

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 8 December 2016

Public Authority: Hartlepool Borough Council
Address: Civic Centre
Victoria Road
Hartlepool
TS23 8AY

Decision (including any steps ordered)

1. The complainant has requested emails which have been sent and received by Gill Alexander, Hartlepool Borough Council's Chief Executive and those sent and received by Sally Robinson, the Council's Director of Child and Adult Services. The requested emails concern the murder of Angela Wrightson in December 2014.
2. The Commissioner's decision is that Hartlepool Borough Council has correctly applied sections 36(2)(b)(i) and 36(2)(b)(ii) to the emails requested by the complainant and it is therefore entitled to withhold them.
3. The Commissioner requires the public authority to take no further action in this matter.

Request and response

4. On 6 April 2016, the complainant wrote to Hartlepool Borough Council and requested information in the following terms:

"Please provide copies of all emails sent and received by Gill Alexander between (and including) April 4, 2016, and today (up to the time of this email) which relates in any way to the Angela Wrightson murder case.

Please provide copies of all emails sent and received by Sally Robinson between (and including) April 4, 2016, and today (up to the time of this email) which relate in any way to the Angela Wrightson murder case."

5. The Council wrote to the complainant on 3 May 2016, confirming that it holds information which is relevant to his request and advising him that it was refusing to disclose that information to him in reliance on sections 42, 41, 40(2), 44 and 36(2)(b)(i and ii) of the FOIA.
6. The complainant wrote to the Council on 3 May to request an internal review of its decision to withhold the information he has requested. The complainant provided the Council with arguments in rebuttal of the exemptions the Council has applied.
7. The Commissioner understands that no internal review was carried out in respect of the complainant's request. This is due to a conflict of interests identified by the Council's Legal Services Manager/Solicitor.

Scope of the case

8. The complainant contacted the Commissioner 11 May 2016 to complain about the way his request for information had been handled.
9. The Commissioner has investigated whether the Council is entitled to withhold information in reliance on the exemptions specified in its refusal notice of 3 May 2016; namely sections 40(2), 41, 42, 44 and 36(2)(b)(i) and (ii) of the FOIA.

Background information

10. The emails which the complainant seeks relate to the murder of a vulnerable woman – Angela Wrightson.
11. The murder was committed by two girls who were aged 13 and 14 at the time of the offence and when both were in the care of the local authority.
12. When the girls were brought for trial they were aged 14 and 15. The trial judge exercised his discretion and made an Order under section 39 of the Children and Young Person's Act 1933 which put in place reporting restrictions for the period of the trial. Consequently the two girls were not named.

13. The question of the girls' anonymity was considered at the subsequent sentencing hearing and the trial judge, Mr Justice Globe, decided that the section 39 Order¹ should remain in place until the girls turn 18.
14. Mr Justice Globe's considerations are detailed at paragraphs 47 – 66 of his sentencing remarks which he delivered on 7 April 2016².
15. Anyone who publishes the girl's names or their photographs is guilty of a criminal offence which is punishable by unlimited fine.
16. The complainant is seeking all emails which have been sent and/or received by Gill Alexander, the Council's Chief Executive and those sent and/or received by Sally Robinson, the Council's Director of Child and Adult Services. Many of the emails relate specifically to the trial of the two girls and the extension of the section 39 Order; as such they include a significant number of emails between the Council's legal officer and its external legal representatives.
17. The Council has provided the Commissioner with copies of the emails which fall within the terms of the complainant's request. The emails were collated into four bundles and each bundle was marked to indicate the exemptions which the Council is claiming. The Council also provided the Commissioner with two bundles of emails which were disclosed to the complainant.
18. The Council is claiming that section 36 applies to all of the withheld email bundles and therefore the Commissioner has decided to consider the section 36 exemption first.

Reasons for decision

Section 36 – Prejudice to the conduct of public affairs

19. Section 36 allows a public authority to withhold recorded information where its disclosure would prejudice the effective conduct of public affairs.
 20. The Council has confirmed to the Commissioner that it is relying on section 36(2)(b)(i) and 36(2)(b)(ii) to withhold the requested emails. Section 36(2) states:
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¹ Section 39 of the Children and Young Person's Act 1933

² <https://www.judiciary.gov.uk/wp-content/uploads/2016/04/sentence-f-d-1.pdf>

"36 (2) 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 purpose of deliberation , or

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

21. The application of section 36 requires the public authority's "qualified person" to consider the withheld information and the exemption which applies to it. This consideration cannot be delegated to another person within the public authority.
22. The Commissioner asked the Council to provide her with evidence that the qualified person considered the application of section 36 personally. The Council did this by sending the Commissioner a record of the qualified person's opinion.
23. The Council's qualified person for the purpose of considering the application of section 36 of the FOIA is the Council's Chief Solicitor and Monitoring Officer, Mr Peter Devlin.
24. The withheld emails were provided to Mr Devlin on 29 April 2016 so that he could review them and consider the application of section 36.
25. The Council's record shows that Mr Devlin approved the Council's application of section 36(2)(b)(i) and (ii) in respect of the withheld emails. His opinion is recorded as:

"Disclosure in this instance is likely to inhibit the ability of Council officials and others in expressing views and deliberating issues which in turn would impair the quality of decision making. There is a need for a safe space for Council officials to have free and frank exchanges with officials within other departments and organisations."
26. The record also shows that Mr Devlin considered arguments which favour disclosure of the emails as well as those which favour their continued withholding. Additionally, Mr Devlin noted the existence of the Section 39 Order and the question of the continued anonymity of the two girls.

