

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 16 April 2012

Public Authority: Department for Culture Media and Sport
Address: 2-4 Cockspur Street
London
SW1Y 5DH

Decision (including any steps ordered)

1. The complainant requested information in relation to the decision by Somerset County Council to close a number of libraries in the county.
2. The Commissioner's decision is that the public authority correctly withheld information on the basis of the exemption at section 36(2)(b)(ii) of the Act. However, the public authority breached sections 1(1)(a) and 10(1) of the Act by not informing the complainant that it held no information relating to certain parts of the request.
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. On 10 May 2011 the complainant wrote to the public authority and requested information. The request was worded as follows:

'In the recent attached replies from DCMS about my questions and representations about library closures, I was told the following:

"At the request of the Department, officers of Somerset County Council have recently come in to present their plans for their library service to DCMS officials"

"The Secretary of State, the Rt Hon Jeremy Hunt MP, has a duty under the Public Libraries and Museums Act 1964 to superintend the delivery of library services by local authorities"

"Consideration by the Secretary of State of whether or not any statutory powers should be used to assess an authority's compliance with the

1964 Act will be on a case-by-case basis and after careful consideration of all relevant facts and local circumstances."

I therefore request under the FOI the following information:

When were the meeting(s) between DCMS and SCC, and where were they held.

Who attended from each party. What were the outcomes.

Please provide all documentation relating to these meetings between the Department and the officers of Somerset County Council including any provided by SCC or DCMS.

Please provide records of all decisions made and the justification for those decisions resulting from those meetings.

Please provide documentation to show whether as a result of the review, the Secretary of State has ascertained whether delivery of library services by Somerset County Council is in compliance with the 1964 Act.

Please provide documentary evidence that the Secretary of State has assessed the specific Somerset County Council case.

Please provide documentation to show the result of this assessment and any decisions made.

Please provide documentation of any actions imposed on Somerset County Council or officers as a result of any of these meetings and reviews.

5. The public authority responded on 6 July 2011. It confirmed that a meeting was held between Somerset County Council and its officials on 30 March 2011. It also disclosed the names of the senior officials who attended the meeting.
6. The public authority however withheld the note of the meeting on the basis of the exemption at section 36(2)(b) of the Act.
7. Following an internal review the public authority wrote to the complainant on 29 November 2011. It upheld the original decision to withhold the note of the meeting (the disputed information) between Somerset County Council and its officials on 30 March by virtue of section 36(2)(b) of the Act.

Scope of the case

8. On 31 October 2011, before the public authority had carried out an internal review of its decision of 6 July 2011, the complainant contacted the Commissioner to complain about the way his request for information had been handled. On 1 December 2011, the Commissioner accepted the complaint after the public authority had completed its internal review on 29 November 2011.
9. The complainant asked the Commissioner to rule on the public authority's decision to withhold the disputed information on the basis of the exemption at section 36(2)(b) of the Act. He clarified that he was satisfied with the public authority's decision to withhold names of junior officials on the basis of section 40(2) (personal information) of the Act. The complainant further explained that the public authority had not made it clear whether it held information in relation to the other parts of his request.
10. The complainant submitted that the disclosure of the disputed information would not close off or adversely affect future discussions with Somerset County Council and other local authorities in connection with similar proposals regarding the provision of library services.
11. He strongly argued that disclosure would not be premature because the decisions taken by Somerset County Council in relation to the future provision of library services were final and had been subjected to a judicial review at the High Court.

Reasons for decision

Section 36(2)(b)

12. Information is exempt from disclosure on the basis of section 36(2)(b) if in the reasonable opinion of a qualified person, disclosure of the information under the Act would, or would be likely to inhibit the free and frank provision of advice¹ or the free and frank exchange of views for the purpose of deliberation.²

¹ Section 36(2)(b)(i)

² Section 36(2)(b)(ii)

Qualified Person's Opinion

13. The opinion was issued by Ed Vaizey, Minister for Culture, Communications and Creative Industries. By virtue of section 36(5)(a), a 'qualified person' under the Act includes any Minister of the Crown. The Commissioner finds that the opinion was issued by the appropriate qualified person.
14. In the qualified person's opinion, there was a real risk that disclosing the disputed information would be likely to inhibit free and frank exchanges between its officials and local authority officials in future. He explained that future meetings may be required with other local authority officials or indeed Somerset County Council officials in connection with decisions taken by their local authorities regarding the provision of library services. He submitted that disclosure would have a chilling effect on the candour of officials at such future meetings.
15. The qualified person was of the view that disclosure would also set a precedent to disclose minutes of meetings already held or to be held with other local authorities in relation to the same issue thereby further increasing the likelihood of a chilling effect on future discussions. According to the qualified person, the cumulative effect of such a chilling effect would make it difficult for the Secretary of State to fulfil his duties under the Public Libraries and Museums Act 1964 (the 1964 Act) to superintend and promote the public library service and to secure local authority functions.

Was the opinion of the Qualified Person reasonable in substance?

