

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 October 2021

Public Authority: Cheshire West and Chester Council
Address: 58 Nicholas Street
Chester
CH1 2NP

Decision (including any steps ordered)

1. The complainant has requested correspondence between Cheshire West and Chester Council (the council) and a publicly owned company, Edsential, regarding its decision to implement the local living wage to employees of the company. The council refused the request on the basis that the exemptions in sections 36(2), 42, 43(2) and section 44 applied.
2. The Commissioner's decision is that the council was correct to apply section 36(2) to withhold the information from disclosure.
 - The Commissioner does not require the council to take any steps

Request and response

3. On 16 January 2020, the complainant wrote to the council and requested information in the following terms:

"I am seeking any and all written documentation relating to the Edsential (Council company) pay award for 1st April 2019 and the (probably) subsequent decision to pay Edsential staff at least the Local Living Wage from 1st July 2019.

This request covers correspondence, including e-mails, reports, written notes of conversations and notes of meetings relating to this issue."
4. The council responded on 12 March 2020. It applied the following exemptions to withhold the information:
 - Section 36 – Prejudice to the Effective Conduct of Public Affairs
 - Section 42 – Legal Professional Privilege
 - Section 43 – Commercial Sensitivity
 - Section 44 – Other Prohibitions
5. Following an internal review, the council wrote to the complainant on 7 July 2020. It apologised for providing information outside of the 20 working days required by section 10(1) of the FOIA but confirmed that it was continuing to rely upon the exemptions claimed in its initial response.

Scope of the case

6. The complainant contacted the Commissioner on 7 August 2020 to complain about the way his request for information had been handled.
7. He considers that the council was wrong to withhold the information under the exemptions it has claimed. He recognises that the council may need to redact some legal advice, or sensitive commercial information, however he believes that the remainder of the information should have been disclosed to him.
8. The Commissioner has considered the application of section 36(2) to withhold the information. Given her decision on this exemption she has not found it necessary to consider any of the other exemptions applied by the council.

Reasons for decision

Background to the case

9. The complainant is seeking information regarding a decision to pay the local living wage (the 'LLW') to employees of a publicly owned company, Edsential, which is 50% owned by the council and 50% owned by Wirral Borough Council (WBC).
10. The council had committed to paying all of its staff the local living wage; however, the complainant argues that shortly prior to announcing this point, on 14 March 2019 a councillor made strong arguments to the committee that paying the LLW was unaffordable in the case of Edsential. The complainant states, however, that there was then a change in the council's position and he found out in June 2019, that the LLW was to be implemented in the company as from 1 July 2019.

Section 36 – prejudice to effective conduct of public affairs

11. The council applied section 36(2) to withhold the information. Section 36(2)(b) and (c) provide that –

"Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-

(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."

12. Section 36 can only be engaged if, in the reasonable opinion of the qualified person, disclosure would result in any of the effects set out in section 36(2) of the Act.
13. The council clarified that the qualified person in the council is the Director of Governance and Monitoring Officer at the council. She is the qualified person under the provisions of section 36(5)(o)(iii) of the FOI Act: *any officer or employee of the public authority who is authorised for the purposes of this section by a Minister of the Crown.*

14. The council provided evidence that the qualified person's opinion was sought on 10 March 2020, and that the opinion was provided on the same date.
15. The Commissioner is therefore satisfied that the qualified person's opinion was properly sought and obtained for the purposes of the application of section 36.
16. The next step in determining whether the exemption is engaged is to consider whether the opinion of the qualified person is reasonable. The Commissioner's guidance explains that the opinion does not have to be one which the Commissioner would agree with, nor the most reasonable opinion that could be held. The opinion must be in accordance with reason and not irrational or absurd.
17. The Commissioner would emphasise that section 36 is concerned with the processes that may be inhibited by disclosure of information, rather than what is in the information itself. The issue is whether it was reasonable for the qualified person to hold the opinion that disclosure of the information would, or would be likely to, inhibit the processes of providing advice or exchanging views (section 36(2)(b)) or would otherwise be likely to prejudice the effective conduct of public affairs (section 36(2)(c)).
18. In *Information Commissioner v Malnick and ACOBA [2018] UKUT 72 (AAC), the Upper Tribunal (UT)* found that the First Tier Tribunal (FTT), in finding that section 36 was not engaged in EA/2016/0055, had erred in law by taking into account matters of public interest when deciding whether an opinion of the qualified person was reasonable for the purpose of section 36(2), which is concerned with substantive but not procedural reasonableness. The decision on the issue of reasonableness cannot therefore take any wider public interest factors into account.
19. The withheld correspondence can broadly be described as correspondence between the council staff internally and between the council's and Edsential. The qualified person provided reasons why she considers that the exemption applies.
20. The qualified person considered that a disclosure would enable the requester to gain information regarding the discussions between senior officers at the council and senior staff at Edsential. She considered that these discussions were held confidentially, as officers within the council and the council's partners required 'free thinking space' for a range of issues.

21. The council, in its response to the complainant, stated that its reasons for the exemption being applied were that disclosure *would be likely* to:
- Inhibit the free and frank exchange of views between individuals involved in the discussions around a pay review for Edsential staff. She argued that the council is entitled to discuss information on sensitive or confidential matters without fear that those discussions will be disclosed to the public.
 - Prejudice the procedural aspects of future discussions or decisions if individuals are concerned that their identity and/or their free and frank exchange of views in relation to the complex issues being discussed, including their recommendations, and how these recommendations may be implemented are made public.
 - Prejudice the effective conduct of public affairs by making it difficult for officers to act on future concerns if there is no trust in their free and frank exchange of views being protected. The information concerns comments or views from officers and councillors from not just Cheshire West and Chester but also other councils and companies. She argued that putting this information in the public domain would inhibit council officers or these third parties from exchanging information or including ideas as solutions in the future.
 - Disclosure is likely to have a 'chilling effect' on decision-making in future if officers feel inhibited when sharing advice and information. This would inhibit future discussions and lead to poorer quality decision-making.