27. The Commissioner notes the contents of the qualified person's opinion. She is satisfied that the qualified person has given an opinion and she must now consider whether that opinion is reasonable.
28. In considering whether the qualified person's opinion is "reasonable", the Commissioner adopts the plain meaning of that word. She has referred to the definition of "reasonable" given in the Shorter English Dictionary: The definition given is; "in accordance with reason; not irrational or absurd".
29. To engage section 36, the qualified person's opinion needs only to be reasonable: It needs to be an opinion reasonably held by a reasonable person. This is not a high hurdle. It is not necessary for the Commissioner to agree with the opinion given; she only needs to recognise that a reasonable person could hold the opinion given. In this case, the Commissioner is satisfied that a reasonable opinion has been given.
30. Whilst the contents of the withheld information is important for considering where the balance of the public interest lies, the primary reason for the Council's application of section 36 is the processes that may be inhibited, rather than what is in the information³.
31. The Council points out that the requested information relates to the court case itself, to the two girls convicted of murder, and to the representations made in respect of reporting restrictions.
32. It asserts that this is a particularly sensitive issue due to the circumstances of the case and the public scrutiny which has resulted from media coverage.
33. During the course of the proceedings an application was made to lift the reporting restrictions on naming the two girls. The Council acknowledges that this was a particularly contentious issue, making it necessary for it to determine whether to challenge the application.
34. This required Council officers, including the Chief executive, to express their views so that informed decisions could be made as to what were and would be the girls' best interests.
35. The Council asserts the circumstances of the case makes it imperative for this decision making process to remain confidential, as disclosure

³ https://ico.org.uk/media/for-organisations/documents/1175/section_36_prejudice_to_effective_conduct_of_public_affairs.pdf

would inhibit the free exchange of views and opinions and have a detrimental effect on future decision making.

36. The Council recognizes that the murder of a vulnerable adult is of clear interest to the public. Whilst the trial took place in April 2016 it remains in the public eye⁴ and is subject to three separate independent reviews: A Safeguarding Adults Review in respect of the murder victim and two Serious Case Reviews in respect of the two girls.
37. The reviews are being carried out in accordance with the Social Care Institute of Excellence ("SCIE") Learning Together methodology which is recommended in Working Together to Safeguard Children 2015. Emails concerning the Safeguarding Children Reviews have been sent to the Council. These have not been considered for release to the public under the complainant's request because recorded information owned by the Safeguarding Children Board is not subject to the provisions of the FOIA by virtue of section 3 of the FOIA.
38. The Council argues that it is imperative to protect the integrity of the Reviews, pointing out their process involves facilitated discussions with members of a multi-agency workforce who have been involved with the support and care of the two girls. This process is challenging and every effort needs to be made to enable officers to fully participate in the process without fear of criticism, recrimination or reprisal.
39. Should disclosure be made by virtue of the complainant's request, the 'safe space' environment would be compromised and would likely result in a failure to make an effective review where continuous learning and improvement can be delivered across all the organisations working in the safeguarding arena. The Council assures the Commissioner that the findings of the reviews will be of national relevance, especially to children's social policy. Once the reviews are concluded the reviews will be published and open to public scrutiny.
40. It is clear to the Commissioner that the Council considers that disclosure of the withheld emails would result in a "chilling effect" to its decision-making process, whereby discussions between its staff would be inhibited. Disclosure of the withheld emails would inhibit free and frank discussions in the future result in a loss of frankness and candor. This

⁴ <http://www.itv.com/news/tyne-tees/2016-06-02/exclusive-hartlepool-teen-killers-mother-claims-authorities-could-have-prevented-murder/>

<http://www.mirror.co.uk/news/uk-news/angela-wrightson-snapchat-murder-victims-8127331>

would damage the quality of advice and deliberation and lead to poorer decision making.

41. The Commissioner has considered the nature and contents of the withheld emails. She accepts the qualified person's opinion that the disclosure of the withheld information would likely prejudice the exchange of views and advice. The Commissioner readily accepts that the Council requires a 'safe space' to consider the issues surrounding the trial of the two girls and the need for their continued anonymity. It is for this reason the Commissioner has decided that sections 36(2)(b)(i) and (ii) are engaged.

