

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 23 July 2014

Public Authority: Stoke-on-Trent City Council
Address: Civic Centre
Glebe Street
Stoke-on-Trent
ST4 1HH

Decision (including any steps ordered)

1. The complainant requested information relating to text messages and emails between two specified individuals within a given timeframe. Stoke-on-Trent City Council (the Council) confirmed that it held some of the requested information – emails – but stated that it was exempt by virtue of section 36(2)(b)(i) and (ii) (inhibition to the free and frank provision of advice and to the free and frank exchange of views). It said that it did not hold the requested text messages.
2. The Commissioner's decision is that the Council correctly applied section 36 to the requested email information. He also considers that the Council stated correctly and in line with section 1(1)(a) of the FOIA that it did not hold the requested text message information.
3. The Commissioner requires the public authority to take no steps following his decision.

Request and response

4. On 22 October 2013 the complainant wrote to the Council and requested the following information:

"I would like a copy of all text messages sent from the Council's Leader to the Council's Chief Executive between Thursday 17th October 2013 and Monday 21st October 2013. I would like a copy of all text messages sent from the council's Chief Executive to the Council's Leader between Thursday 17th October 2013 and Monday 21st October 2013"

"I would like a copy of all emails sent from the Council's Leader to the Council's Chief Executive between Thursday 17th October 2013 and Monday 21st October 2013. I would like a copy of all emails sent from the Council's Chief Executive to the Council's Leader between Thursday 17th October 2013 and Monday 21st October 2013".

5. The Council responded on 12 December 2013. It confirmed it holds the requested information but refused to provide it, citing sections 36(2)(b)(i) and (ii) as its basis for doing so.
6. The complainant requested an internal review on 12 December 2013. The Council sent her the outcome of its internal review on 12 February 2014. It upheld its position with respect to part (b) of the request - about emails. However it revised its position with respect to part (a) of the request:

"Regarding part (a) of your request, as part of this internal review the council can also confirm that its Chief Executive and Council Leader do not hold any text messages that relate to the specifications of your request".

Scope of the case

7. The complainant contacted the Commissioner on 20 February 2014 to complain about the way her request for information had been handled. She told the Commissioner:

"In the original response all the requested information was refused because the Council claimed it was exempt under section 36 of the Act. However in the response to the request for a review there was a change of position".

8. She expressed her concern about that change of position – that rather than the requested text message information being exempt by virtue of section 36, no relevant information was held.
9. The complainant asked the Commissioner to investigate the Council's application of section 36. She also asked him to consider if relevant texts were sent and deleted after the time and date of the original request.
10. The Commissioner considers the scope of his investigation to be the Council's application of section 36 to the information within the scope of part (b) of the request. He has also considered the Council's position that it does not hold the information within the scope of part (a) of the request.
11. The Commissioner has addressed some of the points above in the "Other Matters" section of this notice.

Reasons for decision

Section 36 prejudice to effective conduct of public affairs

12. The Commissioner has first considered the Council's application of section 36 to the requested emails.
13. Section 36 requires that, other than for statistical information, the qualified person for the public authority must give their reasonable opinion that the exemption is engaged.
14. The qualified person is not chosen by the authority itself. Section 36(5) explains what is meant by the 'qualified person'. Subsections (a) to (n) define who the qualified person is for a number of specific authorities.
15. Section 36(2) of FOIA states 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".

16. In this case, the Council considers that section 36(2)(b)(i) and (ii) apply to all the withheld emails.
17. In determining whether section 36(2)(b) was correctly engaged, the Commissioner is required to consider the qualified person's opinion as well as the reasoning which informed the opinion. Therefore, in order to establish that the exemption has been applied correctly the Commissioner must:
 - establish that an opinion was given;
 - ascertain who was the qualified person or persons;
 - ascertain when the opinion was given; and
 - consider whether the opinion was reasonable.
18. The Council explained to the Commissioner that the qualified person at the time was the then Monitoring Officer and Assistant Director (Legal Services). In this case his opinion was sought on 20 November 2013 and given on 25 November 2013. The Council provided the Commissioner with a copy of the written record to that effect.
19. The Commissioner is satisfied that the Monitoring Officer is a qualified person for the purposes of section 36 and that this exemption was cited on the basis of an opinion from that person.
20. In determining whether the exemption is engaged, the Commissioner must determine whether the qualified person's opinion was a reasonable one. In doing so the Commissioner has considered all of the relevant factors including:
 - whether the prejudice relates to the specific subsection of section 36(2) that is being claimed;
 - the nature of the information and the timing of the request; and
 - the qualified person's knowledge of, or involvement in, the issue.
21. Further, in determining whether the opinion is a reasonable one, the Commissioner takes the approach that 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. This is not the same as saying that it is the only reasonable opinion that could be held on the subject. The qualified person's opinion is not rendered unreasonable simply because other people may have come to a different (but reasonable) conclusion. It is only not reasonable if it is an opinion that no reasonable person in the qualified person's position could hold.

The qualified person's opinion does not have to be the most reasonable opinion that could be held: it only has to be a reasonable opinion.

22. If the prejudice or inhibition envisaged is not related to the specific subsection that has been cited, the opinion is unlikely to be reasonable.
23. In correspondence with the complainant, the Council told her:

"It is the Monitoring Officer's reasonable opinion that section 36(2)(b)(i) and (ii) applies to this request for information, because its disclosure would be likely to inhibit the free and frank provision of advice and the free and frank exchange of views for the purposes of deliberation".

24. It went on to explain:

"This is because the information requested relates to live issues and its disclosure would be likely to inhibit the Chief Executive (and other senior Council officers) from expressing themselves openly, honestly and completely or exploring all options, when providing advice or giving their views. Inhibiting the provision of such advice and the exchange of views may impair the quality of decision making by the Council".