16. In the Commissioner's opinion the substance of a qualified person's opinion must be objectively reasonable. He also considers the term 'would be likely to inhibit' means that the possibility of prejudice should be real and significant, and certainly more than hypothetical or remote. However, the opinion only has to be *a* reasonable opinion. An opinion that *a* reasonable person could hold is a reasonable opinion; it does not have to be the *only* reasonable opinion that could be held, or the 'most' reasonable opinion. Therefore the Commissioner does not have to agree with the opinion; he only has to recognise that a reasonable person could hold it.
17. The request was made at the time when local authorities including Somerset County Council were (and still are) making significant financial savings. Furthermore, on 16 November 2011, the High Court found that the decision by Somerset County Council to close a number of libraries

within the county was unlawful on the grounds that it had failed to demonstrate compliance with its public sector equalities duties.³ As far as the Commissioner understands, the High Court decision does not prevent Somerset County Council from reviewing the provision of library services. The opinion that there were likely to be future meetings between local authorities including Somerset County Council in connection with the provision of library services was borne out by the prevailing circumstances and therefore reasonable in substance.

18. Having reviewed the disputed information, the Commissioner also finds the opinion that disclosure would be likely to lead to a chilling effect on free and frank exchanges in future related meetings, reasonable in substance. The exchanges primarily focussed on the steps Somerset County Council had taken to achieve the government's savings targets in view of its obligations under the 1964 Act.
19. The Commissioner therefore finds that the opinion was reasonable in substance by virtue of the prevailing circumstances at the time of the request and the nature of the disputed information. He specifically finds that it was reasonable in the circumstances to issue the opinion that the likelihood of a chilling effect on future related discussions was real and significant.
20. The Commissioner consequently finds that the public authority was entitled to apply the exemption at section 36(2)(b)(ii) of the Act to the disputed information.

Public Interest Test

21. However, the exemptions at section 36(2) are qualified and therefore subject to a public interest test. The Commissioner must therefore also decide whether in all the circumstances of the case, the public interest in maintaining the exemption at section 36(2)(b)(ii) outweighed the public interest in disclosure.
22. In favour of disclosure, the public authority recognised that the disputed information relates to a matter of public importance and there is a public interest in knowing that both the government and Somerset County Council are adhering to their statutory obligations.
23. It acknowledged the public interest in citizens being confident that decisions are taken on the basis of the best available information.

³ [2011] EWHC 2687 (Admin)

24. It added that disclosure would enhance trust and engagement between the government and campaigners against library disclosures in Somerset.
25. As regards maintaining the exemption, the public authority argued that the meeting was part of a process of assessment which will eventually lead to a decision taken by the Secretary of State and it would not be in the public interest to undermine that process by disclosing the disputed information.
26. It further argued that it would not be in the public interest to inhibit the consideration of all options in the future by virtue of the resulting chilling effect on free and frank exchanges on the matter. It also pointed out that the strength of the feelings on the matter meant that there was also likely to be adverse public reaction to the disclosure. It therefore strongly argued that those with expert opinions might be less willing to contribute candidly to the debate if their contributions were disclosed prematurely and possibly subjected to ridicule.
27. The public authority strongly submitted that the High Court ruling did not affect the continuing need for its officials to engage with Somerset County Council officials and other councils in order to secure the effective delivery of statutory functions under the 1964 Act. It argued that the claimants had won on a narrow ground – namely the failure to comply with public sector equality duties. However, that did not mean that the Somerset County Council had discontinued the review of library services in the county.
28. Given that in fulfilling the Secretary of State's duties under the 1964 Act, the same process of engagement will need to be undertaken with other local authority officials, the public authority strongly argued that it would not be in the public interest to jeopardise the openness and cooperation of local authority officials during that process. Lack of frank feedback would diminish the quality and depth of assessments undertaken pursuant to the 1964 Act.

Balance of the Public Interest

29. In addition to the public interest in disclosure recognised by the public authority, the Commissioner considers disclosure could enhance the quality of the debates on a matter of significant importance to the people of Somerset.
30. The Commissioner however disagrees with the complainant that disclosure would not have been premature given that a final decision had been made which was subsequently overturned by the High Court.
31. The Commissioner agrees with the public authority that the High Court decision does not prevent Somerset County Council from reviewing its

library services. The likelihood of a chilling effect on discussions with other local authority officials was also not diminished by virtue of the decision. As mentioned, at the time of the request, the public authority was still negotiating with officials of Somerset County Council and other local authorities regarding the future provision of library services.

32. The Commissioner is generally sceptical of chilling effect arguments which envisage a wide impact from the disclosure of information on the future candour of public officials. Furthermore, in this case the Commissioner disagrees with the public authority's view that the information is entirely candid in nature. However, in the circumstances of this case, the Commissioner has given particular weight to the chilling effect argument advanced by the public authority in respect of the particular issue at play, i.e. protecting discussions in relation to future provision of library services. The Commissioner agrees that lack of candour in future contributions to the debates in question would fundamentally undermine the quality of such discussions and the decisions taken thereof. He believes that this is a strong argument in this particular case which should be afforded greater weight than the arguments favouring the disclosure of this information.
33. Therefore, in all the circumstances of the case, the Commissioner finds that the public interest in maintaining the exemption at section 36(2)(b)(ii) of the Act outweighed the public interest in disclosure.
34. In view of the above decision, the Commissioner did not consider the applicability of the exemption at section 36(2)(b)(i).

Did the public authority hold additional information within the scope of the request?

35. The Commissioner is satisfied with the public authority's explanation to him that it checked and did not consider that it held any additional information within the scope of the request. In respect of the outcome of its meeting with Somerset County Council, the public authority explained that as it was still assessing the Council's decision, no information was held in relation to the remaining parts of the request. It is not clear why this explanation was not specifically provided to the complainant at the time of the request.
36. Nevertheless, the Commissioner is satisfied with the public authority's explanation and finds that it did not hold additional information within the scope of the request.

Right of appeal

37. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

38. 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.
39. 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

**Alexander Ganotis
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