

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 July 2012

Public Authority: Stoke-on-Trent City Council

Address: Civic Centre
Glebe Street
Stoke-on-Trent
ST4 1HH

Decision

1. The complainant has requested copies of correspondence between Stoke-on-Trent City Council and a named party during 2011. Stoke-on-Trent City Council refused the requested information under the provisions of section 36 of FOIA (prejudice to the effective conduct of public affairs) and section 42 of FOIA (legal professional privilege).
2. The Commissioner's decision is that Stoke-on-Trent City Council has correctly refused the requested information.
3. The Commissioner does not require the public authority to take any steps to ensure compliance with the legislation.

Request and response

4. On 20 September 2011, the complainant wrote to Stoke-on-Trent City Council (the council) and requested information in the following terms:

"I would like all correspondence between the authority and [name] or representatives acting on his behalf during 2011."

5. The council responded on 18 October 2011. It stated that it held the information requested but that, in the reasonable opinion of its monitoring officer, the information was exempt from disclosure under the provisions of section 36 of FOIA (prejudice to the effective conduct of public affairs) and also under section 42 (legal professional privilege). It confirmed its view that, for both exemptions, the public interest in

withholding the information was stronger than the public interest in disclosure.

6. Following an internal review the council wrote to the complainant on 18 November 2011. It upheld its decision to withhold information under section 42, and explained that as the decision to withhold information under section 36 had been taken by its monitoring officer (in his role as the 'qualified person' required for the application of section 36) that decision had already been taken at a sufficiently high level that no internal review was offered in relation to that specific exemption.

Scope of the case

7. The complainant contacted the Commissioner to complain about the way her request for information had been handled. She disputed the application of section 36, arguing that the monitoring officer's opinion was not reasonable in substance and also expressing doubt that release of the information would seriously affect the authority's ability to meet its wider objectives. She further argued that, in the case of the information withheld under section 42, legal professional privilege, it was likely that as the correspondence was external any applicable privilege had been waived and, in any event, the fact that litigation was no longer in prospect and the large number of people affected by the matter were relevant public interest factors in favour of disclosure.
8. The Commissioner considers that the scope of his investigation has been to investigate the council's application of the exemptions at section 36 and 42 of FOIA, to determine whether or not the information was correctly withheld.

Background

9. The matter has its origins in a dispute over a proposal to close a council-run swimming facility and make those facilities available in an alternative, privately-owned leisure facility. Informal discussions took place between the council and the owner of the private facility relating to the feasibility and practicality of the proposal. The dispute centred on whether there was a contract between the parties to carry this proposal out, as the owner claimed.
10. Litigation was threatened by the owner of the private facility. As part of the normal pre-action protocols, a formal mediation process was agreed to by way of settlement of the dispute. The fact that the dispute was

settled was confirmed in an agreed press release issued after the mediated settlement was reached, on 19 September 2011.

11. The withheld information is correspondence between the council and the owner of the private leisure facility, about the proposed co-operation over the transfer of facilities, and related matters. The correspondence is relevant to the disputed claim that a contract existed between the parties.

Reasons for decision

Prejudice to effective conduct of public affairs.

Section 36(2) provides 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-

- (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.”

Legal Professional Privilege

Section 42(1) provides that –

“Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.”

Section 36

12. The council has provided the Commissioner with confirmation that its 'qualified person' for the purposes of FOIA is its Monitoring Officer, and that the Monitoring Officer was provided with all files, documentation and correspondence and was given advice, including a barrister's advice note on disclosure obligations. The council confirms that the Monitoring Officer also considered relevant contrary arguments based on the public's need for transparency.
13. The Monitoring Officer's opinion is that disclosure of the information would be likely to prejudice the authority's ability to meet its wider objectives or purpose, due to the disruption caused by the disclosure, and the diversion of resources in managing the impact of disclosure.
14. The Monitoring Officer believed that the council's ability to settle contentious and costly litigious disputes by way of a confidential Alternative Dispute Resolution (ADR) process, such as formal mediation, would be affected by disclosure. It is explained that the disclosure would be contrary to a strict confidentiality clause within the mediation agreement, and breaking that confidentiality could nullify the mediation outcome and leave open the prospect of renewed litigation. This is therefore understood to be one possible impact of disclosure.
15. The Commissioner is satisfied that the withheld correspondence is contained within the agreed bundle of documents collated for the mediation session. The Commissioner has also viewed the mediation agreement entered into by both parties, and has verified that a confidentiality clause exists within that agreement, which binds the parties to keep confidential all information produced for or at the mediation.
16. The Civil Procedure Rules (CPR) encourage all parties engaged in a legal dispute to consider using mediation to settle their differences, as opposed to setting the matter in court. Mediation is in effect a 'without prejudice' but formal meeting between the parties which is conducted by a professional mediator. The documents produced for the meeting and what is said in the meeting are subject to a confidentiality clause. This is because both sides need to have the ability to talk frankly in any mediation meeting without the fear that what was said and produced would be used in a subsequent court hearing should the mediation fail.
17. The maintenance of confidentiality is therefore conducive to obtaining a settlement. The argument put forward is that it would be perverse for a party to refuse to give an undertaking to maintain confidentiality in ADR situations and that, in those circumstances, a party might be deemed to be acting unreasonably by the Courts when the matter came to trial.