The Public Interest

42. The Council's application of sections 36(2)(b)(i) and (ii) is subject to a consideration of the public interest. The Commissioner is required to consider whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
43. In *Guardian and Heather Brooke v the Information Commissioner and the BBC* (EA/2006/001 and EA/2006/0013), the Tribunal provided some general principles about the application of the public interest test in section 36 cases as follows:
- The lower the likelihood is shown to be that the free and frank exchange of views or provision of advice would be inhibited, the lower the chance that the balance of the public interest will favour the exemption.
 - While the Commissioner cannot consider whether prejudice is likely (that is for the qualified person to decide), he is able to consider the severity, frequency or extent of any likely prejudice.
 - Since the public interest in maintaining the exemption must be assessed in the circumstances of the case, the public authority is not permitted to maintain a blanket refusal in relation to the type of information sought.
 - The passage of time since the creation of the information may have an important bearing on the balancing exercise. As a general rule, the public interest in maintaining the exemption will diminish over time.
 - In considering factors against disclosure, the focus should be on the particular interest that the exemption is designed to protect, in this case the effective conduct of public affairs through the free and frank exchange of views.

- While the public interest considerations in the exemption from disclosure are narrowly conceived, the public interest considerations in favour of disclosure are broad ranging and operate at different levels of abstraction from the subject matter of the exemption.
- Disclosure of information serves the general public interest in promotion of better government through transparency, accountability, public debate, better public understanding of decisions, and informed and meaningful participation of the public in the democratic process.

Public interest arguments in favour of disclosing the requested information

44. The Commissioner considers that some weight must always be given to the general principle of achieving accountability and transparency through the disclosure of information held by public authorities.
45. Disclosure of publicly held information generally assists the public to understand how public authorities make their decisions and carry out their functions. Disclosure therefore promotes the better understanding of the decisions made by public authorities.
46. Disclosure may foster trust in public authorities and may also allow greater public participation in the Council's decision making processes.
47. The Commissioner gives some weight to the apparent purpose behind the complainant's request. Having examined the withheld information, the Commissioner finds there is some public interest knowing that the Council has acted properly and has taken lawful decisions in respect of the trial of the two girls and their continued anonymity. She recognises that the public should be properly assured that the Council is acting lawfully and in a considered manner.

Public interest arguments in favour of maintaining the exemption

48. It is the Council's strongly held belief that it is essential for its officers to have free space to consider the issues raised by the trial of the two girls who were in its care. It is necessary for its officers to discuss matters rigorously, with candour and to record these discussions accurately.
49. Releasing the records of its candid discussions would likely result in a chilling effect whereby the Council's officers would be reticent to discuss matters and to provide candid opinions and/or have them recorded. In the context of this case, it is apparent to the Commissioner that this reticence would be real and it would result in detriment to the Council's decision making process.

50. The correspondence is very recent. The Commissioner must have particular regard to those emails where the children are directly referred to. She must also have regard to the Mr Justice Globe's decision to extend the section 39 Order until the girls turn 18 and she is particularly minded that through continued media interest the matter can be considered to be live.

The Commissioner's decision

51. In this case the requested information relates to the trial of two girls and to their continued anonymity. The trial has been well publicised through media coverage and this is demonstrably is on-going.
52. The question of the girls' anonymity was the subject of an Order made under section 39 of the Children and Young Person's Act 1933: This Order was extended by Mr Justice Globe at the girls' sentencing hearing. During the sentencing hearing the judge gave his detailed rationale of why he considered continued anonymity to be necessary.
53. The full facts of the case have been accurately reported. This reporting has made public debate possible without the need of the girls' identities being made public.
54. Whilst the Commissioner must give some weight to the factors which favour the disclosure of the withheld emails, the amount of weight is not sufficient enough to counter the detriment that disclosure would have in respect of the Council's need for 'safe space'.
55. The Commissioner is in no doubt that disclosure of the withheld emails would have a significant negative impact on the Council's decision making process: She agrees with the Council that, in the circumstances of this case, it is necessary to have a 'safe space' to receive candid advice from its officers and to discuss that advice without the threat of disclosure. In the Commissioner's opinion this need is greater than the public interest in knowing the details of the advice contained in the withheld emails.
56. The Commissioner is content that the public interest in this case has been well-served by the openness of the judicial process and by the media coverage which has resulted from it. The Commissioner cannot ignore the detailed rationale given by Mr Justice Globe in his decision to extend the section 39 Order and that this rationale goes a long way to serve the public interest.
57. The Commissioner's decision is that the public interest favours the continued withholding of the information requested by the complainant. She has therefore decided that the Council is entitled to rely on sections 36(2)(b)(i) and(ii) to withhold all of the requested information.

58. The Commissioner's decision means that she is not required to go on to provide detailed analysis of the Council's reliance on sections 40(2), 41, 42, 43 and 44.
59. No inference should be taken from this to make a claim that the Council has failed to make robust and persuasive representations in support of its position; such an inference would be misguided, particularly in respect of the Council's application of sections 40(2) - personal data of third parties, 41 - information provided in confidence and 42 – where the withheld emails are subject to a claim of professional legal privilege. It is the Commissioner's opinion that the arguments advanced in support of these exemptions are equally compelling.

Right of appeal

60. 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

61. 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.

62. 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
Water Lane
Wilmslow
Cheshire
SK9 5AF