

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 16 November 2020

Public Authority: Caerphilly County Borough Council

Address: Penallta House
Tredomen Park
Hengoed
CF82 7PG

Complainant: on behalf of the BBC

Decision (including any steps ordered)

1. The complainant requested a copy of a report into the conduct of the previous Chief Executive. Caerphilly County Borough Council ("the Council") relied on section 40(2) and, later, section 31(1)(c) of the FOIA to withhold the information.
2. The Commissioner's decision is that the Council has correctly relied upon section 31(1)(c) of the FOIA to withhold the requested information and that the balance of the public interest favours maintaining the exemption. However, as the Council failed to issue a refusal notice, citing all the exemptions on which it later came to rely, within 20 working days, it breached section 17(1) of the FOIA.
3. The Commissioner does not require any further steps.

Background

4. Anthony O'Sullivan, the then-Chief Executive of the Council was suspended from his job in March 2013. In 2014, he was charged with the criminal offence of misconduct in public office but the charges were dismissed. Having remained suspended, on full pay, since that date, he was finally dismissed from his post on 3 October 2019. The decision to dismiss him was taken in a private Council meeting at which councillors

were asked to consider a report written by a Designated Independent Person into Mr O'Sullivan's previous conduct. The Designated Independent Person spoke to a number of current and ex-employees of the Council and their versions of events are recorded within that report.

5. Mr O'Sullivan is currently challenging his dismissal via an employment tribunal. The Commissioner notes that Mr O'Sullivan has made public statements to the effect that he considers himself to have been made a scapegoat for the failings of elected councillors. The Commissioner expresses no view on the veracity of such statements.

Request and response

6. On 15 October 2019, the complainant wrote to the Council and requested information in the following terms:

"Please could you release to me the full report from the Designated Independent Person into the disciplinary proceedings relating to Anthony O'Sullivan which was the focus of the special council meeting on 3rd October."

7. On 5 November 2019, the Council responded. It refused to provide the requested information as it considered it to be Mr O'Sullivan's personal data and that disclosure would breach data protection legislation. It therefore relied on section 40(2) of the FOIA to withhold the information.
8. The complainant requested an internal review on 26 November 2019. The Council sent the outcome of its internal review on 24 December 2019. It upheld its original position.

Scope of the case

9. The complainant contacted the Commissioner on 10 January 2020 to complain about the way her request for information had been handled.
10. The Commissioner formally opened her investigation on 19 March 2020. However, the Council responded in early April to say that it no longer had capacity to deal with the complaint because it had needed to re-deploy staff to deal with the Covid-19 pandemic, which was then close to its peak. In line with the pragmatic stance she took during that period, the Commissioner placed this complaint on hold for three months. However, even after that pause, the Council still struggled to respond to her queries and requests to get the complaint moving once

again. It was not until September 2020 that the Commissioner was provided with a copy of the withheld information.

11. Having reviewed the withheld information, the Commissioner posed further questions to the Council to challenge the balance it had conducted between the legitimate interests in disclosure and Mr O'Sullivan's rights and freedoms as a data subject. In particular, she directed the Council's attention to reports in the media that Mr O'Sullivan was preparing to challenge the Council at an employment tribunal. The Commissioner asked the Council whether it had given consideration to the effect that a possible disclosure might have on those proceedings.
12. Following discussion with the Commissioner, the Council noted that it considered that section 31(1)(c) would also apply to the withheld information. There is a well-established precedent that the Commissioner is able to consider the application of late exemptions – so long as the public authority is able to justify why it believes the exemption applies.¹ Some technical communication difficulties prevented the Commissioner from receiving the Council's further submission until 11 November 2020 – although she notes that it was sent on 20 October 2020. In addition to citing section 31, the Council also noted that some of the withheld information would be the personal data of numerous other third parties.
13. The Council issued a further refusal notice on 20 October 2020 in which it now relied on both section 40(2) and 31(1)(c) to withhold the information.
14. Having considered both exemptions and the withheld information, the Commissioner considers that the Council has presented a stronger case in relation to section 31 and she therefore intends to look at this exemption first. Only if she finds that section 31 does not apply will she go on to look at section 40(2).
15. The Commissioner considers that the scope of her investigation is to determine whether section 31 has been correctly applied and, if it has, whether the public interest favours maintaining the exemption.