18. The Commissioner recognises that observance of the principle of confidentiality, and of the specific clause, is fundamental to the outcome of the mediation. A breach of the confidentiality clause would constitute a breach of the agreed terms of the mediation. The Commissioner understands that this would open up the risk of renewed litigation, with the prospect of additional claims for breach of confidence not only from the plaintiff, but also possibly from the mediator himself. It might also incur the displeasure of the court in the event of renewed litigation, as the CPR encourage parties to consider using ADR as a means to avoid litigation coming to court. Therefore, having achieved a mediated outcome, to then breach that mediation and give rise to a renewed cause of action might be deemed by a court to be unreasonable action by the council.
19. The 'prejudice to the effective conduct of public affairs' in this case is, a prejudice not only to the existing (resolved) dispute (ie, the consequences of disclosure would include the possibility of renewed litigation), but also prejudice to the council's ability to use ADR as a means to avoid or pre-empt litigation in future cases.
20. The council argues that it should have the ability, in order to save the costs of expensive litigation, to settle matters on a confidential basis, that being an effective way to conduct public affairs. If it is seen to breach the confidentiality of the proceedings then, potentially, future claimants or defendants in subsequent legal disputes would be less likely to agree to mediation because of the fear that, despite the confidentiality provisions, the council would reveal the details of the mediation in response to FOI requests.
21. The Commissioner is satisfied that the opinion of the qualified person is reasonable in the circumstances and that consequently section 36(2)(c) is engaged in respect of the withheld information. Whether or not the information can be withheld will therefore depend on the balance of the public interest in favour of disclosure, compared to the public interest in maintaining the exemption.

The public interest in favour of maintaining the exemption

22. The council argues that, as mediation is a substantially less expensive alternative to litigation, there is a strong public interest in favour of maintaining the council's ability to use this process now, and in the future. The Commissioner accepts that this is a valid argument.
23. Countering this, the complainant argues that in relation to contentious matters, the council could hide behind mediation to shield itself from scrutiny. It could repeat this exercise in the future – by asking an independent mediator to be present during discussions and then getting

parties to sign a confidentiality clause – thereby making a nonsense of the Freedom of Information Act.

24. The Commissioner does not accept this argument. The ADR (mediation) process is a formal one, invoked only in circumstances where litigation is contemplated, and is undertaken in compliance with the pre-action protocols in the Civil Procedure Rules. To suggest that the council could use mediation, and any associated confidentiality terms, to escape scrutiny of contentious matters when it suited it, is not realistic. The council's argument relates only to the availability to it of ADR processes when it is faced with the prospect of litigation.
25. In any event, the Commissioner's view is that if the council were found to be doing this in future, ie, using mediation in a non-litigation context to ascribe spurious confidentiality to a process which would not otherwise be confidential, that would be a valid argument in favour of disclosure in the public interest, in those particular circumstances. In the present case, the confidentiality is a legitimate and necessary part of the process and the argument is not applicable.
26. The Commissioner also recognises the public interest in the council not opening itself up to the prospect of renewed litigation in relation to a dispute which has already been settled, and possibly including additional claims for breach of confidence.

The public interest in favour of disclosure

27. The Commissioner acknowledges the public interest inherent in the principles of openness, and also the benefits of public scrutiny, awareness and participation in decision-making. In this case, disclosure would not assist the public participation in decision-making, however it might help the public awareness and scrutiny of the council's actions.
28. The complainant has argued that there is considerable public disquiet over the affair, including hostile comments from the public at council meetings. She indicates that this suggests a strong desire on the part of the public to know what has been decided in their name and, further, that "there is a high level of public interest in establishing the probity and transparency in respect of the council's dealings". This latter point accords with the Commissioner's view of the public interest in public scrutiny and awareness.
29. He is less persuaded by the complainant's first point, which appears to conflate the public interest with what the public is interested in, at least to some degree. Nevertheless, the Commissioner does recognise that where there is controversy over a public authority's actions, the associated public interest in transparency and openness is likely to be

greater. The Commissioner is satisfied, from material provided by the complainant and also from material provided by the council, that the matter was the subject of considerable interest, comment and concern at the time. Additionally, a government report into the city's governance¹ published at about the same time as the dispute in question was taking place, was also critical of the council, partly in terms of levels of transparency and mistrust.

