

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 24 August 2010

Public Authority: London Borough of Merton
Address: Merton Civic Centre
London Road
Morden
Surrey
SM4 5DX

Summary

The complainant requested information from the London Borough of Merton ("the Council") concerning proposals to make certain roles within the Council redundant. The Council initially refused to provide any information citing the exemptions under section 40(2) and 43(2) of the Freedom of Information Act 2000 ("the FOIA"). In relation to the latter exemption, it concluded that the public interest favoured withholding the information. During the internal review, the Council provided the information that it had sought to withhold using section 40(2). Once the scope of the request had been clarified, the information withheld under section 43(2) was no longer relevant. The Council identified that it held a number of items of information relating to the request that had either been disclosed or which were already in the public domain. It disclosed this information in a single bundle to the complainant. It then sought to withhold a small amount of information under sections 36(2)(b)(ii) and 36(2)(c). It considered that the public interest favoured maintenance of the exemptions. The Information Commissioner ("the Commissioner") was satisfied that section 36(2)(b)(ii) was engaged in respect of this information but he did not agree that the public interest favoured withholding it. The arguments identified by the qualified person in relation to section 36(2)(c) were found to be relevant and reasonable but in relation to section 36(2)(b)(ii). Having addressed the arguments under section 36(2)(b)(ii), it was not necessary to consider section 36(2)(c) further as no additional arguments were made about how disclosure

would otherwise prejudice the effective conduct of public affairs. The Commissioner considers that the Council breached sections 10(1), 1(1)(b) and 17(1) (a), (b) and (c) of the FOIA.

The Commissioner's Role

1. The Commissioner's 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 1 of the FOIA. This Notice sets out his decision.

The Request

2. On 20 February 2009, the complainant wrote to the Council and requested information in the following terms:

"We understand that there was a proposal to delete roles within the London Borough of Merton [Reference to a particular department] which were put to Cabinet on 8th September 2008 and Star Chambers on 12th September 2008. We understand that there was subsequently a decision to delete the [specified post] as opposed to subordinate roles subsequent to these meetings and that a further cabinet proposal was made on 15th December 2008.

We would be grateful if you would provide documentation relevant to these processes".

3. The Council responded on 20 March 2009. The Council stated that it could not provide any of the information requested because it was exempt. It stated that it considered that the exemptions under section 40(2) and section 43(2) of the FOIA applied and that the public interest in withholding the information outweighed the public interest in disclosing it. It provided some rationale.
4. On 2 April 2009, the complainant wrote to complain about the refusal notice. He stated that he did not accept that the exemptions applied.
5. In a letter dated 1 May 2009, which was not received by the complainant until 14 May 2009 because it was not sent until 11 May 2009, the Council set out its internal review of the

refusal notice. The Council stated that it maintained its position that section 40(2) applied. It provided some further supporting rationale. The Council also elaborated on its reasons for applying section 43(2) and deciding that the public interest favoured withholding the information.

6. On 26 May 2009, the complainant replied. He stated that he was writing to ask the Council to conduct a further internal review. He stated that he did not accept that the exemptions applied. He also referred in particular to the fact that the relevant posts had now been "deleted".
7. On 2 June 2009, the Council completed a second internal review. Referring to section 43(2), the Council provided some further supporting argument. In relation to section 40(2), the Council stated that as the posts it had applied section 40(2) to had been "deleted", it did not consider that section 40(2) continued to apply because it now considered that disclosure of the information would be fair. It stated that it had enclosed the information it had withheld relating to these posts. It also specifically confirmed that no information was held relating to the "deletion" of the post specified in the request.

The Investigation

Scope of the case

8. On 2 June 2009, the complainant contacted the Commissioner. He specifically asked the Commissioner to consider whether the Council had correctly withheld the information requested.
9. During a telephone conversation at the beginning of the Commissioner's investigation, the complainant explained that he wished the Commissioner to investigate whether any further information was held that had not been identified by the Council.
10. Towards the end of the Commissioner's investigation, the complainant explained that the scope of the information that he was interested in (and was therefore complaining about) was limited to that concerning the specific roles mentioned in the request. This meant that a significant amount of the withheld information that was being considered by the Commissioner at this stage became redundant. The Decision

Notice only deals with the information that the complainant clarified was of interest and which was within the scope of the original request.

