

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 March 2023

Public Authority: Sheffield City Council
Address: Town Hall
Pinstone Street
Sheffield
S1 2HH

Decision (including any steps ordered)

1. The complainant requested emails from Sheffield City Council (the Council) relating to the 'NUM building'.
2. The Council provided some information but withheld the remainder citing sections 36(2) (prejudice to effective conduct of public affairs), 40(2) (personal information), 42 (legal professional privilege) and 43(2) (commercial interests) of FOIA.
3. The Commissioner has investigated its application of sections 36, 42 and 43.
4. The Commissioner's decision is that the Council has failed to provide sufficient evidence to support the engagement of those exemptions.
5. The Commissioner requires the Council to take the following step to ensure compliance with the legislation:
 - disclose the withheld information to the requester, redacted to avoid disclosure of personal information.
6. The Council must take this step 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 FOIA and may be dealt with as a contempt of court.

Request and response

7. On 10 November 2020, the complainant wrote to the Council and requested information in the following terms:
 - “1. Internal emails from the Chief Executive’s office relating to the NUM building between 19 April 2018 and September 2018.
 2. Email correspondence of [redacted] (including full email trails) relating to the NUM building between January 2018 and December 2019.Please provide the information in electronic form if possible, however we are happy to receive the information by post if that is more convenient.”
8. Following the Commissioner’s intervention, the Council provided its substantive response on 18 October 2021.
9. It confirmed it held information within the scope of the request, and provided it with redactions. Those redactions relate to the following exemptions:
 - section 36(2)(b) (prejudice to effective conduct of public affairs)
 - section 40(2) (personal information)
 - section 42 (legal professional privilege)
 - section 43(2) (commercial interests).
10. The disclosure was described as ‘a privileged disclosure’.
11. The complainant requested an internal review on 4 November 2021, challenging the handling of the request, including “the number of redactions and the general tone of some of the correspondence that has been disclosed”.
12. There was further correspondence between the parties in relation to the deadline for conducting an internal review. Ultimately, in the continued absence of an internal review, the complainant contacted the Commissioner.
13. Given the history of this request for information, the Commissioner exercised his discretion to accept the complaint without the internal review having been carried out.

14. On 22 December 2022, in correspondence with the Commissioner, the complainant confirmed the basis of their complaint, namely:

"...that the redactions in the documentation provided in response to the Freedom of Information request are excessive".

15. It explained:

".. the lack of context makes it difficult to determine whether the exemptions that the Council have relied on have been correctly applied".

16. The Commissioner understands that the disputed information relates to a project supported by the Jessica [Joint European Support for Sustainable Investment in City Areas] Fund.

17. As is his practice, during the course of his investigation, the Commissioner asked the Council to provide him with a copy of the withheld information. As the Council is citing multiple exemptions in this case, he specifically asked the Council to ensure that it is clear which exemption(s) apply to which information or whether it considers all the exemptions apply equally to all the information.

18. The Commissioner also asked the Council to respond to a number of questions about its use of exemptions in this case.

19. The Commissioner acknowledges that the Council provided him with details of the information (comprising 781 pages) considered to be within scope of the request, along with some background information and limited explanations of the exemptions.

20. The Commissioner understands that 429 of those 781 pages were disclosed, albeit with redactions, to the requester, with the remaining 352 pages withheld in full.

21. By way of background to its handling of the request, the Council explained to the Commissioner that, where information had been disclosed, it was on the basis of a privileged disclosure. In that respect, the Commissioner understands that the Council disclosed information to the requester that the requester themselves had sent or received. The Council told the Commissioner that such information would not be disclosed to the world at large, for example if the same request was made by any other requester.

22. It went on to say:

"Otherwise, we have withheld information under the Freedom of Information Act 2000".

23. It also told him:

“...the council retains its refusal to release the outstanding 352 pages”.

24. While the Commissioner accepts that there may have been a privileged disclosure in this case, his duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part I of FOIA. In that respect, he must consider whether the information in scope of the request is suitable for disclosure to the world at large. To that end, he put further questions to the Council and asked for further submissions to clarify its position.
25. It is also the Commissioner's long held view that it is the responsibility of the public authority to show why it should be allowed to refuse a request under FOIA.
26. The Commissioner is mindful that the Council is familiar with the process when the Commissioner accepts a complaint about a public authority's handling of a request for information.
27. In this case, despite being given the opportunity to revisit its handling of the request and to clarify the exemption(s) it considers apply to the withheld information, and being granted extensions in time to respond, the Council failed to provide the necessary clarification.
28. The Commissioner considers it failed to adequately identify which exemption(s) applied, and where, to the 781 pages of information in scope of the request. Nor did it add to what the Commissioner considers to be the generic arguments it provided to the complainant about the exemptions cited.
29. The following analysis explains why the Commissioner is not satisfied that the Council has demonstrated that the exemptions at sections 36, 42 and 43 are engaged.
30. However, from the evidence he has seen, he is satisfied that, where section 40(2) has been applied, it has been applied correctly.

