

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 July 2016

Public Authority: Gloucestershire County Council

Address: Shire Hall
Westgate Street
Gloucester
GL1 2TR

Decision (including any steps ordered)

1. The complainant has requested recorded information which concerns his claim against the Gloucester County Council for damage to his vehicle whilst driving on one of the Council's roads.
2. The Commissioner's decision is that Gloucestershire County Council is entitled to withhold a chain of emails in reliance on section 36(2)(b)(ii) of the FOIA.
3. The Commissioner requires the public authority to take no further action in this matter.

Request and response

4. On 25 September 2015, the complainant wrote to Gloucestershire County Council and requested information in the following terms:

"Under the general requirements of the Freedom of Information Act 2000, I would be grateful if you would provide the following information:
 1. A copy of the detailed report submitted by Amey Gloucestershire or Amey Gloucestershire Highways Ltd to Gallagher Bassett between 21st April 2015 and 20th July 2015 regarding:
 - Amey claim case number 11050956
 - Gallagher Bassett claim case numbers JM-005724-000613-GD-01 and GM-005724-000613-GD-01
 2. Copies of any written correspondence, by report, addendum, amendment, letter or email, between Amey Gloucestershire or Amey

Gloucestershire Highways Ltd and Gallagher Bassett regarding the claim case numbers quoted in paragraph 1 above between 21st April 2015 and 25 September 2015.

3. Copies of any written records regarding the claim case numbers quoted in paragraph 1 above between 21st April 2015 and 25 September 2015, in report, letter, email format between Amey Gloucestershire or Amey Gloucestershire Highways Ltd and Gloucestershire County Council, including the Council's Highways Authority, the Council's executive management or staff and any of the Council's elected members and their staff.

I wish to receive the information from you by email."

5. The Council acknowledged the complainant's request on 28 September under reference 619428, informing him that it would respond to the request no later than 23 October 2015.
6. The Council eventually responded to the complainant's request by providing him with some recorded information falling within the scope of his request. The Council also informed the complainant that it was withholding a number of emails in reliance on section 36(2)(b)(ii) of the FOIA. The Council stated that, "releasing this information would prejudice the ability of the Council to undertake its duties effectively and would be likely to have the effect of inhibiting the free and frank provision of advice and exchange of views for the purpose of deliberation".
7. On 9 December 2015, the complainant wrote to the Council to ask it to carry out an internal review. The complainant outlined the scope of what he wanted the Council to review, this was:
 - The Amey Red Claim Investigation Report signed by [name redacted].
 - The email exchanges between Amey and Gallagher Bassett.
 - The validity of the Council's decision to withhold information on the basis of its public interest considerations.
8. The complainant's internal review request was acknowledged by the Council on 14 December.
9. On 28 January 2016, the Council completed its internal review and wrote to the complainant to inform him of its final decision. The Council's conclusions were:
 - The Amey Red Claim Investigation Report signed by [name redacted]: "This information was supplied to you following your request under FOI."

- The email exchanges between Amey and Gallagher Bassett: "I have checked with Gallagher Bassett and can confirm that there is further information held by Gallagher Bassett in relation to your claim. Please find this information enclosed."
- The validity of the Council's decision to withhold information on the basis of its public interest considerations: The Council upheld its application of Section 36(2)(b)(ii) on the grounds that disclosure of the emails 'would likely to inhibit the free and frank exchange of views for the purposes of deliberation'.

Scope of the case

10. The complainant initially contacted the Commissioner on 16 November 2015 to complain about the way his request for information had been handled.
11. The Commissioner has investigated the Council's handling of the complainant's request and in particular he has investigated the Council's reliance on section 36(2)(b)(ii). This notice sets out the Commissioner's decision.

Reasons for decision

Section 36 – Prejudice to the conduct of public affairs

12. Section 36 allows a public authority to withhold recorded information if its disclosure would prejudice the effective conduct of public affairs.
13. The Council has confirmed to the Commissioner that it is relying on section 36(2); this section states:

"36 (2) 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 –

(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 purpose of deliberation , or

(c) Would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs."