11. For clarity, some information relating to the request has been disclosed by the Council. As the issues relating to this information were informally resolved by the disclosure, they have not been addressed in the Analysis and Decision sections of this Notice.
12. The Commissioner also determined that part of the request related to the complainant's own personal data i.e. information relating to the specific post mentioned in the request that was carried out by the complainant. As this part of the request represents a subject access request under the Data Protection Act 1998 ("the DPA"), it has not been considered as part of this Notice.

Chronology

13. As discussed in the scoping section of this Notice, towards the end of the Commissioner's investigation, the complainant clarified that the information of interest was actually more limited in nature than had been appreciated by the Commissioner. This significantly narrowed the scope of the investigation and the information being considered. In view of this development, the Commissioner has not gone into detail about the earlier part of his investigation relating to other information not relevant to the complaint. The chronology below largely focuses on the point in time when it became apparent that the complaint was about more limited information.
14. The Commissioner initially contacted the Council about the complaint on 18 June 2009.
15. On 13 August 2009, the Commissioner also wrote to the complainant. The Commissioner set out the scope of his investigation in this letter, stating that he would consider the refusal to provide information and whether any more information was held that had not been identified.
16. On 18 August 2009, the complainant wrote to the Commissioner. He confirmed that he wished the Commissioner to investigate whether the Council had correctly withheld information and whether any more information was held that had not been identified.

17. The Commissioner and the Council wrote to each other about the request until 22 April 2010 when the Council expressed some uncertainty surrounding the scope of the request. Prior to this, the Commissioner and the Council's correspondence had concerned the application of the exemptions under sections 40(2), 36(2)(b)(ii) and (c) and 43(2) to various items of information. The Commissioner had also been investigating whether any more information was held by the Council and some additional information that was relevant to the request was discovered during the investigation. Once the Council had expressed uncertainty about what was within the scope of the complaint, the Commissioner wrote to the complainant on 28 April 2010. He explained that his understanding, based on the wording of the request, was that the complainant was seeking information about proposals to "delete" roles in the particular department mentioned in the request. He asked the complainant to clarify whether the complaint was intended to cover information about proposals to "delete" any roles in the relevant department or was limited to the specific roles mentioned in the latter part of the request.
18. On 29 April 2010, the complainant emailed the Commissioner and stated that the complaint was limited to the particular roles mentioned in the request and it specified these more precisely. Although, read objectively, the original request arguably covers more than the specified roles, the complainant has limited the complaint to information about the specified roles. Therefore the Commissioner has only investigated the information that the Council withheld which was about those roles.
19. On 12 May 2010, the Commissioner wrote to the Council asking it to consider the more limited information that remained of interest to the complainant and to specify which information had now become irrelevant.
20. The Council replied on 18 May 2010. The Council went on to specify what information was relevant to the more limited complaint, and it stated that the vast majority of this had been disclosed at various points or was publicly available. It stated that it was now only seeking to withhold part of one document which it stated was exempt under sections 36(2)(b)(ii) and (c). It referred to arguments it had previously made in support of the application of these exemptions to this information. The document being withheld was named as follows: "Star Chamber Meeting – Draft notes – Corporate

Services Department 18th July 2008". For clarity, only part of this document was deemed to be relevant to the request under the heading "Decision Package: [relevant department named in the request]". The relevant parts were identified by the Council as being the introduction to this section and the comments made in respect of "Proposal 1" which was a proposal to make the two subordinate roles mentioned in the request redundant.