Reasons for decision

Section 36 prejudice to effective conduct of public affairs

31. Section 36 of FOIA 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.

32. In this case, the Council considers section 36(2)(b)(ii) applies. Arguments under this limb are usually based on the concept of a 'chilling effect'. The chilling effect argument is that disclosure of discussions would inhibit free and frank discussions in the future.
33. The Council explained:

"If information in this correspondence is disclosed to the public it would likely be likely [sic] to inhibit the free and frank provision of advice and exchange of views for the purposes of deliberation between SYPIC [South Yorkshire Property Investment Company] and the Fund Manager; SCC [Sheffield City Council] officers; and between these parties and the Sheffield City Region".
34. The exemption at section 36 can only be engaged on the basis of the reasonable opinion of a qualified person. The Commissioner has seen evidence of the submissions considered by the qualified person. He has also seen the record of the qualified person's opinion that was given on 13 September 2021.
35. However, in the circumstances of this case, the Commissioner has concerns as to whether the information seen by the qualified person is all, or only some of, the information the Council is withholding under section 36.
36. It is also not clear whether, when that information was considered by the qualified person, it was with a view to disclosure to the world at large or with a view to making a privileged disclosure solely to the requester.
37. In its submission, the Council told the Commissioner that, in retrospect, there is information which should have fallen under the commercial interests exemption rather than prejudice to the conduct of public affairs. It also said that there may even be some information, exempted under section 36, that was better exempted under section 40(2).
38. The Commissioner considers the Council confused, rather than clarified, matters with statements such as this.
39. In the absence of sufficient information from the Council, the Commissioner cannot be satisfied that the Council clearly identified what information is caught by section 36. Nor can he be satisfied that the qualified person's opinion covers the exempted information.
40. It follows that he cannot find the exemption engaged.

Section 42 legal professional privilege

41. Section 42(1) of FOIA provides that information is exempt from disclosure if the information is protected by legal professional privilege (LPP) and this claim to privilege could be maintained in legal proceedings. Legal professional privilege protects the confidentiality of communications between a lawyer and client.
42. In this case, the Council described the withheld information as "information between lawyers external and in-house, and from lawyers to SYPIC and SCC, which contains legal advice".
43. The Commissioner considers that this broad description of the withheld information is not sufficient to determine which information within the scope of the request the Council is withholding under section 42.
44. Nor has the Council explained whether it considers litigation privilege, or advice privilege, or both apply.
45. It follows that the Commissioner cannot be satisfied that the information withheld by virtue of the exemption at section 42 constitutes confidential legal advice provided by a qualified legal adviser to their client.
46. The exemption provided by section 42(1) of FOIA is, therefore, not engaged.

Section 43 commercial interests

47. Section 43(2) of FOIA states that information is exempt if its disclosure would, or would be likely to, prejudice the commercial interests of any person, including the public authority holding it.
48. Where a public authority considers that the information it holds comprises commercial information, the Commissioner's longstanding view is that, in order to engage section 43, the public authority must be able to show how, and why, its disclosure has the potential to prejudice someone's commercial interests.
49. In reaching his decision in this case, the Commissioner has taken into account that, in its submission, the Council told the Commissioner:

"We would of course have consulted the requester but our own commercial interests as well as other exemptions would have severely restricted the 429 pages, we did provide the requester".
50. It also told him:

"There is information, in retrospect, which should have fallen under commercial interests rather than prejudice to the conduct of public affairs".

51. As noted above, the Commissioner considers this statement did not clarify matters.
52. The Commissioner accepts that the Council put forward arguments that relate to section 43. However, in the absence of a clear indication from the Council where section 43 applies and precisely whose commercial interests would likely be prejudiced, he cannot be satisfied how those arguments relate to the withheld information.
53. In the circumstances, the Commissioner is not satisfied that the Council has demonstrated that the exemption is engaged.

Other matters

Internal review

54. The Commissioner cannot consider the amount of time it takes a public authority to complete an internal review in a decision notice because such matters are not a formal requirement of FOIA. Rather, they are matters of good practice which are addressed in the code of practice issued under section 45 of FOIA which suggests that internal reviews should be responded to within 20 working days, and if complex it is best practice for any extension to be no longer than a further 20 working days.

Engagement with the Commissioner

55. The Commissioner accepts that, in its correspondence with the ICO, the Council acknowledged, and apologised, that it missed deadlines for responding. However, the Commissioner considers that the Council's actions did not meet his reasonable expectations as to how public authorities will engage with his office during section 50 FOIA investigations.

Right of appeal

56. 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: 0203 936 8963
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

57. 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.

58. 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

**Laura Tomkinson
Group Manager
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SK9 5AF**