

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 1 October 2007

Public Authority: South Tyneside Council
Address: Town Hall and Civic Offices
Westoe Road
South Shields
Tyne and Wear
NE33 2RL

Summary

1. The complainant asked the Council for information which it held about the Tyne and Wear Anti-Fascist Association ("TWAFa"). In its response the Council provided to the complainant most of the requested information, but redacted the names and contact details of TWAFa staff and organisations associated with it. In doing so, the Council cited the exemptions contained in sections 38(1)(a) and (b), and section 40(2) of the Freedom of Information Act ("the Act"). The Council also withheld four internal emails which it considered to be exempt under section 36 of the Act. Following the Commissioner's intervention, the Council identified further relevant information, which it later provided to the complainant after redacting the personal details of TWAFa staff. The Commissioner has decided that sections 36, 38 and 40 are engaged, and that the public interest lies in favour of maintaining the exemptions. However, he has concluded that the Council failed to comply with section 1(1) of the Act as the complainant was not informed of all information held about TWAFa until a further search was carried out at the request of the Commissioner.

The Commissioner's Role

2. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Act. This Notice sets out his decision.

The Request

3. Having refined an earlier information request, on 22 February 2005 the complainant wrote to the Council requesting the following information:

'All information concerning South Tyneside Council and the Tyne & Wear Anti-Fascist Association, income and expenditure, grants and communications, within the last five years.'

4. On 23 March 2005 the Council wrote to the complainant enclosing copies of the requested documents. The Council stated, however, that certain information which identified individuals had been withheld under the exemption provided by section 40 of the Act. In addition, identifying information relating to some organisations had been redacted under section 38 of the Act. In doing so the Council had applied the public interest test and had concluded that the information provided was sufficient to show how funding allocated to TWAFa had been used and that, in view of safety concerns which had been raised, the public interest lay in favour of not disclosing the redacted details.
5. The Council also withheld four internal emails relating to the future funding of TWAFa, citing section 36 of the Act. The Council said that its Monitoring Officer, who was the qualified person within the meaning of section 36(2) of the Act, had concluded that disclosure of the emails would, or would be likely to, inhibit free and frank provision of advice or the free and frank exchange of views for the purpose of deliberation. The Council had applied the public interest test and had concluded that the balance lay in favour of not disclosing the information.
6. On 30 March 2005 the complainant wrote to the Council asking for a review of its decision to withhold identifying information about individuals and groups linked to TWAFa. He pointed out that other Councils had disclosed such details and argued that information should be available in relation to a group which was in receipt of public funding. On 4 April 2005 the Council asked the complainant to provide information about the disclosure by other councils, which the complainant forwarded on 30 April 2005. On 12 May 2005 the Council responded to the complainant informing him that an appeal panel had upheld the original decision to withhold identifying information.

The Investigation

Scope of the case

7. On 30 May 2005 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
 - Other councils had provided information about TWAFa which undermined the Council's redaction of the information which it had released.
 - Public funding of a body such as TWAFa should be transparent and therefore those in receipt of funding should be identified.
 - The complainant did not believe that all information relating to the Council's dealings with TWAFa had been released, particularly that concerning financial records and the use to which funding had been put.

Chronology

8. On 7 February 2006 the Commissioner wrote to the Council to request clarification of the application of exemptions to the withheld information. On 20 February 2006 the Council provided to the Commissioner copies of the information in question and of its communications with the complainant, and expanded on its reasons for applying the exemptions.
9. The Council said that it had withheld four internal emails under the exemption provided by section 36 of the Act for the reasons already stated to the complainant. The Council provided details of the qualified person's decision on the application of the exemption. The Council added that, with the exception of the emails, all information requested and in the Council's possession had been provided to the complainant, but that certain identifying information about individuals and organisations had been redacted to protect personal details. The Council provided to the Commissioner evidence supplied to it by TWAFa which had led to the application of the section 38 exemption to the details of organisations included in the information, and of section 40 to the personal details of individuals.
10. Following further correspondence with the Commissioner, the Council identified additional information relating to TWAFa which was relevant to the complainant's original request. This comprised correspondence, emails, financial statements, internal notes and annual reports. In agreement with the Commissioner, the Council subsequently provided to the complainant copies of the information, having redacted certain identifying information under the section 38 and 40 exemptions. The exemptions were applied on the same basis as those cited in respect of the information provided earlier.
11. During the course of the investigation the Commissioner was contacted by TWAFa, which reiterated its serious concerns about the request for information. TWAFa explained that it was a voluntary body involved in campaigning against extremist organisations, and that it also participated in political work such as anti-racist education and tackling hate crime. TWAFa provided evidence of harassment and intimidation and stated that it was fearful of the potential threat to its staff and contacts should their details be released. TWAFa also explained that it no longer published its office address as it had suffered harassment at its previous address. In addition, it had been targeted at the venues of other organisations when meetings with them had been held. TWAFa added that, when information had previously been provided about its activities, details (together with inflammatory comments) had appeared on extremist websites.

