

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 19 January 2023

Public Authority: Belfast City Council
Address: Belfast City Hall
Belfast
BT1 5G

Decision (including any steps ordered)

1. The complainant has requested from Belfast City Council ("the Council") a copy of a Health and Safety Work Related Transport Audit that it had conducted. The Council refused the request, citing section 36(2)(b)(ii) (Prejudice to effective conduct of public affairs) of FOIA.
2. The Commissioner's decision is that the Council was entitled to rely on section 36(2)(b)(ii) to withhold the requested information.
3. The Commissioner requires no steps as a result of this decision.

Request and response

4. On 4 March 2022, in correspondence with the Council about its Work Related Transport Audit (which it had previously told the complainant it would not disclose), the complainant requested information in the following terms:

"I therefore request this information to be formally released under the relevant FOI legislation, please respond to this FOI request by acknowledging receipt of this email and advising the timeframe of your response to my request. I am advising you that I am exhausting the process of requesting this information from you, giving you an opportunity to reconsider your decision not to release this information, before I would refer this to the ICO."

5. The Council replied on 29 March 2022. It said the Work Related Transport Audit was exempt from disclosure under section 36(2)(b)(ii) of FOIA. The Council maintained this position at internal review.

Reasons for decision

Section 36 – Prejudice to the effect conduct of public affairs

6. Section 36(2)(b)(ii) of FOIA states that information is exempt where, in the reasonable opinion of a qualified person, its disclosure would, or would be likely to, inhibit the free and frank exchange of views for the purposes of deliberation.
7. The Council has applied section 36(2)(b)(ii) to withhold the Work Related Transport Audit report, which is a health and safety focussed assurance review of the Council's use of transport in its service provision (ie it identifies any health and safety risks in the Council's operation of, for example, bin wagons, and how these might be addressed). The audit report was compiled following factfinding across the Council, with staff asked about the practices and procedures they followed.
8. The Council has assessed that disclosure of the audit report under FOIA "would" inhibit the free and frank exchange of views for the purposes of deliberation, ie it is relying on the higher likelihood of prejudice occurring.
9. Arguments under section 36(2)(b)(ii) are often 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, and that the resulting loss of frankness and candour would damage the quality of advice and deliberation and lead to poorer decision making. 'Safe space' arguments will also apply if premature public or media involvement would prevent or hinder the free and frank exchange of views.
10. The Council has submitted both chilling effect and safe space arguments in support of applying section 36(2)(b)(ii).
11. The Council explained to the Commissioner that the audit report was held confidentially, within an established governance, oversight and reporting framework. The audit report was compiled in confidence, for senior management, and a summary of its main points was provided to councillors via the Council's Audit and Risk Panel. Other interested parties might receive verbal briefings on it, but the report itself has not been circulated more widely.

12. The Council has explained that it uses internal audit reports to improve every aspect of its governance, risk management and internal control arrangements. In order to be effective, internal audits rely on honest and candid feedback and advice from Council staff. It said that, going forward, its employees would be less likely to engage candidly and honestly in such exchanges, if there is an assumption that internal audit reports will be disclosed into the public domain.
13. The Council also explained that although the audit report was issued in November 2020, at the time of the request (and currently) the audit report remains a 'live' document. The full implementation of the action points identified in the audit report has not yet been completed (the process has been significantly delayed by the diversion of resources to deal with the COVID 19 pandemic during 2020 and 2021).
14. The Council explained that the issuing of an audit report is not the end point of the audit process. "Many" meetings must then take place with various internal stakeholders to reflect on the report's findings:

"... to further discuss, deliberate, give opinions and consult, if appropriate, on how to implement the required changes discuss the findings and agree ways forward...Management may decide to amend some of the actions that are outlined in the Final Audit Report, after further deliberations and further opinions are given on how best to address the issues practically. These deliberations may lead to different approaches in addressing the issues raised, including new ways of working, which need to be approached in a controlled and sensitive manner."
15. The Council therefore argued that a continuing safe space (in which advice could be provided, and free and frank discussions could take place) was needed to allow it to deliberate over some of the audit report's action points, prior to it determining its response to them. It said the matter was both sensitive and known to be of interest to particular external parties, who may have their own, strongly held views on the measures that should be adopted. Disclosure would therefore remove the Council's ability to thoroughly consider the report in a safe space, thereby prejudicing the Council's ability to properly assess and respond to compliance issues with policies, procedures, and legal requirements.