¹ For the binding authority on this issue see *McInerney v Information Commissioner & Department of Education* [2015] UKUT (AAC)

Reasons for decision

16. Section 31(1) of FOIA states that:

information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice—

(c) the administration of justice,

17. The Commissioner's guidance on section 31(1)(c) states that the "administration of justice" can refer to a wide variety of judicial bodies. In addition to criminal and civil courts the exemption would also cover coroner's courts or tribunals.
18. At the point at which the request was made, Mr O'Sullivan appears to have already publicly announced an intention to challenge his dismissal via an employment tribunal. Therefore the Commissioner agrees that section 31(1)(c) is a relevant exemption to consider.
19. The exemption can be engaged on the basis either that disclosing the information "would" prejudice the administration of justice, or the lower threshold that disclosure only "would be likely" to prejudice the administration. For the Commissioner to be convinced that prejudice "would" occur, she must be satisfied that there is a greater chance of the prejudice occurring than not occurring. To meet the threshold of "would be likely to" occur, a public authority does not need to demonstrate that the chance of prejudice occurring is greater than 50%, but it must be more than a remote or hypothetical possibility.
20. In the Commissioner's view it is not sufficient for a public authority to merely assert that prejudice would be likely to occur to the administration of justice to engage the exemption. The public authority must draw a causal link between disclosure of the information and the claimed prejudice. It must specify how and why the prejudice would occur.
21. The prejudice test, as set out in *Hogan and Oxford City Council v Information Commissioner* (EA/2005/0026 and 0030), involves a number of steps:
- One of the law enforcement interests protected by section 31 must be harmed by the disclosure.
 - The prejudice claimed must be real, actual or of substance. Therefore, if the harm was only trivial, the exemption would not be engaged.

- The public authority must be able to demonstrate a causal link between the disclosure and the harm claimed.
- The public authority must then decide what the likelihood of the harm actually occurring is, ie. would it occur, or is it only likely to occur?

The Council's position

22. The Council argued that the withheld information is likely to form an important part of the Tribunal proceedings which Mr O'Sullivan has brought. Disclosure of the report, prior to the Tribunal proceedings, would affect the ability of both parties to advance their positions effectively. The Council noted that those proceedings remained live and that the Tribunal was not scheduled to hear the case until summer 2021.
23. The Council argued that the withheld report (and, in particular, its conclusions) would be likely to form a key part of its defence against Mr O'Sullivan and that premature disclosure would risk undermining that defence.
24. In addition, the Council noted that the report describes the actions of a number of other individuals whose evidence may also form part of the Tribunal proceedings. It noted that those individuals:

"could be less cooperative and more guarded about what they say and may be less willing to participate in free and frank discussions about the dispute, which could significantly prejudice the Employment Tribunal's ability to resolve the dispute efficiently and fairly."
25. Whilst the Council did not state explicitly whether it was claiming that prejudice "would" occur or whether it only "would be likely to" occur, it did note that:

"It is highly likely that harm would occur as this has been a very high profile case from the outset and was the subject of a police investigation before it became a disciplinary investigation into the conduct of a Senior Officer. The case has been reported in numerous newspaper articles and news programmes on TV and releasing the DIP report into the public domain could fuel media interest in the case once again and adversely affect the fair process of the Employment Tribunal which is scheduled to take place in 2021."
26. Finally, the Council made some further arguments relating to the fact that this particular report arose out of inquiries it conducted in respect

of a disciplinary matter and it argued that its ability to conduct further such inquiries might be affected in future by disclosure. Whilst the Commissioner accepts that these are reasonable concerns, she notes that they do not relate to the administration of justice. Whilst the arguments might be relevant had the Council relied on section 31(1)(g) together with either 31(2)(b) or (d) (prejudice to the Council's ability to ascertain improper conduct or the fitness of an individual to manage a body corporate), they are not relevant to the limb of the exemption that has been cited in the refusal notice. Given the delays that had already occurred in this case, the Commissioner considered that it would be unfair to the complainant to seek further submissions on this point.

The Commissioner's view

27. Having reviewed the withheld information and the Council's arguments, the Commissioner is satisfied that the Council has met the requirements of the prejudice test. She is satisfied that there is a significant likelihood that disclosure would affect the ability of the Tribunal to go about its business and she therefore considers that the higher bar of "would" prejudice the administration of justice is met.
28. Some open source research demonstrates that there is already a significant media and public interest in the circumstances of this case. The Commissioner considers it highly likely that disclosure of this report would lead to a number of further media stories about the case, prior to the Tribunal beginning its work. The fact that the complainant in this case is a journalist demonstrates that this is not just a hypothetical possibility.
29. The Commissioner accepts that, as the defendant in those proceedings, the Council has a right to put forward a case in its own defence. Whilst that case should be subject to rigorous scrutiny, it is the responsibility of the Tribunal, in the first instance, to subject that case to scrutiny. Premature disclosure could undermine the Council's ability to defend itself which, in turn, undermines the fairness of those proceedings and the ability of both parties to advance their respective cases.
30. Furthermore, the Commissioner agrees that disclosure of this information is likely to lead to a number of press enquiries aimed at the other individuals named in the report and their families. This could, in turn, impact the willingness of those witnesses to take part in the formal proceedings and the quality of the evidence they provide when they do so. Given the importance of the withheld information to the Council's case, it is likely that any statements witnesses submit to the Tribunal will be compared to what they told the Designated Independent Person and any discrepancies between the two challenged.