Analysis

Exemptions

Section 36

12. Section 36 exempts information from disclosure if, in the reasonable opinion of a qualified person, its release would be prejudicial to the effective conduct of public affairs. The majority of public authorities in England either rely on a Minister to act as a qualified person or have someone in the organisation authorised by a Minister as such. In this case the Council has informed the Commissioner that the qualified person whose opinion it sought was the Monitoring Officer.
13. In considering the application of section 36 the Commissioner's role is confined to satisfying himself that the qualified person's opinion was reasonable in substance and reasonably arrived at. However, even if the Commissioner is satisfied that the exemption is engaged, he must then consider whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure.
14. In this instance the exemption was applied to four internal emails in which the funding of TWFA was discussed. The Commissioner considered the arguments advanced by the qualified person and examined the information in question. The factors addressed by the qualified person included the candid nature of some of the contents of the emails, and the likely impact on the quality and frankness of future advice on funding should the contents be made public. The qualified person clearly evaluated the position carefully and came to his decision having considered all relevant factors. The Commissioner is satisfied that the qualified person gave proper consideration to those factors before reaching his decision, and that he came to a reasoned conclusion. The Commissioner therefore considers that the exemption is engaged.

The Public Interest Test

15. As stated above, section 36 is a qualified exemption and once the exemption is engaged, the release of the information is subject to the public interest test. The Commissioner has considered the withheld information and the arguments put forward by the complainant and the Council. The emails in question discuss the merits of providing funding to TWFA, and contain frank views and advice on the subject of financial support. The Council has said that the ultimate decision maker was responsible for justifying any decision on funding, and it was therefore important to ensure a free and frank exchange of advice and views before such a decision was made. The Council believes that, if it became the practice to publish such information, officers would feel inhibited in giving candid advice and would be more reserved in expressing their views, which would not be in the public interest.
16. The Commissioner recognises that there is an inherent public interest in ensuring that public authorities are transparent in the decisions they take in order to

promote accountability. He also accepts that there is a strong public interest in relation to the allocation of public money. However, the complainant has already been provided with details of grants made to TWAFa and, while the emails at issue give some background information about the early views of Council officers on the funding of TWAFa, the Commissioner does not believe that the information would add to the public understanding of the eventual decision.

17. The Commissioner acknowledges that, for the Council to deal with grant applications effectively, particularly in a case such as this where serious security concerns have been raised, a certain distance must be maintained in order to allow individuals to give their personal views without concerns about those views being subject to public scrutiny. It would not be in the public interest for decisions to be made on the basis of advice which was inhibited by such concerns. The Commissioner therefore believes that, in all the circumstances of this case, the public interest factors in favour of disclosure are outweighed by the public interest in maintaining the exemption.

Section 38(1)(a) and (b)

18. Section 38 provides an exemption in relation to information which, if disclosed, would, or would be likely to, endanger the health and safety of an individual. The Council applied this exemption in redacting the details of organisations associated with TWAFa, as it considered that disclosure would be likely to endanger the safety of individuals who were members of those organisations. While this exemption can be applied to organisations associated with TWAFa, and to TWAFa's contact details, the Commissioner considers that the disclosure of information relating to living individuals is more appropriately dealt with under section 40 of the Act.
19. In deciding to redact certain personal and contact details from the information provided to the complainant, the Council was clearly influenced by past knowledge of problems experienced by TWAFa and by that organisation's representatives. TWAFa had expressed serious concerns about possible harassment, based on previous experience when release of contact details had resulted in incidents of harassment, including physical and verbal abuse. TWAFa presented to the Council a comprehensive dossier of evidence to substantiate its case.
20. While there can be no absolute certainty that the release of the withheld information would put the individuals and organisations concerned at risk, there is sufficient evidence to lead the Commissioner to conclude that there is a real likelihood that they would be singled out for harassment, intimidation and possible violence by others. The Commissioner is therefore satisfied that section 38 is engaged in relation to the organisations whose details were redacted from the information released to the complainant, as the publication of that information could endanger the health and safety of those involved with those organisations.