21. On 1 June 2010, the Commissioner responded to the Council. The Commissioner noted that the Council had identified that the vast majority of the information it held relating to the request had been disclosed or was otherwise available. For clarity, he asked the Council whether it would be willing to disclose a single bundle of this information to the complainant (referred to as Bundle A in this Notice). He also asked for information to help him to consider the application of sections 36(2)(b)(ii) and 36(2)(c). In addition, the Commissioner asked the Council whether there was any possibility of informal resolution in this case given the passage of time and the fact that the redundancies had been made.
22. The Council replied on 16 June 2010. It agreed to disclose bundle A as requested by the Commissioner. It explained that this information had been sent directly to the complainant. It provided some further information regarding the information being withheld under sections 36(2)(b)(ii) and 36(2)(c). On the subject of informal resolution, the Council stated that it wished to maintain its position that the remaining information was exempt.
23. On 24 June 2010, the Commissioner emailed the Council to request some further information, focusing mainly on understanding what the circumstances were at the time of compliance with the complainant's request (i.e. 20 March 2009).
24. On 9 July 2010, the Council responded to the Commissioner's questions.

Analysis

Substantive Procedural Matters

Section 1

On the balance of probabilities, was any more information held?

25. In cases where there is a disagreement between a complainant and a public authority over the extent of recorded information held relating to a particular request, the Commissioner will consider whether any more information was held on the balance of probabilities. In deciding where the balance lies, the Commissioner will consider the scope, quality and thoroughness of any searches undertaken by the authority as well as considering, where appropriate, any other reasons offered by the public authority to explain why the information was not held.
26. The Council assured the Commissioner that it had conducted very thorough searches for relevant information and maintained that no further information, other than that identified was held. The Council's officer dealing with the case stated that he had personally spent in excess of 18 hours trying to locate relevant information. The Council stated that it searched information held by relevant departments. It also confirmed that it had searched the Council's records of reports and minutes as well as searching for any relevant emails. It confirmed that it did not believe it had ever held any other information that had been deleted, destroyed or mislaid. It stated that it held no records of the deletion or destruction of any relevant information.
27. The Commissioner notes that the Council did not manage to identify all the relevant information at the same time, as some additional information was discovered during the Commissioner's investigation. However, in view of the above, the Commissioner is satisfied that, on the balance of probabilities, the Council did not hold any further relevant information than that disclosed in bundle A and the withheld information. There is no clear evidence available to the Commissioner that indicates that any further information was held.

Exemption

Section 36

28. As already noted, the information being withheld in this case was part of a document named “Star Chamber Meeting – Draft notes – Corporate Services Department 18th July 2008”. This document was not originally identified by the Council when it first responded to the request on 20 March 2009. The Council has confirmed to the Commissioner that it did not identify that it held this document until 25 February 2010. The information was only discovered following a suggestion by the Commissioner that it was reasonable to expect the Council to consult its staff about relevant emails. Given these circumstances, the Commissioner has decided to accept the late claim of the exemption as it was claimed at the earliest opportunity following discovery of the information.
29. Section 36(2)(b)(ii) provides that information is exempt under the FOIA if, in the reasonable opinion of a qualified person, disclosure of the information would or would be likely to inhibit the free and frank exchange of views for the purposes of deliberation. Section 36(2)(c) applies if, in the reasonable opinion of a qualified person, disclosure of the information would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

The qualified person’s opinion

30. In order to establish whether the exemption was engaged, the Commissioner must:
- Establish that an opinion was given
 - Ascertain who the qualified person was
 - Ascertain when the opinion was given
 - Consider whether the opinion was objectively reasonable
31. The Council has confirmed that its monitoring officer is its qualified person. It stated that she considered the withheld information initially on 5 March 2010 and again on 14 April 2010. The Council provided the Commissioner with copies of two “Decision Sheets” setting out the qualified person’s considerations on the two dates mentioned. It appears that a second “Decision Sheet” was completed after the Commissioner had noted that the first sheet only specified that the opinion was that “Section 36(2)(b)” was engaged. The first “Decision Sheet” also dealt with other information

that was being withheld at the time whereas the second deals solely with the withheld information following the limiting of the request.