31. Whilst the Commissioner notes that the Tribunal does have powers to compel witnesses to give evidence and to make them do so under oath, these powers do not, in themselves, compel a witness to be fully co-operative. If the report were disclosed prior to the Tribunal, the witnesses involved would have the opportunity to read the Council's evidence and alter any testimony they give so that it either better aligns with or better contradicts the Council's case. Their evidence would therefore be "tainted" and the Tribunal could not be sure that it was being given a wholly honest account of events. If tainted evidence is introduced to proceedings that will undermine the fairness of those proceedings.
32. The Commissioner also notes that parties to a Tribunal hearing will often be required to share material they hold. However this sharing of information is governed by rules and will be overseen by a judge. Disclosure under the FOIA is disclosure to the world at large – not the restricted disclosure between parties governed by the Tribunal.
33. The Commissioner is therefore satisfied that a relevant harm to the administration of justice has been identified. That harm is real, actual and of substance. There is also a clear causal link between disclosure of the withheld information and the harm occurring. The Commissioner considers that the likelihood of harm occurring is more probably than not. She therefore accepts that section 31(1)(c) is engaged in respect of the withheld information.

Public interest test

34. Whilst the Commissioner has determined that the exemption is engaged, she is also required to consider whether the balance of the public interest favours maintaining the exemption.
35. The Commissioner accepts that there will almost always be a general interest in transparency and in understanding how publicly-funded bodies spend taxpayers' money. However, there are several factors in the circumstances of this case which the Commissioner considers add weight to that public interest.
36. Firstly, the Commissioner notes that, prior to his dismissal, Mr O'Sullivan was the most senior non-elected official at the Council and should therefore expect a greater degree of scrutiny of his conduct. Secondly, the gravity of the reasons the Council gave for dismissing Mr O'Sullivan are far from trivial. There is a significant public interest in understanding how the cited gross misconduct came about, who at the Council knew about it and whether sufficient steps were taken to prevent it. Finally, the Commissioner notes, that prior to his dismissal, Mr O'Sullivan had been placed on suspension for a period of over six years. That

suspension came at a cost of nearly £1 million to the taxpayers of Caerphilly and there is a public interest in understanding why that state of affairs came about.

37. Finally, the Commissioner notes that Mr O'Sullivan has made public claims that he has been made a scapegoat for the failings of others – in particular, the elected members of the Council. There is also a public interest in understanding the veracity of those allegations.
38. However, whilst the Commissioner recognises a significant weight in favour of disclosure, she notes that all those questions can (and, likely, will) be addressed at the Employment Tribunal. The Commissioner therefore considers that there is an even more substantial public interest in allowing both parties to make their cases to the Tribunal and having the competing arguments adjudicated on in a fair manner. Having identified significant harms, which would result from disclosure, the Commissioner considers that there is a very strong public interest in maintaining the exemption – at least whilst the proceedings are ongoing.
39. The balance of the public interest in this case therefore lies in favour of allowing the Tribunal to go about its business unhindered. The Commissioner thus finds that the Council was entitled to rely on section 31(1)(c) of the FOIA to withhold the requested information.

Procedural Matters

40. Section 17(1) of the FOIA states that when a public authority wishes to withhold information or to neither confirm nor deny holding information it must:

within the time for complying with section 1(1), give the applicant a notice which—

(a) states that fact,

(b) specifies the exemption in question, and

(c) states (if that would not otherwise be apparent) why the exemption applies.

41. Whilst the Commissioner notes that the Council's original refusal notice was issued within 20 working days (and that, as described above, the Council was entitled to rely on the additional exemption), that refusal notice did not cite all the exemptions on which the Council eventually relied. The Commissioner therefore finds that the Council breached section 17(1) of the FOIA in responding to the request.

Right of appeal

42. 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@justice.gov.uk

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

43. 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.
44. 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

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