14. The application of section 36 requires the public authority's "qualified person" to consider the withheld information and the exemption which applies to it. This consideration cannot be delegated to another person within the public authority.
15. The Commissioner asked the Council to provide him with evidence that the qualified person considered the application of section 36 personally. The Council did this by sending the Commissioner a copy of the email submission provided to the qualified person, which included the withheld information as attachments and details of the Council's public interest considerations.
16. The Council's qualified person is Jane Burns; the Council's Monitoring Officer and Ms Burns' opinion was sought on 29 October 2015.
17. On 11 November 2015, Ms Burns approved the Council's application of section 36(2)(b)(ii) in respect of the information which the Council is withholding from the complainant.
18. For the purpose of the Council's internal review, the qualified person was the Council's Chief Executive, Mr P Bungard.
19. On 26 January 2016, Mr Bungard reviewed copies of the withheld information and confirmed its continued withholding under section 36(2)(b)(ii).
20. The Commissioner is satisfied that the Council's qualified person has given an opinion in this case. He must now consider whether that opinion is reasonable.
21. The Commissioner adopts the plain meaning of the word "reasonable" as defined by the Shorter English Dictionary: The definition given is; "in accordance with reason; not irrational or absurd".
22. To engage section 36, the qualified person's opinion needs only to be reasonable: It needs to be an opinion reasonably held by a reasonable person. This is not a high hurdle. It is not necessary for the Commissioner to agree with the opinion given; he only needs to recognise that a reasonable person could hold the opinion given. In this case, the Commissioner is satisfied that a reasonable opinion has been given.
23. The Council has assured the Commissioner that the qualified person's opinion was predicated on whether there is or is not the required degree of likelihood of inhibition and that she has concluded that the information should remain withheld.

24. In making this decision the qualified person has had access to all of the withheld information and to advice detailing the prejudice and public interest considerations both for and against release.
25. Whilst the contents of the withheld information is important for considering where the balance of the public interest lies, the primary reason for the Council's application of section 36 is the 'processes that may be inhibited, rather than what is in the information'¹.
26. The Council considers that release of the requested information would likely to inhibit the free and frank exchange of views for the purposes of deliberation and therefore should be exempt from disclosure by virtue of Section 36(2)(b)(ii).
27. The Council points out that the requested information relates to a complaint and potential claim for compensation for a specific incident. This involved the process of considering the implications for the Council, the wider issues and how best to respond in such cases.
28. In replying to the complaint it received, the Council was required to deliberate over the approach which should be taken. This process involved discussions between officers and with Elected Members so that a response to the complaint could be formulated, in circumstances where there is also a potential threat of legal action.
29. The Council asserts that it is reasonable to conclude that releasing correspondence of earlier drafts and discussions about the proposed responses would mean that the Council's processes would be inhibited and less candid. Disclosure would be likely to restrict a frank exchange of views in deliberating about how to manage such complaints and claims, pending formal legal action being taken.
30. Disclosure would be likely to inhibit the ability of public authority staff and Elected Members to express their opinions openly, honestly and completely, or to explore options, when giving their views as part of the process of deliberation. The rationale for this is that inhibiting the provision of advice or the exchange of views would be likely to impair the quality of decision making by the Council.

¹ https://ico.org.uk/media/for-organisations/documents/1175/section_36_prejudice_to_effective_conduct_of_public_affairs.pdf

31. The withheld information in this case relates to consideration of a complaint by an individual member of the public regarding a pothole. The Council has advised the Commissioner that there is an established procedure in place for considering and appealing pothole claims, which the requestor has had full access to.
32. The Council asserts that the withheld correspondence falls outside of the procedures referred to above, and that it considers the wider implications, rather than just the complaints made. Furthermore, public resources would be likely to be diverted to managing the effect of disclosure for an incident that has already been investigated through the proper procedures.
33. The Council considers that disclosure of the withheld information would result in a "chilling effect", the argument being that disclosure of discussions between Council staff and Elected Members would inhibit free and frank discussions in the future, and that the loss of frankness and candor would damage the quality of advice and deliberation and lead to poorer decision making.
34. The Council believes that litigation is still a possibility: It accepts that it may be required to disclosure information in a controlled manner during any litigation procedure and it assures the Commissioner that the Council would comply with any court direction on the matter.
35. In the Council's opinion, a controlled disclosure of the withheld information to interested parties would be more appropriate, should this be ordered, rather than release to the wider public under Freedom of Information legislation.
36. The Commissioner has considered the nature of the information which the complainant seeks. He accepts the qualified person's opinion that the disclosure of the withheld information would likely prejudice the exchange of views and advice. The Commissioner readily accepts that the Council requires a 'safe space' to consider how best to respond to a complaint and it is for this reason the Commissioner has decided that section 36(2)(b)(ii) is engaged.