The Commissioner's analysis

22. 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 herself that the opinion is reasonable, or, in other words, it is an opinion that a reasonable person could hold.
23. The Commissioner has focussed on subsections 36(2)(b)(i) and (ii), so whether it was reasonable for the qualified person to be of the opinion that disclosure would be likely to cause inhibition to the free and frank provision of advice or to the free and frank exchange of views.

24. She accepts that it is reasonable for the qualified person to consider that there was a need for a safe space to deliberate upon the issues as they developed. She also considers that it was reasonable to consider that that protection should last beyond the initial decision-making period as the sensitivity of that information was still high and the detrimental effects envisaged would still have been relevant at the time of the request, albeit that at that point the decisions had been taken.
25. The process which the qualified person is referring to as needing to be protected under section 36 is the process of being able to discuss and debate sensitive issues, such as staff salaries, away from the public eye. It is also that sensitive information should be able to be withheld whilst it retains its sensitivity.
26. Having reviewed the withheld information the Commissioner is satisfied that the reasons outlined by the qualified person fit substantially with the application of section 36(2)(i) and (ii,). She is also satisfied that the qualified person's opinion, that inhibition relevant to those subsections would be likely to occur through disclosure of the withheld information, is reasonable. The Commissioner's conclusion is, therefore, that the exemption provided by section 36(2) is engaged.

The Public Interest

27. As a qualified exemption, section 36 is subject to a public interest test. Having accepted the opinion of the qualified person is reasonable, the Commissioner must consider whether the public interest in maintaining the exemption claimed outweighs the public interest in the information being disclosed.
28. The test, set out in section 2(2) of the Act, is whether in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

The public interest in the disclosure of the information

29. The council noted that there is a general level of expectation that public authorities will act transparently where it is appropriate to do so, and that there is a strong public interest in that being the case.
30. The complainant argues that the council switched its position from considering that implementing the local living wage for Edsential employees was unaffordable to implementing exactly that within a very short period of time, and it has not explained how or why it has been able to do that.

31. He argues that there has been a lack of proper scrutiny over the pay issue and of Edsential itself. He also argues that there is a lack of transparency as to the business plans of Edsential, thereby making it unclear whether the previous concerns about affordability were correct. More widely, he argues that this calls into question whether the council is serious about its commitment to implement the local living wage for its employees.
32. He argues that disclosure would highlight the *"role of councillors and council officers in addressing with this particular company the Council's broader commitment to adoption of and implementation of the Local Living Wage. These actions can then be tested against the Council's public commitments. I see no reason why the Council should not be accountable in relation to its public commitment to implement the LLW or be able to hide behind commercial confidentiality when it does not exist, and behind public interest – when the real public interest lies in these processes being open to effective scrutiny."*
33. The Commissioner also notes that the decision affects the spending of public money, and therefore the resources available to the council and Edsential at a time where all local council's resources are limited.
34. The Commissioner recognises that there is a strong public interest in allowing the public to know the reasons why decisions are taken which will impact upon council resources and where public money is being spent. Edsential is a company partly owned by the council, and operating in a commercial environment to deliver services.

The public interest in the exemption being maintained

35. The council considered the following factors supported the exemption being maintained:
 - The council is entitled to receive confidential advice on sensitive or confidential matters from officers without fear that the advice will be disclosed to the public – disclosure would impact on officer's willingness to engage in free and frank discussions about complex issues if those views were subsequently made public.
 - It is vital that the council maintains confidentiality of internal discussions in order to maintain employee confidence that their advice is kept confidential. If the council were to disclose advice from officers, this would undermine the confidence that employees have in the council keeping their independent views confidential.

- The information is still recent and current. Disclosing this information is likely to inhibit officer's ability to conclude any present or future related actions.

The Commissioner's analysis

36. The Commissioner has considered the above arguments, and has had sight of the withheld information. The Commissioner acknowledges the public interest in openness, transparency, and accountability and how access to public information enables members of the public to understand more clearly how decisions are reached by public authorities. Disclosure aids public debate, and in this case, it would highlight the reasons behind an apparent change in policy in the council's decision over the local living wage being paid to Edsential employees.
37. Whilst the complainant argues he wishes to test the commitment of the council to introducing the local living wage, it is noted that the request follows a decision by the council to introduce the LLW as regards Edsential.
38. Turning to factors in favour of maintaining the exemption, having found that the qualified person's opinion was reasonable, appropriate weight must be given to that here. It would not be in the public interest to harm the ability of the council to engage in important internal discussions. As to how much weight this should carry in the balance of the public interests, the question is what the severity, extent and frequency would be of the prejudice identified by the qualified person.
39. The Commissioner considers that there is a strong public interest in the exemption being maintained. She accepts that disclosure poses a strong likelihood of having a chilling effect on free and frank exchanges in respect of the Council's decision-making and analysis processes as regards information of a sensitive nature, such as discussions surrounding salary awards.
40. The Commissioner acknowledges the withheld information consists of sensitive information, and that its disclosure would be likely to inhibit the Council's ability to discuss analyse and make decisions on issues of this nature in the future. At the time of the request, the decision had just been made, and the information was still relevant and sensitive; it was still 'live' information.

Conclusion of the public interest test

41. Having considered the public interest test above, together with having sight of the withheld information, the Commissioner is satisfied that the public interest in this case rests in the exemption being maintained. The council was not, therefore, obliged to disclose the information requested by the complainant.

Right of appeal

42. 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

43. 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.
44. 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
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