32. In view of the above, the Commissioner has focused on the second "Decision Sheet". He notes that this document clearly records that the qualified person is of the opinion that sections 36(2)(b)(ii) and 36(2)(c) were engaged.
33. Having inspected the above information, the Commissioner was satisfied that the Council's qualified person clearly gave an opinion that section 36(2)(b)(ii) and section 36(2)(c) were engaged on 14 April 2010.
34. In *Guardian and Brooke v the Information Commissioner and the BBC* (EA/2006/0011 and EA2006/0013), the Information Tribunal decided that a qualified person's opinion under section 36 is reasonable if it is both "reasonable in substance and reasonably arrived at". It elaborated that the opinion must therefore be "objectively reasonable" and based on good faith and the proper exercise of judgement, and not simply "an opinion within a range of reasonable opinions". However, it also accepted that "there may (depending on the facts) be room for conflicting opinions, both of which are reasonable". In considering whether an opinion was reasonably arrived at it proposed that the qualified person should only take into account relevant matters. The Commissioner accepts the Tribunal's view that an opinion does not have to be verified by evidence i.e. a qualified person could not be expected to prove that there would be an inhibition in the future, but the Commissioner would still expect the public authority to be able to provide some evidence of how the qualified person reached their opinion. It is also accepted that materials which may assist in the making of judgement will vary from case to case.

Was the opinion reasonably arrived at?

35. To help the Commissioner to consider whether the opinion was reasonably arrived at, he considered the information that the qualified person had been provided with that would have helped her to make the decision. The Council's "Decision Sheet" confirms that the qualified person was provided with the relevant withheld information.
36. From his inspection of the "Decision Sheet", the Commissioner did not consider that there was evidence that any irrelevant

arguments were considered by the qualified person. It would have been helpful if the Council had created a record showing how the qualified person weighed up different factors both for and against the engagement of the exception, to demonstrate in more detail the process of arriving at a decision.

37. The Commissioner also considered that it was regrettable that the information was not discovered until February 2010. The passage of time since the original request may have made it more difficult for the qualified person to consider the circumstances as they existed at the time of the request. Nevertheless he recognises that the qualified person's opinion was obtained prior to the Council refusing to disclose the additional information it had located on the basis that it was exempt by virtue of section 36.
38. The Commissioner was ultimately satisfied that there was no evidence that the opinion was arrived at in such a way that it should be considered to be unreasonable.

Was the opinion reasonable in substance?

39. As the Commissioner was satisfied that the opinion was reasonably arrived at, he went on to consider whether the opinion was "reasonable in substance". It is worth emphasising that this does not mean that the Commissioner has to agree that the inhibition described was "likely" to occur as this is for the qualified person to decide.
40. The Council has explained to the Commissioner that the purpose of the Star Chamber meeting on 18 July 2008 was to review the proposals for savings as part of the overall requirement of the Council to deliver a balanced budget for 2009/10, which necessitated savings of approximately £12 million. The meeting on the 18 July 2008 was the initial meeting and was followed up by Star Chamber meetings in September and October. The document is described as being a "draft" and the Council has confirmed that a final version was not created, although it is not clear why this was the case or if the Council ever intended to produce a permanent version of the document.
41. The Commissioner has considered the contents of the withheld information and notes that it concerns internal Council discussions regarding how to make savings. He notes that the subordinate posts mentioned in the request are specifically discussed. The Council has explained that Star

Chamber is not itself a “decision-making” body as any proposal would need to be subject to further scrutiny. The Council has explained to the Commissioner that the subordinate posts were “deleted” in the budget process. The final full council meeting to agree the budget was on 4 March 2009 and the posts were made redundant for the budget year beginning April 2009. The Council has confirmed that it believes it would have published information confirming that the two relevant posts had been made redundant by the time it responded to the request i.e. on 20 March 2009.

42. The Commissioner has quoted below the arguments that were presented to him in respect of section 36(2)(b)(ii):

“Officers need to be able to consider proposing savings that may be unpopular. Publication would be likely [sic] inhibit the proposal of savings by line managers both because of public opinion – the need to be able to think the unthinkable, and because of the impact it will have on those employees put forward for redundancy by their line Manager. The damage to employee morale and manager – employee relations would be significant”.

43. Although the Council presented relatively brief arguments in favour of withholding the information under section 36(2)(b)(ii), the Commissioner understands that the Council is basically arguing that disclosure at the time of the request would have been likely to have created a “chilling effect” because it would be likely to inhibit the willingness and ability of council officers to put forward proposals relating to future budgets.