The Public Interest

37. The Council's application of section 36(2)(b)(ii) is subject to a consideration of the public interest. The Commissioner is required to consider whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
38. In *Guardian and Heather Brooke v the Information Commissioner and the BBC* (EA/2006/001 and EA/2006/0013), the Tribunal provided some

general principles about the application of the public interest test in section 36 cases as follows:

- The lower the likelihood is shown to be that the free and frank exchange of views or provision of advice would be inhibited, the lower the chance that the balance of the public interest will favour the exemption.
- While the Commissioner cannot consider whether prejudice is likely (that is for the qualified person to decide), he is able to consider the severity, frequency or extent of any likely prejudice.
- Since the public interest in maintaining the exemption must be assessed in 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 passage of time since the creation of the information may have an important bearing on the balancing exercise. As a general rule, the public interest in maintaining the exemption will diminish over time.
- In considering factors 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.
- 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 in the democratic process.

Public interest arguments in favour of disclosing the requested information

39. The Commissioner considers that some weight must always be given to the general principle of achieving accountability and transparency through the disclosure of information held by public authorities. This assists the public in understanding the basis and how public authorities make their decisions and carry out their functions, and in turn fosters trust in public authorities. It may also allow greater participation by the

public in the Council's decision making process and to make appropriate challenges to those decisions.

40. In this case, the requested information relates to a complaint made to the Council by the requester/complainant. The contents of the emails concerns drafts and internal deliberations on the wider issues surrounding highway claims handling.
41. The complainant has had the opportunity to pursue his complaint via the Council's established procedure for dealing with claims relating to potholes and he may still initiate legal action against the Council.
42. The Council has assured the Commissioner that the complainant has been given the majority of the information he has requested and that only a small amount of information has been withheld. Likewise, the Council has exchanged a number of emails with the complainant and through these it has endeavoured to answer all of his questions and concerns. The Council has advised him of its Highway Safety Inspection policy, claim processes and strategy for making repairs to the highways. Further, the Council has made detailed responses to questions about its claims handling and inspection processes and it has assured the complainant that its processes are in compliance with national guidelines and best practice.
43. The Commissioner gives some weight to the apparent purpose behind the complainant's request – to understand how the Council has considered his claim/complaint and perhaps those made by others.
44. Having examined the withheld information, the Commissioner finds there is some public interest in the public having knowledge that the Council is acting properly, in all respects, concerning complaints made about the county's roads. He recognises that the public should be properly assured that the Council is acting lawfully and in a considered manner.

Public interest arguments in favour of maintaining the exemption

45. It is the Council's strongly held belief that it is essential for its officers to have free space to consider complaints. It is necessary for its officers to discuss matters rigorously and with candour and to record these discussions.
46. Releasing the records of its candid discussions would likely result in a chilling effect whereby the Council's officers and elected members would be reticent to discuss matters and to provide candid opinions and/or have them recorded. In the context of this case, it is apparent to the Commissioner that this reticence would be real and it would result in detriment to the Council's decision making process.

47. The substantive issue contained within the withheld information is certainly likely to be one where it will reoccur. Through early intervention and discussions it is more likely that a positive solution may be found in a cost effective manner. This will ensure the best use of public funds and it is a factor which underpins a public interest argument concerning cost effectiveness and achieving the best outcome.
48. The correspondence is recent and in view of the possibility of legal action being taken, the matter can be considered to be live.

The Commissioner's decision

49. The Commissioner must afford some weight to the factors which favour the disclosure of the withheld correspondence. The amount of weight is significantly reduced by the fact that the correspondence relates to a single, person-centred complaint and it is not a matter of wider public interest. This is especially the case where the complainant has been notified of the outcome of his claim and has been given the opportunity to challenge the decision.
50. The Commissioner must also give some weight to the principles of accountability and transparency. The amount of weight given is again reduced through the provision of information to the complainant which is relevant to the complainant's matter.
51. Considering all of the above, the Commissioner has decided that greater weight must be given to the potential negative impact of disclosure to the Council's need to have a 'safe space' for consideration and to have the opportunity to receive candid advice from its officers.
52. The Commissioner's decision is that the public interest favours the continued withholding of the information requested by the complainant. He has therefore decided that the Council is entitled to rely on section 36(2)(b)(ii) of the FOIA to withhold the requested information.
53. The complainant's request for information has, by its nature, included information which is the complainant's personal data. The withheld information in this case concerns the Council's internal deliberations on the wider issues surrounding highway claims handling. Where the withheld information has contained the complainant's personal data, the Council has assured the Commissioner that this has been provided to him.

Right of appeal

54. 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

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

55. 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.
56. 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
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF