

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 14 March 2017

**Public Authority:** Durham County Council  
**Address:** County Hall  
Durham  
DH1 5UL

#### Decision (including any steps ordered)

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1. The complainant has requested all reports made prior to November 27 2015 to the Corporate Management team of Durham County Council relating to proposals to change the contracts of classroom assistants in County Durham. The Commissioner's decision is that Durham County Council has correctly applied the exemption at section 36(2)(b)(i) where disclosure would, or would be likely to, inhibit the free and frank provision of advice. She does not require the public authority to take any steps to ensure compliance with the legislation.

#### Request and response

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2. Following the council's refusal of the complainant's previous request (reference FOI20153723OT), on 20 May 2016 the complainant made the following request for information:  

"I therefore request to be provided with all reports made prior to November 27th 2015 to the Corporate Management team of Durham County Council relating to proposals to change the contracts of classroom assistants in County Durham."
3. The council responded on 20 June 2016 (reference FOI20164358OT) and refused to provide the requested information citing the exemptions at sections 36(2)(b)(i) and 42 of the FOIA.
4. On 21 June 2016, the complainant requested an internal review.
5. The council provided its internal review response on 4 August 2016 in which it maintained its position.

## Scope of the case

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6. The complainant contacted the Commissioner on 22 August 2016 to complain about the way his request for information had been handled.
7. The Commissioner has considered whether the council has correctly applied the exemption at section 36(2)(b)(i) where disclosure would, or would be likely to, inhibit the free and frank provision of advice.
8. As the Commissioner has decided that the council has correctly applied the exemption at section 36(2)(b)(i), it has not been necessary to consider the application of the exemption for legal professional privilege at section 42.

## Reasons for decision

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### Section 36

9. Section 36 states that information is exempt where, in the reasonable opinion of a qualified person, disclosure would or would be likely to prejudice the effective conduct of public affairs. Section 36 operates in a slightly different way to the other prejudice based exemptions in the FOIA. Section 36 is engaged only if, in the reasonable opinion of a qualified person, disclosure of the information in question would, or would be likely to, prejudice any of the activities set out in sub-sections of 36(2).
10. In this case the Commissioner is considering the application of the exemption at section 36(2)(b)(i).
11. Section 36(2)(b)(i) provides an exemption where disclosure would, or would be likely to, inhibit the free and frank provision of advice.

### Is the exemption engaged?

12. In order to establish whether the exemption has been applied correctly the Commissioner has:
  - Ascertained who is the qualified person or persons for the public authority in question;
  - Established that an opinion was given;
  - Ascertained when the opinion was given; and
  - Considered whether the opinion given was reasonable.

13. With regard to the first two criteria, the Commissioner has established that the opinion was given by the council's Monitoring Officer. The Commissioner is satisfied that the council's Monitoring Officer is a qualified person for the purposes of section 36(5) of the FOIA.
14. In relation to the third criterion, the council has provided the date when the opinion was given. The Commissioner is satisfied that the opinion was provided after the receipt of the request and before the initial response.
15. With regard to the fourth criterion, in deciding whether an opinion is reasonable the Commissioner will consider the plain meaning of that word, that being: in accordance with reason, not irrational or absurd. If it is an opinion that a reasonable person could hold, then it is reasonable for these purposes. This is not the same as saying that it is the *only* reasonable opinion that could be held on the matter. The qualified person's opinion is not rendered unreasonable simply because other people may have come to a different (and equally reasonable) conclusion. It is only not reasonable for these purposes if it is an opinion that *no* reasonable person in the qualified person's position could hold. The qualified person's opinion does not even have to be the *most* reasonable opinion that could be held; it only has to be *a* reasonable opinion.
16. The Commissioner has also been guided by the Tribunal's indication, in the case *Guardian Newspapers & Brooke v Information Commissioner & BBC*<sup>1</sup>, that the reasonable opinion is limited to the degree of likelihood that inhibition or prejudice may occur and thus 'does not necessarily imply any particular view as to the *severity* or *extent* of such inhibition [or prejudice] or the *frequency* with which it will or may occur, save that it will not be so trivial, minor or occasional as to be insignificant' (paragraph 91). Therefore, when assessing the reasonableness of an opinion the Commissioner is restricted to focussing on the likelihood of that inhibition or harm occurring, rather than making an assessment as to the severity, extent and frequency of prejudice or inhibition of any disclosure.
17. With regard to the degrees of likelihood of prejudice the Commissioner has been guided on the interpretation of the phrase 'would, or would be likely to' by a number of Information Tribunal decisions. In terms of 'likely to' prejudice, the Tribunal in *John Connor Press Associates Limited*

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<sup>1</sup> Appeal numbers EA/2006/0011 & EA/2006/0013

*v The Information Commissioner*<sup>2</sup> confirmed that 'the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk' (paragraph 15). With regard to the alternative limb of 'would prejudice', the Tribunal in *Hogan v Oxford City Council & The Information Commissioner*<sup>3</sup> commented that 'clearly this second limb of the test places a stronger evidential burden on the public authority to discharge' (paragraph 36).

18. The qualified person's signed section 36 statement states that the claimed inhibition and prejudice 'would' occur if the information was disclosed. Therefore, the Commissioner considers that it is appropriate to apply the stronger evidential test.
19. At the Commissioner's request, the council confirmed that the qualified person was provided with the requested reports. It also informed the Commissioner that the Monitoring Officer is a member of the council's Corporate Management Team, and has full knowledge of the issues contained within the reports and attended the Corporate Management Team meetings in which the reports were discussed.
20. The reason given for the engagement of the exemption is that, at times, the council will have to consider extreme options regarding funding, staffing and service provision which will require the officers involved to provide free and frank advice. The council said that when officers prepare such advice for the Corporate Management Team, it is on the understanding that it will be confidential and that if such advice were disclosed it would inhibit the ability of officers to be able to express themselves openly, honestly and completely while exploring sensitive matters. It said that if those officers did feel so inhibited, there is a realistic prospect that this would adversely impact the discussions and therefore the decisions that flow from the discussions.
21. Whilst the Commissioner does not accept that those involved in the process will be put off providing advice in full, it is not unreasonable to conclude that information would be less descriptive and couched in a more cautious manner. This would then have a harmful effect on the provision of advice in relation to the proposals to change the contracts of classroom assistants in County Durham. The Commissioner finds that the opinion of the qualified person is a reasonable one in this instance and therefore finds that section 36(2)(b)(i) is engaged.

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<sup>2</sup> Appeal number EA/2005/0005

<sup>3</sup> Appeal number EA/2005/0026 & 0030

### **Public interest test under section 36**

22. Sections 36(2)(b)(i) is a qualified exemption and therefore the Commissioner must consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure of the information. The Tribunal in the aforementioned case of *Guardian Newspapers & Brooke v Information Commissioner & BBC* indicated the distinction between the consideration of the public interest under section 36 and consideration of the public interest under the other qualified exemptions contained within the FOIA:

“The application of the public interest test to the s36(2) exemption involves a particular conundrum. Since under s36(2) the existence of the exemption depends upon the reasonable opinion of the qualified person it is not for the Commissioner or the Tribunal to form an independent view on the likelihood of inhibition under s36(2)(b), or indeed of prejudice under s36(2)(a) or (c). But when it comes to weighing the balance of public interest under s2(2)(b), it is impossible to make the required judgment without forming a view on the likelihood of inhibition or prejudice.” (Paragraph 88)

23. As noted above, the Tribunal indicated that the reasonable opinion is limited to the degree of likelihood that inhibition or prejudice may occur and thus ‘does not necessarily imply any particular view as to the *severity* or *extent* of such inhibition [or prejudice] or the *frequency* with which it will or may occur, save that it will not be so trivial, minor or occasional as to be insignificant’ (paragraph 91). Therefore, the Commissioner’s view is that whilst due weight should be given to reasonable opinion of the qualified person when assessing the public interest, the Commissioner can and should consider the severity, extent and frequency of prejudice or inhibition to the subject of the effective conduct of public affairs.