44. Having carefully considered the above, although the Commissioner does not agree with the opinion that inhibition would be likely, he accepts that the opinion was nonetheless a reasonable one and that section 36(2)(b)(ii) was therefore engaged. The Commissioner can accept that the discussions took place in a confidential setting and concerned a difficult and sensitive issue in general. He can accept that disclosure of information relating to discussions about possible redundancies may result in some officers demonstrating more reluctance to present completely free and frank reasons for considering certain roles for redundancy for fear that this could cause distress if the details of the discussions are subsequently disclosed.

45. In relation to section 36(2)(c), the Council presented the following arguments:

"It is the opinion of the qualified person that disclosure of the confidential draft notes of the discussions at Star Chambers meeting on 18 July 2008 would be likely to prevent such note taking in the future. These draft notes are not an official record of council business but they do serve a very important purpose.

The notes record the rationale behind the recommendations and provide an important reference point for the refinement of the proposals, particularly, but not exclusively, by those who were not at the meeting. Without the notes there would be no evidence of the instructions given at the meetings and this would be likely to lead to misunderstandings and dispute over what had been discussed. In some circumstances this could mean a lack of evidence".

46. In the Commissioner's view the argument above put forward by the qualified person in relation to section 36(2)(c) was in fact related to those given in respect of section 36(2)(b)(ii). The Commissioner appreciates that it can sometimes be difficult to judge which of the section 36 exemptions is relevant to a particular argument. In the circumstances of this case he felt that it was appropriate to consider the argument made in support of section 36(2)(c) under section 36(2)(b)(ii).
47. Although the Commissioner does not agree with the opinion that inhibition would be likely, he accepts the opinion was nonetheless a reasonable one. The Commissioner notes that the information relates to an early meeting which was followed up by subsequent meetings regarding the proposed removal of roles. The Commissioner can accept that just as some staff members may be put off expressing certain views if the information was disclosed, they may also choose to discuss their views verbally but without recording them in detail. Furthermore he accepts that an absence of detailed records to refer to may restrict the thoroughness of future related exchanges for the purposes of deliberation.
48. The Commissioner has concluded that section 36(2)(b)(ii) was engaged because he accepts that all the arguments put forward by the qualified person were relevant to that exemption and were reasonable in substance.

49. When considering section 36 it is only acceptable to claim more than one limb of the exemption for the same information if different arguments can be made in support of the separate limbs. Therefore in order to engage section 36(2)(c), which specifies that disclosure must 'otherwise prejudice the effective conduct of public affairs', the qualified person needs to identify prejudice other than that relevant to the alternative limbs of the exemption.
50. As explained above, the Commissioner considers that the qualified person's opinion regarding record keeping was reasonable and relevant in relation to section 36(2)(b)(ii). Given that the qualified person's views in this regard have already been considered and that no other way in which disclosure of the requested would prejudice the effective conduct of public affairs was identified, the Commissioner has not given further consideration to section 36(2)(c).

Public interest test

51. Having concluded that section 36(2)(b)(ii) is engaged the Commissioner has gone on to consider the public interest test. Section 36 is a qualified exemption and therefore the Commissioner must consider whether in all the circumstances of the case the public interest in maintaining the exemption outweighed the public interest in disclosing the information.
52. In the case of *Guardian Newspapers Limited and Heather Brooke v Information Commissioner and the BBC* (EA/2006/001 and EA/2006/0013) heard before the First-Tier Tribunal (Information Rights), some useful general principles were set out with regard to the public interest test under section 36 as follows:
 - (a) the lower the likelihood is shown to be that the free and frank exchange of views would be inhibited, the lower the chance that the balance of the public interest will favour maintaining the exemption.
 - (b) Since the public interest in maintaining the exemption must be assessed in all 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 authority may have a general policy that the public interest is likely to be in favour of maintaining the exemption in respect of a specific type of information, but any such policy must be

flexibly applied, with genuine consideration being given to the circumstances of the particular request.

(c) The passage of time since the creation of the information may have an important bearing on the balancing exercise. As a rule, the public interest in maintaining the exemption will diminish over time.

(d) In considering factors that militate 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 for the purposes of deliberation.

(e) 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 democratic process.

