Freedom of Information Act 2000 (FOIA)

Decision notice

Date: **2 September 2014**

Public Authority: **Copeland Borough Council**
Address: **The Copeland Centre**
Catherine Street
Whitehaven
Cumbria
CA28 7SJ

Decision (including any steps ordered)

1. The complainant has requested a copy of the Pow Beck valley Stadium project review. The council withheld the information under the exemptions for information intended for future publication (section 22 of the FOIA) and prejudice to effective conduct of public affairs (section 36 of the FOIA)

2. The Commissioner's decision is that Copeland Borough Council has:

   - Failed to demonstrate that section 22 of the FOIA is engaged;
   - Failed to demonstrate that section 36(2)(b)(i) and section 36(2)(b)(ii) are engaged.

3. The Commissioner requires the public authority to disclose the requested information to the requester.

4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 23 January 2014, the complainant wrote to Copeland Borough Council (the "council") and requested information in the following terms:

   "….a copy of the Pow Beck Project Review which has been compiled by consultant, Rob Blanden."

6. The council responded on 28 February 2014 and refused the request, citing the exemption for information intended for future publication (section 22 of the FOIA).

7. Following an internal review the council wrote to the complainant on 16 April 2014. The council maintained its position in relation to the application of section 22 and applied additional exemptions – section 36(2)(b) and section 36(2)(c) of the FOIA.

Scope of the case

8. On 28 February 2014 the complainant contacted the Commissioner to complain about the way their request for information had been handled.

9. The Commissioner confirmed with the complainant that his investigation would consider whether the council had correctly withheld the requested information.

Reasons for decision

Section 36 – prejudice to effective conduct of public affairs

10. The council has withheld a copy of "Pow Beck Valley Stadium Project: Lessons Learnt Review" (the "Report").

11. In refusing the request, the council has cited the exemptions set out in the following sections of the FOIA:

    - 36(2)(b)(i) (inhibition to free and frank provision of advice)

    - 36(2)(b)(ii) (inhibition to the free and frank exchange of views)

12. In order for these exemptions to be engaged, a public authority is obliged to first seek the reasonable opinion of a qualified person. In this case, the qualified person at the council is the Monitoring Officer and the

council has provided evidence that their opinion was sought and provided.

13. The Commissioner has gone on to consider whether the opinion of the qualified person was a reasonable one.

Was the opinion reasonable?

14. The Commissioner has issued guidance on section 36 of the FOIA. With regard to what can be considered a 'reasonable opinion' it states the following:

> *"The most relevant definition of 'reasonable' in the Shorter Oxford English Dictionary is 'In accordance with reason; not irrational or absurd'. 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."*[1]

15. In determining whether an opinion is reasonable in the context of section 36(2) and whether the exemption is engaged, the Commissioner must consider whether the prejudice or inhibition claimed relates to the specific subsections of section 36(2) that the council is relying upon.

36(2)(b)(i) and (ii)

16. In applying the exemptions the qualified person has stated that disclosure of the information would inhibit "….the free and frank exchange of advice and views and would almost certainly have resulted in the 'chilling effect' referred to in ICO guidance and possibly defeated the 'safe space' arguments referred to therein."

17. 'Would inhibit' means that it is more likely than not (i.e. a more than 50% chance) that inhibition would occur. The degree of likelihood claimed by the public authority is important because it sets the bar for engaging the exemption and then, if demonstrated, is carried forward into the balance of factors in the public interest test.

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1 http://www.ico.org.uk/for_organisations/guidance_index/~/media/documents/library/Freedom_of_Information/Detailed_specialist_guides/section_36_prejudice_to_effective_conduct_of_public_affairs.ashx

18. In cases where an authority claims that disclosure would be more likely than not to result in the inhibition described by the exemptions, the Commissioner expects that the opinion of the reasonable person would reflect that this conclusion was based on adequate evidence and/or arguments.

19. In reaching a decision as to whether the exemptions are engaged in this case, the Commissioner has referred to the record of the qualified person's opinion, the council's initial response to the request, its internal review response and its submissions to him during the course of his investigation. The Commissioner notes that the council has made reference to his guidance, however, he does not consider that it has shown how the concepts referred to in his guidance (i.e., "safe space" and "chilling effect") are instantiated in the facts of this particular request.

20. The qualified person's opinion states:

    "To release the draft version of the report in January 2014 before it was considered by stakeholders and members of the Council would have inhibited the free and frank exchange of advice and views and would almost certainly have resulted in the 'chilling effect' referred to in ICO guidance and possibly defeated the 'safe space' arguments referred to therein."

21. Having considered the qualified person's opinion and its development via other council submissions, the Commissioner considers that, rather than demonstrating that the information and circumstances engage the exemptions, the council has simply referred to and attempted to define the information using the language of the exemption and the terminology of his guidance.

22. The exemptions cited by the council require more than the possible inconvenience in responding to queries about disclosures or the possibility of misinterpretation to be engaged. The Commissioner considers that the council has not provided arguments which demonstrate that disclosure would result in the effects required to engage the exemption, namely, the inhibition of the free and frank provision of advice or the free and frank exchange of views for the purposes of deliberation.