16. The Commissioner's guidance on section 36¹ states that information may be exempt under section 36(2)(b)(ii) if its disclosure would, or would be likely to, inhibit the ability of public authority staff, and others, to express themselves openly, honestly and completely, or to explore extreme options, when giving their views as part of the process of deliberation.
17. The exemptions at section 36 can only be engaged on the basis of the reasonable opinion of a qualified person. The Commissioner is satisfied that the Council's Chief Executive is authorised as the qualified person under section 36(5)(l) of FOIA and that he gave the opinion that the exemption was engaged. The Commissioner has seen the submission the qualified person considered and accepts that it was reasonable for him to consider that there was a need to protect the confidentiality of internal discussions and deliberations surrounding the Work Related Transport Audit.
18. As to the likelihood of prejudice resulting from disclosure, the Council considers that disclosure "would" inhibit the free and frank exchange of views. It regards this as a real and significant risk of prejudice.
19. The Commissioner is not satisfied that the Council's submissions demonstrate that inhibition "would" occur, particularly as the report is concerned with addressing overarching issues and not with individual allegations. It is normal in any public authority to ask officers to reflect on processes that were followed, where a concern has been raised. The report in this case reflects on processes followed by the Council as a collective organisation, and does not seek to blame any individual, nor does it identify anyone who has provided the audit with information. The Commissioner is not persuaded that there is an extensive or severe risk that Council staff would cease to participate in internal audits in a candid way, due to the disclosure of this audit report.
20. Nevertheless, he considers it reasonable to consider that disclosure "would be likely to" result in some reluctance by parties to, in future, engage in a full and frank exchange of information and views, which may delay and frustrate the audit process and impair audit investigation works seeking to review the Council's control mechanisms.
21. The Commissioner therefore considers that it is the lower threshold of prejudice (that inhibition "would be likely to" occur through disclosure of

¹ <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/section-36-prejudice-to-the-effective-conduct-of-public-affairs/>

the withheld information) which is reasonable, in this case. He is satisfied that the exemption was engaged on that basis, and has considered the public interest test accordingly.

22. When considering whether the public interest favours maintaining the exemption or disclosing the requested information, the Commissioner will consider the severity, extent and frequency of the inhibition that has been identified as being likely to occur, and balance this against the general public interest in transparency, and any other factors, specific to the case, which favour disclosure of the information.
23. The complainant has not explained to the Commissioner his reasons for requesting the information, or why disclosure would be in the public interest. Nevertheless, the Commissioner considers that, in this case, disclosure would serve the public interest in transparency on an area of employee health and safety.
24. Turning to the chilling effect that disclosure would be likely to have, having viewed the audit report, the Commissioner does not consider that the inhibition and prejudice likely to result from disclosure would be of a great extent, severity or frequency, for the reasons set out in paragraph 19. He has therefore accorded little weight to the Council's chilling effect arguments when considering the public interest.
25. However, the Commissioner has placed significant weight on the fact that, at the time of the request, the audit report was still very much a 'live' document, there being some action points identified in the audit which the Council was still working towards implementing. This required ongoing deliberations of the audit report in a 'safe space'.
26. Having considered all the circumstances of this case, the Commissioner accepts that the Council needed a 'safe space' in which to discuss the audit report in question and to deliberate on its own response to particular action points. He considers that the public interest in protecting the Council's ability to decide on effective measures, in an area of health and safety which affects public employees, without external interference, outweighs the public interest in transparency (which would be served, to some extent, by scrutiny of the report via the established reporting framework referred to in paragraph 11).
27. The Commissioner is therefore satisfied that, in this case, the public interest favours maintaining the exemption. It follows that his decision is that the Council was entitled to rely on section 36(2)(b)(ii) of FOIA to refuse the request.

Right of appeal

28. 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

29. 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.

30. 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

Samantha Bracegirdle
Senior Case Officer
Information Commissioner's Office
Wycliffe House
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SK9 5AF