The Public Interest Test

21. Section 38 is a qualified exemption and is therefore subject to the public interest test. The complainant believes that organisations in receipt of public funding such as TWAFAs should be open to public scrutiny so as to avoid any possibility of the misuse of this funding. He also considers that the identities of those associated with TWAFAs should be made public, and points out that another council had already provided similar details. The Council, for its part, has serious concerns about the safety of the individuals and groups named in the documents provided to the complainant, should their identities be made public. Given those concerns, the Council decided that the public interest in maintaining the exemption outweighed the public interest in disclosure.
22. As stated above, the Commissioner recognises that there is significant and legitimate public interest in the funding of voluntary organisations such as TWAFAs and the way in which that funding is utilised. However, the complainant has now been provided with all of the information held by the Council in relation to the grants made to TWAFAs with the exception of four emails. As the public interest in this case relates to the need for clarification that TWAFAs's funding was being used legitimately, the Commissioner believes that the information released satisfies that purpose. Therefore, the Commissioner does not believe that disclosure of the names and contact details of TWAFAs and its staff, or details of other associated organisations, would add to the public understanding of TWAFAs's activities in that regard. In view of the potential risk to the health and safety of the staff of the organisations whose details have been withheld, the Commissioner considers that, in this case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Section 40(2)

23. The principal purpose of section 40 is to protect personal data relating to living individuals rather than organisations. The names and contact details of individuals included in the documents in question clearly represent personal data as they relate to personal information about third parties. The information will constitute exempt information if one of the two conditions referred to in section 40(2) is satisfied. In considering the first condition (section 40(3)(a)), the Commissioner has had regard to whether any of the data protection principles would be breached by releasing the information. The first data protection principle requires that personal data should be processed fairly and lawfully and, in particular, that it should not be processed unless at least one of the conditions in schedule 2 of the Data Protection Act 1998 is met. In this case, the Commissioner regards condition 6 to be the most relevant and that none of the other conditions apply.
24. The information at issue concerns the names and contact details of TWAFAs officials. TWAFAs has expressed serious concerns about the potential consequences should the information be released, and has provided to the Council a substantial dossier setting out those concerns. Reservations have also been raised with the Commissioner, and TWAFAs has supplied evidence of previous incidents of harassment following disclosure of similar information.

25. The complainant has argued that he has a legitimate interest in knowing the names of those in receipt of public funds. However, the Commissioner accepts that disclosure of personal details could cause distress to the individuals concerned and that they have a legitimate expectation that their details should not be placed in the public domain. Therefore, the Commissioner has decided that, in the circumstances of this case, the interests of the data subjects outweigh those of the public. Having concluded that none of the conditions in Schedule 2 of the 1998 Act are met, and having regard to the concerns articulated by TWAFa and the Council, the Commissioner has decided that releasing the information would not allow for fair and lawful processing and would breach the first data protection principle. It should therefore remain withheld.

The Decision

26. The Commissioner's decision is that the Council dealt with the request for information in accordance with the Act in respect of the application of sections 36, 38 and 40. In coming to this decision the Commissioner has had regard to three previous Decision Notices issued in respect of complaints made by the complainant (Reference: FS50066289, FS50070185 and FS50092069).

However, the Commissioner has also decided that the following element of the request was not dealt with in accordance with the Act:

The Council failed to comply with section 1(1) as the complainant was not informed of all of the information held about TWAFa until a further search was carried out following the Commissioner's involvement.

Steps Required

27. The Commissioner requires no steps to be taken.

Right of Appeal

28. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@dca.gsi.gov.uk

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 1st day of October 2007

Signed

**Graham Smith
Deputy Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Materials Annex

Section 1(1) states that:

“Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds the information of the description specified in the request; and
- (b) If that is the case, to have the information communicated to him.”

Section 2(2) states that:

“In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply to the extent that –

- (a) the information is exempt information by virtue of a provision conferring absolute exemption, or
- (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.”

Section 36 states that:

“(1) This section applies to –

- (a) information which is held by a government department or by the National Assembly for Wales and is not exempt information by virtue of section 35, and
- (b) information which is held by any other public authority.

(2) 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 –

- (a) would, or would be likely to, prejudice –
 - (i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or
 - (ii) the work of the Executive Committee of the Northern Ireland Assembly, or
 - (iii) the work of the executive committee of the National Assembly for Wales,
- (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.”

Section 38 states that:

- “(1) Information is exempt information if its disclosure under this Act would, or would be likely to –
- (a) endanger the physical or mental health of any individual, or
 - (b) endanger the safety of any individual.”

Section 40 states that:

- “(1) Any information to which a request for information relates is exempt information if it is personal data of which the applicant is the data subject.
- (2) Any information to which a request for information relates is also exempt information if -
- (a) it constitutes personal data which do not fall within subsection (1), and
 - (b) either the first or second condition below is satisfied.
- (3) The first condition is –
- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of ‘data’ in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene -
 - (i) any of the data protection principles, or
 - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress, and
 - (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.”