### **Public interest arguments in favour of disclosing the requested information**

24. The Council accepts that there is a general public interest in transparency and accountability.
25. In his initial request, the complainant has said that he wants the requested information in order to judge:

1. Whether the proposals being consulted on on November 27th were identical with those recommended/suggested to the Corporate Management Team prior to that date
2. What the logic was for those proposals

3. To establish whether the CMT had included comparisons with the pay grades and terms and conditions of local authorities contiguous with County Durham in order to consider the likely effect on recruitment and retention of classroom assistants within County Durham”.
26. In the internal review request, the complainant has said that in this case, public policy was not made within the confines of either the Corporate Management Team or the council executive cabinet but was made by a decision of all elected members and that the refusal to disclose the reports requested to this member, and all other members, clearly had, and continues to have, an adverse effect on public policy because the decision has had to be taken by people who have been denied ‘free and frank’ advice. He also said that the refusal to disclose all details, regardless of whether they refer to legal advice, financial implications, options for consideration, or recommendations is a refusal to disclose the extent, volume, frequency and approach that has been taken in respect of this issue.
27. The Commissioner considers that the ‘default setting’ of the FOIA is in favour of disclosure. This is based on the underlying assumption that disclosure of information held by public authorities is in itself of value because it promotes better government through transparency, accountability, public debate, better public understanding of decisions and informed and meaningful participation of the public in the democratic process.
28. In this particular case, disclosure would aid transparency in relation to the proposals to change the contracts of classroom assistants in County Durham.

### **Public interest arguments in favour of maintaining the exemption**

29. The council said that it requires a safe space in which sensitive matters can be discussed, advice can be developed for extreme options, and decisions can be made. It explained that the public interest is not served if it is unable to consider such advice or deliberate effectively to prepare the best option for public decision making. It also said that there is a strong argument regarding the chilling effect. It explained that the matter in question is still live and therefore disclosure of the two reports withheld in this case would inhibit the free and frank provision of advice in the future. It said that the knowledge that such reports could be disclosed could also have a chilling effect on the willingness of the council’s partners and stakeholders to share information with it to aid joint consideration and policy development.

30. The council also said that the consequence from disclosure would be to damage the quality of the advice and deliberation and lead to poorer decision making.

### **Balance of the public interest arguments**

31. Where, as with this case, a qualified exemption is engaged, the information requested must still be disclosed unless, in all circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing it.
32. The council said that in carrying out the public interest test, it has considered the arguments in favour of both disclosing the information and maintaining the exemption. It explained that the public interest test is met to a degree by the information already in the public domain through council reports and briefings and concluded that the public interest in disclosing the information is outweighed by the public interest in refusing to disclose the information because disclosure would undermine the council's ability to conduct its business.
33. Having seen the withheld information, the Commissioner will consider where the balance of the public interest lies. In doing so, she has taken into account the opinion of the qualified person. In accepting that the qualified person has given a reasonable opinion that disclosure would cause the inhibition described, this carries a certain amount of weight through to the public interest test.
34. However, the exact weight that should be given to maintaining the exemption depends on the particular circumstances of the case. This means that while the Commissioner accepts that a reasonable opinion has been expressed that inhibition would occur she will go on to consider the severity, extent and frequency of that inhibition in forming her own assessment of whether the public interest test dictates disclosure.
35. The Commissioner notes that there is a public interest inherent in section 36(2)(b)(i), that being a prejudice-based exemption, in avoiding harm to the decision making process. She has taken into account that there is automatically some public interest in maintaining this exemption.
36. One of the arguments presented in paragraph 29 relates to the concept of a 'safe space'. Public authorities may argue that they need a safe



space to develop ideas, debate live issues, and reach decisions away from external interference and distraction.

37. The Commissioner's guidance on section 36<sup>4</sup> states that:

"The safe space argument could also apply to section 36(2)(b), if premature public or media involvement would prevent or hinder the free and frank exchange of views or provision of advice... This need for a safe space will be strongest when the issue is still live. Once the public authority has made a decision, a safe space for deliberation will no longer be required. If it was a major decision, there might still be a need for a safe space in order to properly promote, explain and defend its key points without getting unduly sidetracked. However, this can only last for a short time and the public authority would have to explain clearly why it was still required at the time of the request on the facts of each case. The timing of the request will therefore be an important factor."