53. In respect of the statement made at point (a), the Tribunal commented that it was for the qualified person to decide whether prejudice was likely and thereby whether the exemption was engaged. However, in making a decision on the balance of the public interest, the Tribunal (and therefore the Commissioner) would need to make a decision as to the severity, frequency, or extent of any prejudice that would or might occur.

Public interest arguments in favour of disclosing the requested information under section 36(2)(b)(ii)

54. The "default setting" of the FOIA is in favour of disclosure. This is based on the underlying assumption that the disclosure of information held by public authorities is in itself of value and in the public interest in promoting the interests described in point (e) above. These general interests were acknowledged by the Council.
55. The Council also acknowledged that there is a public interest in public authorities being accountable in respect of financial information particularly where it concerns significant sums of public money. The Commissioner also notes that it is likely

that the disclosure of the information would help the public, including those directly affected, to understand more about the reasons why these specific redundancies were made.

Public interest arguments in favour of maintaining the exemption under section 36(2)(b)(ii)

56. The Council argued that the public interest in maintaining the exemption outweighed the public interest in disclosing the information in the circumstances of this case. As already discussed, the Commissioner accepts that the qualified person's opinion was reasonable that disclosure at the time of the request would have been likely to result in a chilling effect on future discussions. He must therefore accept that disclosure would be likely to result in reluctance to discuss the issues as openly for fear of causing subsequent distress and that this same concern could lead to less complete record-keeping and therefore impact future discussions.
57. It would not be in the public interest to prejudice the Council's ability to properly consider the best way to achieve savings in the future. This could result in delays or less well considered decisions being made regarding the use of public money and the way in which the authority operates. It would also not be in the public interest to prejudice the Council's ability to conduct full and candid follow-on discussions based on accurate records. The Commissioner also considers that it is in the public interest that important discussions are recorded by public authorities so that they are accountable for the decisions that are reached.
58. The Council also argued that the public interest would be sufficiently met by the publication of final proposals at the end of the process which would be subject to public and council scrutiny.

Balance of the public interest arguments

59. Although the Commissioner must give weight to the qualified person's opinion once he has accepted its reasonableness, it is open to the Commissioner to consider how severe, frequent and extensive any prejudice that would be likely to occur would be.
60. The Commissioner has decided that timing is an important issue in this case. He notes that by the time of compliance with the request, it appears that the decision to make the

redundancies discussed in the withheld information had been arrived at and made public. The Commissioner considers that this would reduce the severity, frequency and extensiveness of prejudice to future discussions.

61. The need to preserve a safe space in which to carry out difficult discussions is often greater while they are on-going and therefore the severity of prejudice to free and frank exchanges is greatest at this time. Where a disclosure would take place after the matter in question has been decided and made public, the Commissioner considers that any chilling effect to future discussions regarding savings would not be as severe. This is because in his view in future situations staff would be able to see that the disclosure was only made once the matter had been concluded and would be mindful of the need to continue to provide full and candid comments in order to fulfil their professional duties. This is consistent with the idea that public authority staff can no longer generally expect confidentiality to be maintained in respect of their work unless there are specific and compelling reasons for that once decisions have been arrived at. The Commissioner did not consider that the Council provided arguments of this nature. In the absence of such reasons, it is important that public authority staff members are accountable.
62. The Commissioner has had particular regard to the nature of the information. He notes that there is one sentence which is arguably more free and frank in its nature than the remainder of the information, though not particularly significantly so. In any event he considers that disclosure of that particular comment would be likely to help the public gain a greater understanding of why the Council reached its decision. Ultimately, the Commissioner was not of the view that the information was sufficiently detailed or sensitive that disclosure at the time would have been severe enough to outweigh the public interest in its disclosure. Additionally, the Commissioner notes that the Council has conceded that as far as it is aware, the details of the redundancies had been made public by the time of its refusal notice to the complainant. For these reasons, the Commissioner does not consider that the prejudice described in respect of section 36(2)(b)(ii) would have been severe, frequent or extensive enough to warrant the maintenance of the exemption.
63. The Commissioner notes that the Council has argued that the public interest is satisfied by the publication of the final proposals. While the Commissioner accepts that this does

satisfy the public interest to some extent, he was not satisfied that this sufficiently diminishes the public interest in accessing information regarding earlier discussions. In his view, the withheld information gives a fuller picture about the process the Council followed and more detail about the rationale behind its final decision.