30. As the dispute took its course, allegations were made about corruption by the parties involved and these were investigated by the police at the time. No charges were brought against any persons. Furthermore, the settlement sum agreed after the mediation process reflects only the claimant's legal costs², and no damages or other compensatory element is therefore included. These two factors do not suggest that there was wrongdoing which might add to the balance in favour of disclosure in the public interest.

The balance of the public interest

31. There is a reasonable degree of public interest in opening the council's actions to closer public scrutiny in the circumstances of this case. This arises from the specific public controversy over the affair, and also from the more general feeling that the council has been less than transparent.
32. It would be wrong, however, to order disclosure of information purely in order to respond to a generalised public suspicion that a public authority has been being less than transparent. The public interest in disclosure can relate only to the specific public interest factors at play in respect of the withheld information.
33. In this case, alongside the general principle of openness and transparency, there is a specific level of public concern about the matter and disclosure might inform the public debate about the affair.
34. Balancing this, there is a strong, and legally binding, confidentiality clause which directly covers the withheld information, and a breach of that confidentiality would have significant consequences for the council. Those consequences are considered to include:

¹

http://www2002.stoke.gov.uk/transition_board/Governance%20Commission%20Report.pdf

² Confirmed in a second joint press release, dated 13 October 2011

- the normal risks of a claim for a breach of confidence;
 - The council points out that if it breached the confidentiality clause the other party to the mediation would be able to bring an action for breach of confidence and, moreover, the mediator himself would also have grounds to bring an action against the council. Dealing with these actions would be likely to disrupt the council's normal activities by diverting staff from other tasks; prejudice to the conduct of public affairs would also be likely to arise through the risk of further costs to the council for any necessary defence, or damages incurred, which would divert scarce financial resources from other activities.
 - the risk that the specific litigation which was settled could be reopened, and the council's actions in breaching the confidence would not assist its defence;
 - The council points out that the mediation arose from a legal claim brought against it, so a failure of the mediation would open up the possibility that the litigation could be renewed. Defending that litigation would divert its staff from other activities and incur costs, as above, together with the associated risk that its actions in breaching the terms of the mediation might prejudice its case; and
 - the likelihood that the council would be less able to resolve disputes by mediation in future, because it had been seen to breach the terms of confidentiality (and hence the terms of the mediation itself) previously, so parties might be more reluctant to enter into mediation.
 - If the council is seen to breach the terms of a mediation agreement, future claimants in other cases might be more reluctant to enter into mediation as a route to resolving the dispute. The council consequently argues that disruption to its activities would be likely to occur in future cases where mediation might otherwise have been a less costly or time-consuming option available to it.
35. The Commissioner considers that these factors, in the specific circumstances of this case, outweigh the public interest factors in favour of disclosure. This is because the consequences to the public authority of disclosing the information are likely to be significant, whereas the benefits of access to the requested information to transparency, openness and the public debate, are less clear, given that the matter has been both examined by the police, and has been settled in a judicial process to the apparent satisfaction of the claimant.

36. The underlying issue has been dealt with elsewhere, in circumstances which suggest quite strongly that any impropriety would have emerged and could have been dealt with appropriately. There is therefore no compelling ground in favour of openness which would override the likelihood of harm to the council's ability to conduct its business. Any residual public interest in adding to public understanding and informing public debate is modest, and insufficient to counter the strong public interest factors identified above in maintaining the exemption in this case.
37. The Commissioner therefore concludes that the exemption at section 36(2)(c) of FOIA has been correctly applied to the withheld information.
38. It has therefore not been necessary to consider the application of section 42 of FOIA.

Other matters

39. The public authority declined to offer an internal review of its refusal under the provision of section 36 of FOIA, on the grounds that the decision that the exemption was engaged was taken by the council's Monitoring Officer in his role as the qualified person. As the Monitoring Officer is a very senior individual within the organisation, the council would not be offering to review his decision.
40. The Commissioner has recently revised his guidance on the application of section 36 of FOIA³ and it states, in respect of the conduct of internal reviews:

"In the case of section 36 we expect that the qualified person would take the opportunity to consider their reasonable opinion again, taking account of any comments from the complainant. Furthermore it should always be possible for the public authority to review the public interest arguments."

41. The Commissioner would therefore like to take this opportunity to remind public authorities that a blanket refusal of an internal review in section 36 refusals is not considered to be a valid approach. Such an

³ See

http://www.ico.gov.uk/for_organisations/guidance_index/~/_media/documents/library/Freedom_of_Information/Detailed_specialist_guides/section_36_prejudice_to_effective_conduct_of_public_affairs.ashx

approach could deprive the complainant, or the public authority, of an opportunity to resolve the complaint or reduce the areas of disagreement, before the intervention of the Information Commissioner becomes necessary.

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: 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

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

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