38. The complainant refers to a decision having been made in relation to this issue. However, the council has explained that the industrial relations issue at the heart of the withheld reports remains live and therefore the information is particularly sensitive. It said that despite the original timescale to conclude in 2016, a review of the role of Teaching Assistants commenced early in 2017 and is due for completion at the start of the 2017/18 academic year. The Commissioner notes that the council posted an update on review on its website on 24 February 2017<sup>5</sup> and accepts that the overall issue remains live. She has therefore given significant weight to the public interest in maintaining a safe space.

39. The other argument presented in paragraph 29 relates to the concept of a 'chilling effect'. The chilling effect argument is that disclosure of information would inhibit free and frank discussions in the future, and that the loss of frankness and candour would damage the quality of advice and deliberation and lead to poorer decision making.

40. The Commissioner's aforementioned guidance on section 36 states that:

"Chilling effect arguments operate at various levels. If the issue in question is still live, arguments about a chilling effect on those ongoing

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<sup>4</sup> [https://ico.org.uk/media/for-organisations/documents/1175/section\\_36\\_prejudice\\_to\\_effective\\_conduct\\_of\\_public\\_affairs.pdf](https://ico.org.uk/media/for-organisations/documents/1175/section_36_prejudice_to_effective_conduct_of_public_affairs.pdf)

<sup>5</sup> <http://www.durham.gov.uk/article/11376/Update-on-teaching-assistants-review>



discussions are likely to be most convincing. Arguments about the effect on closely related live issues may also be relevant. However, once the decision in question is finalised, chilling effect arguments become more and more speculative as time passes. It will be more difficult to make reasonable arguments about a generalised chilling effect on all future discussions."

41. When considering the public interest, the Commissioner should give such 'chilling effect' arguments appropriate weight according to the circumstances of the case and the information in question. As stated in the Tribunal case *Department for Education and Skills v the Information Commissioner*<sup>6</sup> and endorsed as a statement of principle in the *Export Credits Guarantee Department High Court* case<sup>7</sup>;

"The central question in every case is the content of the particular information in question. Every decision is specific to the particular facts and circumstances under consideration. Whether there may be significant indirect and wider consequences from the particular disclosure must be considered case by case."

42. Having viewed the withheld information, and considering the circumstances, the Commissioner considers that disclosure could lead to a chilling effect given that the information relates to a live matter of changes to terms and conditions of employment which is a contentious issue.
43. On the other hand, whilst the Commissioner accepts the qualified person's opinion that a 'chilling effect' leading to poorer quality decision making would occur, knowing that information might be subject to future disclosure under FOIA could actually lead to better quality decisions being made. In this case, being aware that the reports regarding the change to contracts of classroom assistants in County Durham could be disclosed in response to a FOIA request could ensure that recommendations are thorough and robust which in turn would ensure that future decisions in this, and related areas, are improved.
44. The Commissioner has considered the complainant's argument as to why the information should be disclosed. She considers that the arguments relates more to information that should be provided to councillors rather than release of the reports to the world at large under

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<sup>6</sup> Appeal number EA/2006/0006

<sup>7</sup> 2008 EWHC 638

the FOIA. She also considers that the concerns at paragraph 25 could be met without disclosure of the withheld reports.

45. The argument presented by the council includes the view that there is already information in the public domain on the matter (as detailed in paragraph 32). The Commissioner acknowledges that the public interest in the matter is met, to some degree, by publically available information. However, she acknowledges that there is public interest in being provided with a full picture.
46. The Commissioner has considered the public interest arguments presented in this case. She has given due weight to the opinion of the qualified person and has considered the likely extent, frequency and severity of any impact of disclosure on the free and frank provision of advice. She has taken into account the candid content of the information and has to consider that the issue has not been finalised and the harm that could result from publishing reports before a final decision has been taken in this area. She has therefore given weight to both the safe space and chilling effect arguments. The Commissioner has concluded that in the circumstances of this case the public interest in maintaining the exemption outweighs the public interest in disclosure of the requested information and therefore the exemption at section 36(2)(b)(i) has been applied correctly.

## Right of appeal

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47. 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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

48. 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.
49. 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**  
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