25. Having viewed the withheld information and the written record of the qualified person's opinion, the Commissioner is satisfied that the opinion – that disclosure would be likely to inhibit the free and frank provision of advice and the free and frank exchange of views for the purposes of deliberation - is reasonable. It follows that he finds that the withheld information is exempt under sections 36(2)(b)(i) and (ii).

The public interest test

26. The fact that the exemption is engaged does not automatically mean that the information should be withheld. The public interest test is separate from the qualified person's opinion.
27. The Commissioner has gone on to consider, in accordance with section 2(2)(b) of FOIA, whether the public interest requires disclosure, despite the valid application of the exemption.

Public interest arguments in favour of disclosing the requested information

28. The Council acknowledged that:

"By disclosing the information the council would be open and transparent".

Public interest arguments in favour of maintaining the exemption

29. In favour of maintaining the exemption the Council told the complainant:

"The 'chilling effect' – disclosure of internal discussions on live issues would inhibit free and frank discussions in the future, and the loss of frankness and candour would damage the quality of advice and deliberation and lead to poorer decision making. The 'safe space' argument would also apply if premature public or media involvement would prevent or hinder the free and frank exchange of views or provision of advice. The 'chilling effect' and 'safe space' arguments attach further weight to the argument that it is in the public interest to withhold the information rather than disclose it".

30. The Council did not elaborate on its public interest arguments in its correspondence with the Commissioner.

Balance of the public interest arguments

31. When balancing the opposing public interests in a case, the Commissioner is deciding whether it serves the public interest better to disclose the requested information or to withhold it because of the interests served by maintaining the relevant exemption. If the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure, the information in question must be disclosed.
32. The Commissioner acknowledges the presumption running through the FOIA that openness is, in itself, to be regarded as something which is in the public interest.
33. The Commissioner notes, however, that having accepted the reasonableness of the qualified person's opinion that disclosure of the information would have the stated detrimental effect, he must give weight to that opinion as a valid piece of evidence in his assessment of the balance of the public interest.
34. In this case, the Council has argued that it needs a 'safe space' to discuss live issues, away from external interference and distraction. In that respect, the Commissioner accepts that the requested information relates to issues that were live at the time of the request. This adds weight to the public interest arguments in favour of maintaining the exemption.
35. Having taken into account the weight in the public interest balance that he must afford to the qualified person's opinion, the Commissioner considers that in this case, at the time they fell to be considered by the

Council, the public interest arguments in favour of disclosure are outweighed by the public interest arguments in favour of maintaining the exemption. His conclusion is, therefore, that the public interest in the maintenance of the exemption outweighs the public interest in disclosure.

Section 1 general right of access

36. The Commissioner has next considered the Council's position that it does not hold information within the scope of part (a) of the request.
37. Section 1(1) of the FOIA states that an individual who asks for information is entitled to be informed whether the information is held and, if the information is held, to have that information communicated to them. Clearly this means that a public authority is required to establish accurately whether it holds information that has been requested.
38. During the investigation of this case, the Council apologised for any confusion caused by its original response:

"[which] had given the impression that all the information was exempt under section 36 which implied it was held at that point".
39. In bringing her complaint to the Commissioner's attention, the complainant asked him to consider whether an exchange of texts took place and, if so, whether it fell within the scope of the request. In that respect she advanced arguments as to why she believed that texts were sent and therefore that the Council must hold the requested information.
40. The FOIA gives the right to access recorded information held by public authorities. Therefore, the issue for the Commissioner to determine is not whether or not text messages were sent but whether the Council held a record of any such messages.
41. In scenarios such as this one, where there is some dispute between the public authority and the complainant about the amount of information that may be held, the Commissioner, following the lead of a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities. In other words, he must decide whether, on the balance of probabilities, a public authority holds any information which falls within the scope of the request (or was held at the time of the request).
42. Accordingly, the Council was asked to provide the ICO with an explanation of the searches that were carried out in response to the complainant's request, as well as any other reasons it had for concluding that it did not hold the requested text message information.

43. In its substantive response, the Council advised the Commissioner that:

"Text messages are treated like phone calls and there is no requirement for them to be retained".

44. It also told the Commissioner:

"the retention of text messages is not incorporated within the records management policy"

and

"there are no statutory requirements for the council to retain text messages".

45. While appreciating the complainant's frustration in this case, the Commissioner is mindful of the comments made by the Information Tribunal in the case of *Johnson / MoJ* (EA2006/0085) that FOIA:

"does not extend to what information the public authority should be collecting nor how they should be using the technical tools at their disposal, but rather it is concerned with the disclosure of the information they do hold".

46. In the circumstances, the Commissioner does not consider that there is any evidence that would justify refusing to accept the Council's position that, even if text messages were sent, it does not hold the information requested in part (a) of the request. The Commissioner is satisfied that, on the balance of probabilities, that information is not held by the Council.

Other matters

Section 77 offence of altering etc records with intent to prevent disclosure

47. Section 77 of the FOIA states that a criminal offence is committed if any person alters, defaces, blocks, erases, destroys or conceals any information with the intention of preventing the applicant from receiving any of the information he is entitled to receive. In order to secure a conviction in criminal proceedings, each element of an offence must be proven to the criminal standard, that being 'beyond reasonable doubt', as opposed to the lesser civil standard of 'balance of probabilities'.

48. The complainant alleged that the Council may have deliberately attempted to conceal information. In that respect she was concerned that relevant texts were sent and deleted after the time and date of the original request.

49. The standard of proof is beyond reasonable doubt. The Commissioner did not consider that evidence has been presented that would justify undertaking an investigation into this allegation.

Right of appeal

50. 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: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

51. 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.
52. 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

Jon Manners
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