23. The Commissioner considers that it is an expected part of the role of officials to exchange free and frank views. It has not been explained to the Commissioner how the disclosure of the withheld information would impact on this process or on the provision of free and frank advice, let alone how it would inhibit these processes. In this case the council has

relied upon the limb of the exemption which requires a higher burden of proof to demonstrate that it is engaged. So, it must be shown that the inhibition described would be more likely than not to occur.

24. Whilst the Commissioner accepts that disclosure of the information would be likely to result in queries being raised, requiring additional work and the generating of responses by the council he does not consider that it logically follows that this will result in officials being reluctant to provide free and frank advice or freely exchange views. Since the passing of the FOIA authorities will be aware that no information is automatically exempt or for internal consumption only. Clearly there will be situations in which it is appropriate to withhold information but, in order to do this, authorities must provide arguments which are specific to the exemption being claimed and the information being withheld. In this case, the Commissioner considers that the council has simply attempted to characterise the outcome of disclosure in the terms described by the exemption rather than shown how these effects would arise.

25. Having considered the withheld information and the arguments provided the Commissioner considers that, in this case, it has not been shown that disclosure would result in the inhibition described by the exemptions. As he has concluded that the exemptions are not engaged the Commissioner has not gone on to consider the public interest test.

Section 22 – information intended for future publication

26. The council has also withheld the Report under section 22 of the FOIA.

27. For the exemption to be engaged, the Commissioner first needs to be satisfied that the information is held with the intention of being published, whether by the public authority or by any other person.

28. Secondly, section 22 requires that this intention to publish must have existed at the time of the request, and thirdly, it must be reasonable in all the circumstances that the information should be withheld from disclosure until the intended date of publication.

29. This exemption is also qualified by the public interest, meaning that the information should be disclosed if the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure.

Intention to publish at some future date existed at the time the request was made

30. Section 22 applies only when the information is held with a view to publication at the time the request for it was received.

31. The council has stated that the Report relates to a project which as important to parts of the community. It confirmed that it had committed itself to an investigation into what had happened and there was an overarching or "implied" intention and settled expectation that the results of that investigation would be notified to the general public in "due course". In explaining this the council directed the Commissioner to minutes of its Overview and Scrutiny Committee (dated 21 June 2012) which states that "..a project review was underway with key partners and [that the] Council would facilitate and support this review".

32. The council stated to the Commissioner that its "current position" was that the "draft report" into the project is likely to be completed "over the next two months".

Information held at the time of the request

33. The council confirmed that the requested information, namely the Report was held at the time of the request.

Held with a view to publication?

34. The Commissioner interprets the words 'with a view to' in section 22 to indicate an intention has been made to publish - or at the very least that the information is held in the settled expectation that it will be published. If, during the course of the preparation of the information for publication, some material will be redacted or rejected, section 22 will not apply to that information. This is because the public authority will no longer hold the information with a view to publication in the future.

35. In the Commissioner's view, in order to engage section 22, a public authority must be able to show clearly which information within the scope of a request it intends to publish.

Is the exemption engaged?

36. The Commissioner's task is to consider whether information was held with an intention to disclose at the time that the request was made and whether it was reasonable to delay access to this information until the time of that publication.

37. The Commissioner acknowledges that the date of publication does not need to be definite for the exemption to apply.

38. In this case the council stated that, at the date of the request it was in "possession of a document" which needed input from those who were involved in the project and external project partners. It explained that comments had already been received from the external consultant who

had managed the project and these had been incorporated into the Report. It confirmed that comments from others were still to be sought and this process was ongoing.

39. The Commissioner has noted that the council's submissions, in defining the information intended for future publication, oscillate between references to the Report (which is complete and was held at the time of the request) and to a final "report" which will be produced when the processes referred to in paragraph 35 above.

40. Notwithstanding that it may have been appropriate to conduct such a investigation, in the Commissioner's view the council's argument about such an investigation process is not inherent to the consideration of the application of section 22. The arguments about any impact on the publication timetable, which are inherent in section 22, are unconvincingly explained and there is a lack of evidence about the impact.

41. More relevantly, on the basis of the council's explanations, the Commissioner considers that it is not the withheld Report which the council intends publishing, but a (as yet unwritten) "report" which it will create at the outcome of its investigation.

42. Whilst elements of the withheld information may well find their way into the final report, the Commissioner does not accept that the version which existed at the time of the request will be the same as the one published.

43. It therefore could not be said that, at the date of the request, the council had an intention or settled expectation that all the information for which it has claimed section 22 would be published.

44. Accordingly, the Commissioner does not find the exemption engaged. As he has not found section 22 engaged, the Commissioner has not gone on to consider the public interest test in relation to that exemption.

Right of appeal

45. 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: 0870 739 5836
    Email: GRC@hmcts.gsi.gov.uk
    Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

46. 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.

47. 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 .....

Andrew White
Group Manager
Information Commissioner's Office
Wycliffe House
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