indicated some information by highlighting it in green. The highlighted information comprises a number of whole documents, and extracts from document 4 as numbered on the schedule (specifically, items 5 and 7 from that document).

62. This schedule of documents prepared by the Commissioner is, necessarily, confidential.

63. The Commissioner has considered, separately, the public interest in the disclosure of the information not indicated on the confidential schedule

in green ("the unhighlighted information") and also in the disclosure of the information which is highlighted ("the highlighted information").

The unhighlighted information

64. The unhighlighted information covers a broad range of issues and ranges in date from 2012 - 2016 inclusive.

The Council's arguments

65. The Council has acknowledged that disclosure of the information would promote transparency in public affairs.

66. However, in the Council's view, the public interest in maintaining the exemptions outweighs the arguments in favour of disclosing the information.

67. The Council has explained that the purpose of the meetings is to enable the sharing of information between itself and local MPs.

68. The qualified person's view is that the Council needs a 'safe space' for deliberation and for sharing matters of current importance. It has argued that disclosure of the information would be likely *"to inhibit the discussion of important issues between the Council and local MPs which is important for the MPs to carry out their roles"* and would be likely *"to inhibit the provision of advice by MPs to the Council about important local issues."*

69. The Council argues that the briefing notes contain information that is intended for discussion purposes only, and which pre-dates any specific outcome(s) being determined and/or implemented or any formal decision-making process.

70. The Council has explained that the process of meeting MPs every quarter is *"continual"* and that accordingly it considers that *"future discussions between the local MPs would be less candid if the briefing materials, whether used or not, were to be subsequently made public."*

Balance of the public interest – the unhighlighted information

71. There is always a public interest in a public authority conducting its business in a transparent manner, enabling the public to be better informed on how decisions are made. In addition, the Commissioner may attach considerable weight to this argument where it appears that the information has become less sensitive due to age, and/or relates to matters which have been completed.

72. However, the Commissioner also considers that there is a strong public interest in public authorities being able to obtain free and frank advice, exchange views freely and frankly, and conduct its public affairs effectively.

73. In cases where a public authority has withheld information under section 36(2) of the FOIA, the Commissioner, as explained previously, also considers that the qualified person's opinion, if found to be reasonable, will affect the weight of the public interest arguments. She has already determined in this case that the qualified person's opinion that the information should not be disclosed is a reasonable opinion, and this attaches some weight to this side of the argument.

74. However, the Commissioner will also go on to consider the severity, extent and frequency of the prejudice or inhibition, which the qualified person considers would be likely to occur, in forming her own assessment of whether the public interest test dictates disclosure.

75. With regard to frequency, the Commissioner notes that the briefing notes were not drafted as an isolated occurrence, but rather are part of a continual process for the Council in preparing materials for discussion. The possibility of inhibition would therefore be likely to arise with some frequency, as further notes are likely to be prepared. The Commissioner accepts that this lends some weight in favour of maintaining the exemptions.

76. With regard to the extent and severity of the likely prejudice, the Commissioner notes that the unhighlighted information includes some sensitive information; for example, concerning the safeguarding of vulnerable persons.

77. The Commissioner is aware that there is considerable public interest in understanding what actions the Council has taken regarding matters which may be sensitive or high-profile.

78. However, weighed against this is the fact that, in her view, the severity and extent of prejudice would be likely to be significant if the notes were made public, since the Council is likely to feel inhibited in future when considering whether to produce materials on sensitive topics as a basis for discussion, if the notes were routinely made public

79. She also notes that some of the unhighlighted information relates to 'live', ongoing matters.

80. She notes that there may also be a number of other exemptions to disclosure which the Council would need to consider if the briefing notes in this category were intended for publication, such as third party

personal data, or prejudice to commercial interests, which may also have an inhibitive effect on those individuals preparing the notes.

81. She is aware that the complainant is seeking to understand Council policy and the processes which have led to decision-making, and part of her role is to promote transparency in public office.

82. However, with regard to the unhighlighted information, the Commissioner has determined in this case that the balance of the public interest arguments is in favour of maintaining the exemptions, and that the briefing notes should not be disclosed.

The highlighted information

83. The highlighted information covers a broad range of issues and ranges in date from 2011 to 2016 inclusive.

Arguments in favour of disclosing the information

84. As previously stated, the Council has acknowledged that disclosure of the information would promote transparency in public affairs, and the Commissioner attaches considerable weight to this argument where it appears that information has become less sensitive due to age, and/or relates to matters which have been completed.

Arguments in favour of maintaining the exemptions

85. The Council did not present separate arguments in respect of the highlighted information, despite the Commissioner inviting its views. She therefore understands that the Council considers that the same risk of prejudice is likely to occur to its internal processes as is outlined above, due to the 'safe space' argument.

Balance of the public interest – the highlighted information

86. The Commissioner considers that some weight attaches in favour of maintaining the exemptions due to the reasonableness of the qualified person's opinion.

87. She is also aware of the argument at paragraph 75 above which explains that notes of this type are prepared with some frequency.

88. However, as explained above, she will also consider the severity and extent of the likely prejudice or inhibition in forming her own assessment of whether the public interest test dictates disclosure, on a case by case basis.

89. With regard to the highlighted information, the Commissioner considers that, in this case, it comprises information of a non-sensitive nature and/or is often several years old.

90. She does not consider that the information relates to matters which are live or ongoing except in the most general sense. For example, reviewing the impact of benefit changes: the Council will still be addressing this area, but it will be in relation to more recent changes in policy or legislation rather than to matters covered directly in the withheld information.

91. For this reason, the Commissioner considers the risk of prejudice from the disclosure of the highlighted information to be remote.

92. She has determined that the balance of the public interest lies in the disclosure of the withheld information which has been highlighted in green on the confidential schedule.

93. She therefore orders the Council to disclose this information to the complainant, subject to paragraph 96 and 97, below.

94. The Commissioner has considered whether the highlighted information contains the personal data of any individuals, and if so, whether it would be fair to disclose that data, in line with her approach to the relevant data protection legislation.

95. She is satisfied that most individuals' names which appear on the documents are those of senior figures whose names are in the public domain in connection with the relevant matters. She does not, therefore, believe it is necessary for these names to be withheld from disclosure.

96. However, documents numbered 45, 63 and 82 on the confidential schedule, which are part of the highlighted information, include the name of the individuals that have, respectively, prepared the reports; it is not clear that these individuals' names and contact details are in the public domain, nor that they have played any role in the Council's discussions or decision-making processes. The Commissioner does not consider that it would be fair to disclose the personal data of these two individuals and the Council should therefore redact that information prior to disclosure.

97. The footer on document 21 also contains the name of an individual. The individual is not an employee of the Council and has not consented to the disclosure of his name; therefore, the Commissioner does not consider that it would be fair for the footer to be disclosed with the remainder of the document and it should be redacted.

Other matters

98. The Council initially responded to the complainant within 20 working days, as is required by the FOIA. However, it took 60 working days to respond to the complainant's request for an internal review. While the FOIA does not establish a statutory requirement for a public authority to conduct an internal review, they are referred to in the section 45 Code of Practice and the Commissioner considers that it is best practice for one to be carried out within 20 working days from the date of the request for a review, and that in no case should the total time taken exceed 40 working days. She would remind the Council to carry out internal reviews in a timely manner.

Right of appeal

99. 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: 0300 1234504
    Fax: 0870 739 5836
    Email: GRC@hmcts.gsi.gov.uk
    Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

100. 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.

101. 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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