64. In view of the above, the Commissioner decided that the prejudice caused by disclosure would not have been severe, frequent or extensive enough to warrant withholding the information. As the redundancies concerned involved significant sums of public money and had a significant impact on those directly affected, it is important that the Council is as open and accountable as possible about this aspect of its work. It is also the case that the timing of the request and the nature of the information would have reduced the severity, frequency and extensiveness of prejudice in the circumstances of this case. The Commissioner would also add that in respect of the record-keeping concerns, the Commissioner also feels that this issue could and should be addressed by effective management.
65. The Commissioner therefore considers that the public interest in maintaining the exemption under section 36(2)(b)(ii) did not outweigh the public interest in disclosure of the information by the time for compliance with the request.

Procedural Requirements

66. The Commissioner found that section 36(2)(b)(ii) was engaged in respect of the withheld information but decided that the public interest did not favour withholding it. Having determined that the arguments put forward by the public authority in relation to section 36(2)(c) were in fact relevant and applicable to section 36(2)(b)(ii) (and in the absence of any different arguments regarding prejudice) it was not necessary to consider section 36(2)(c) further. He therefore considers that the Council breached section 1(1)(b) and 10(1) of the FOIA in not providing the withheld information to the complainant within 20 working days or by the date of its internal review.
67. When the Council initially responded to the request, it did not rely on section 36(2)(b)(ii) or 36(2)(c). The Council only sought to apply these exemptions during the course of the Commissioner's investigation. As such, the Council breached section 17(1) (a), (b) and (c) in failing to rely on the

exemption within 20 working days of the request or by the date of its internal review.

The Decision

68. The Commissioner's decision is that the Council dealt with the following elements of the request in accordance with the requirements of the FOIA:

- It correctly concluded that the exemption in section 36(2)(b)(ii) was engaged.

69. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the FOIA:

- The Council incorrectly determined that the public interest in maintaining the exemption under section 36(2)(b)(ii) outweighed the public interest in disclosing the information in question. It therefore breached section 1(1)(b) and 10(1) of the FOIA because it did not provide this information to the complainant within 20 working days of the request or by the date of its internal review.
- The Council breached section 17(1) (a), (b) and (c) of the FOIA in failing to cite the exemptions in sections 36(2)(b)(ii) and 36(2)(c) within 20 working days or by the date of its internal review.

Steps Required

70. The Commissioner requires the Council to take the following steps to ensure compliance with the FOIA:

- Disclose to the complainant a copy of the withheld information

71. The Council must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

72. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Other matters

73. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:
- The Commissioner notes that the Council took longer than 20 working days to send a copy of its internal review to the complainant. He also notes that the Council undertook two internal reviews. This is not in accordance with guidance published on the Commissioner's website at www.ico.gov.uk. The Commissioner's guidance states that internal reviews should be conducted within 20 working days unless exceptional circumstances are involved. The guidance also states that internal reviews should not consist of more than one stage. Following an internal review, a requester must appeal to the Commissioner if he or she remains dissatisfied with the response. The Commissioner trusts that the Council will consider the guidance and make any improvements to its internal review procedure that may still be necessary.

Right of Appeal

74. 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,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

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.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is sent.

Dated the 24th day of August 2010

Signed

**Jo Pedder
Group Manager**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex – Freedom of Information Act 2000

General Right of Access

Section 1(1) provides that –

“Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him.”

Public interest test

Section 2(2) provides that –

“In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that –

- (a) the information is exempt information by virtue of a provision conferring absolute exemption, or
- (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information”

Time for Compliance

Section 10(1) provides that –

“Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”

Refusal of Request

Section 17(1) provides that –

“A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is

exempt information 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."

Exemption – Section 36

Section 36(2) provides that –

"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-

- (a) would, or would be likely to, prejudice-
 - (i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or
 - (ii) the work of the Executive Committee of the Northern Ireland Assembly, or
 - (iii) the work of the executive committee of the National Assembly for Wales,
- (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 purposes of deliberation, or
- (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.