

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 December 2015

Public Authority: Royal Borough of Windsor and Maidenhead
Address: Town Hall
St. Ives Road
Maidenhead
SL6 1RF

Decision (including any steps ordered)

1. The complainant has requested a copy of the Desborough Suite Feasibility study. The feasibility study explored the possibility of transforming a suite, at Maidenhead Town Hall into a multi-purpose entertainment centre. The Council refused to provide the requested information under section 36(2)(b)(ii) FOIA.
2. The Commissioner's decision is that the Council has correctly applied section 36(2)(b)(ii) FOIA to the withheld information.
3. The Commissioner requires no steps to be taken.

Request and response

4. On 4 June 2015 the complainant requested information of the following description:

"The Council recently spent £75,000 on the Desborough Suite Feasibility study for arts in the town hall. Under the Freedom of Information Act I wish to formally request a copy of this report or its publication."

5. On 29 June 2015 the Royal Windsor and Maidenhead responded. It refused to disclose the requested information under section 36(2)(c) and section 43(2) FOIA.
6. The complainant requested an internal review on 29 June 2015. The Royal Windsor and Maidenhead sent the outcome of its internal review

on 1 July 2015. It upheld its original position.

Scope of the case

7. The complainant contacted the Commissioner on 14 July 2015 to complain about the way his request for information had been handled.
8. During the course of the Commissioner's investigation the Council confirmed that the qualified person considered section 36(2)(b)(ii) FOIA to be engaged in this case and that the reference to section 36(2)(c) in the response to the complainant was a typing error. The Council did not provide the Commissioner with any further supporting arguments in relation to its application of section 43(2) FOIA.
9. In its response to the Commissioner, the Council explained that section 36(2)(b)(ii) was applicable to the feasibility study as well as associated minutes. After having reviewed the wording of the request, the Commissioner does not consider that the associated minutes fall within its scope. The Commissioner has therefore only considered the application of the exemptions to the feasibility study itself and any reference to the withheld information is limited to this.
10. The Commissioner has considered whether the Council correctly applied section 36(2)(b)(ii) or section 43(2) FOIA to the withheld information.

Reasons for decision

11. Section 36 FOIA 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-

(2)(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

(2)(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

12. The Council has applied section 36(2)(b)(ii) FOIA to the withheld information.
13. In determining whether the exemption was correctly engaged by the Council, 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.
14. The Council explained that the qualified person is the Monitoring Officer. It explained that the qualified person's opinion was that section 36(2)(b)(ii) FOIA was applicable in this case. It said that the Monitoring Officer was provided with a copy of the feasibility study and also all minutes of the Desborough Suite Steering Group. It said that there were no written records of the qualified person's opinion. It said it is likely the Monitoring Officer took her own notes but she has since left the authority. It did not provide the date on which the qualified opinion was provided.
15. The Council explained that if the withheld information were disclosed it would be likely to inhibit the free and frank discussion and deliberation of the options between elected members and council officers relating to the Desborough Suite. It confirmed that a decision has not yet been taken and the decision date is not yet known.
16. The qualified person's opinion is that disclosure would be likely to prejudice the free and frank exchange of views for the purpose of deliberation under section 36(2)(b)(ii) FOIA for the reasons given above.
17. Whilst the Commissioner does not have a written copy of the qualified opinion, he does have an explanation from the Council as to what that opinion was. He also does not have a date the opinion was given, however given that a decision has not yet been taken in relation to the Desborough Suite, the reasoning behind the decision remains sound. Therefore after viewing the withheld information and the factors considered above, the Commissioner is satisfied that the opinion of the qualified person is a reasonable one.

18. As the Commissioner has decided that the exemption is engaged, he has gone on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information. In his approach to the competing public interest arguments in this case, the Commissioner has drawn heavily upon the Information Tribunal's Decision in the case of Guardian Newspapers Limited and Heather Brooke v Information Commissioner and BBC (the Brooke case)¹.
19. The Commissioner notes, and adopts in particular, the Tribunal's conclusions that, having accepted the reasonableness of the qualified person's opinion that disclosure of the information would, or would be likely, to have the stated detrimental effect, the Commissioner must give weight to that opinion as an important piece of evidence in his assessment of the balance of the public interest. However, in order to form the balancing judgment required by section 2(2)(b), the Commissioner is entitled, and will need, to form his own view as to the severity of, and the extent and frequency with which, any such detrimental effect might occur. Applying this approach to the present case, the Commissioner recognises that there are public interest arguments which pull in competing directions, and he gives due weight to the qualified person's reasonable opinion that disclosure would, or would be likely to inhibit the free and frank provision of advice.

Public interest arguments in favour of disclosing the requested information

20. The Council acknowledged that disclosure would promote transparency, may improve the quality of discussion and public understanding of the proposals may be enhanced.

Public interest arguments in favour of maintaining the exemption

21. The Council has explained that it believes the following public interest arguments favour maintaining the exemption:

The Chilling Effect

The Council argued that disclosure would risk inhibiting the frankness and candour of debate and decision making on all of the relevant issues relating to the Desborough Suite project and might impact on other

¹ EA/2006/0011; EA/2006/0013

discussions held between members and officers on this and other matters in the future.

The Timing of the Request

The feasibility study has now been passed on to architects and the Cabinet will take a formal decision on this in the future. Once a decision has been made the exemptions applied may no longer be relevant for any future requests for disclosure of this information. At this time the likely decision date is not known.

Balance of the public interest arguments

22. The Commissioner considers there is a strong public interest in openness and transparency, particularly in relation to a proposal such as this which will impact upon the local community. This is because it would provide the public with a greater understanding and reassurance behind Council decision making.
23. The Commissioner does however consider that there is a requirement for free and frank discussion to enable the Council to make a decision based upon the feasibility study. Disclosure of information which would be likely to inhibit the frankness and candour of such discussions would not be in the public interest. Particularly as a decision has not yet been taken.
24. The Commissioner considers that there is a strong public interest in disclosure of information relating to the review as it could potentially effect a number of individuals in the locality and in terms of public spending. However the Commissioner considers that there is a strong public interest in relevant individuals being able to share views freely and frankly based upon the feasibility study and to come to a decision on this matter.
25. On balance the Commissioner considers that in this case, the public interest arguments in favour of disclosure are outweighed by the public interest arguments in favour of maintaining the exemption. Section 36(2)(b)(ii) FOIA was correctly applied in this case.
26. As the Commissioner considers that section 36(2)(b)(ii) FOIA was correctly applied, he has not gone on to consider the application of section 43(2) FOIA any further.

Other Matters

27. In this case, whilst the Commissioner has accepted that the qualified person's opinion is reasonable, the process was flawed because there was no written record of the opinion or discussions to explain how it was reached. He also has not been provided with the date the opinion was provided.
28. If the PA has no record of the submission or the qualified person's opinion, the Commissioner would accept a signed statement from the qualified person stating whether they saw the information in question, what factors they took into account and what their opinion was and when they gave it. There is a form on the ICO website that public authorities can use to provide us with a record of the qualified person's opinion.
29. The Council should ensure the correct process is followed in the future.

Right of appeal

30. 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

31. 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.
32. 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

Gemma Garvey
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF