

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 28 March 2012

**Public Authority:** Stoke-on-Trent City Council  
**Address:** Civic Centre  
Glebe Street  
Stoke-on-Trent  
ST4 1HH

#### Decision (including any steps ordered)

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1. The complainant has requested any tender assessments or internal audit reports relating to contracts given to a specific company.
2. The Commissioner's decision is that Stoke-on-Trent City Council ('the council') has incorrectly applied the exemption where disclosure would prejudice the effective conduct of public affairs as the public interest in maintaining the exemption does not outweigh the public interest in disclosing the information. The Commissioner has also found a number of procedural breaches.
3. The Commissioner requires the council to take the following step to ensure compliance with the legislation:
  - Disclose the requested information.
4. 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 (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

#### Request and response

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5. On 27 January 2010, the complainant wrote to the council and requested information in the following terms:

"In response to a recent FoI request, Advantage West Midlands released details of areas of concern relating to contracts given to Pro-venture.

Could you provide the following information;

- a) What contracts have been given to Pro-venture
  - b) The value of those contracts
  - c) Any tender assessment or internal audit reports relating to the Pro-venture contracts".
6. The council provided a response on 4 June 2010. It provided the information requested at a) and b) and stated that the exemption at section 36(2)(c) of the Act applied to question c). It further stated that section 36(2)(c) exempts authorities from the obligation to confirm or deny the existence of information where it would, or would be likely to, prejudice the effective conduct of public affairs.
7. An internal review was requested on 15 June 2010. This was acknowledged on 17 June 2010. A response has not been provided to date despite the complainant sending numerous emails to request one.

### Scope of the case

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8. The complainant contacted the Commissioner to complain about the way his request for information had been handled. He specifically complained that he had not had a response to part c) of the request. During the course of the Commissioner's investigation the council also sought to rely upon the exemption at section 36(2)(b) of the Act.
9. The Commissioner considers whether the council are correct to apply the exemption at section 36(2)(b) where disclosure would, or would be likely to, inhibit the free and frank provision of advice, or the free and frank exchange of views for the purposes of deliberation and the exemption at section 36(2)(c) where disclosure would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

### Reasons for decision

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10. Section 36 states that information is exempt from disclosure where, in the reasonable opinion of a qualified person, disclosure would or would be likely to prejudice the effective conduct of public affairs. Section 36 operates in a slightly different way to the other prejudice based

exemptions in the FOIA. For section 36 to be engaged, information is exempt only if, in the reasonable opinion of a qualified person, disclosure of the information in question would, or would be likely to, prejudice any of the activities set out in sub-sections of 36(2).

11. In this case the council is applying the exemptions at both section 36(2)(b) and 36(2)(c).
12. Section 36(2)(b) provides an exemption where disclosure 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.
13. 36(2)(c) provides an exemption where disclosure would, or would be likely to, otherwise prejudice the effective conduct of public affairs.

### **The duty to confirm or deny**

14. As stated in paragraph 6, in its response to the complainant the council explained that section 36(2)(c) exempts authorities from the obligation to confirm or deny the existence of information where it would, or would be likely to, prejudice the effective conduct of public affairs. However, the council did not specifically state that it was relying on the exemption to neither confirm nor deny the existence of the information or to withhold the requested information. In its response to the Commissioner's enquiries, the council provided arguments for withholding the requested information rather than arguments for neither confirming nor denying its existence. Therefore, the Commissioner sought and received clarification that the council's application of the exemption applied to withholding the information rather than the confirmation of its existence.

### **Are the exemptions engaged?**

15. In order to establish whether each of the exemptions has been applied correctly the Commissioner has:
  - Ascertained who is the qualified person or persons for public authority in question;
  - Established that an opinion was given;
  - Ascertained when the opinion was given; and
  - Considered whether the opinion given was reasonable.
16. With regard to the first two criteria, the Commissioner has established that for both exemptions the reasonable opinion was given by Paul

Hackney, Assistant Director of Legal Services. The Commissioner is satisfied that Mr Hackney, being the council's Monitoring Officer, is a qualified person for the purposes of section 36(5) of the FOIA.

17. In relation to the third criterion, the council has provided dates of when the opinion was sought and given in respect of the exemption at section 36(2)(c) and the Commissioner is satisfied that the opinion was provided after the receipt of the request and before the response. In correspondence with the Commissioner, the council suggested that, although not referred to in the initial response, it may be possible to apply the exemption at section 36(2)(b). The Commissioner requested evidence that this was the opinion of the qualified person and the date it was given, and was informed that the opinion was provided by the qualified person on 23 November 2011. Although this is clearly after the initial response, the Commissioner considers that public authorities have the right to raise exemptions for the first time at internal review or during the Commissioner's investigation.
18. With regards to the fourth criterion, in deciding whether an opinion is reasonable the Commissioner will consider the plain meaning of that word, that being, in accordance with reason; not irrational or absurd. If it is an opinion that a reasonable person could hold, then it is reasonable. This is not the same as saying that it is the *only* reasonable opinion that could be held on the subject. The qualified person's opinion is not rendered unreasonable simply because other people may have come to a different (and equally reasonable) conclusion. It is only unreasonable if it is an opinion that *no* reasonable person in the qualified person's position could hold. The qualified person's opinion does not even have to be the *most* reasonable opinion that could be held; it only has to be *a* reasonable opinion.
19. The Commissioner has also been guided by the Tribunal's indication, in the case *Guardian Newspapers & Brooke v Information Commissioner & BBC*<sup>1</sup>, that the reasonable opinion is limited to the degree of likelihood that inhibition or prejudice may occur and thus 'does not necessarily imply any particular view as to the *severity* or *extent* of such inhibition [or prejudice] or the *frequency* with which it will or may occur, save that it will not be so trivial, minor or occasional as to be insignificant' (paragraph 91). Therefore, when assessing the reasonableness of an opinion the Commissioner is restricted to focussing on the likelihood of that inhibition or harm occurring, rather than making an assessment as

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<sup>1</sup> Appeal numbers EA/2006/0011 & EA/2006/0013

to the severity, extent and frequency of prejudice or inhibition of any disclosure.

20. With regard to the degrees of likelihood of prejudice the Commissioner has been guided on the interpretation of the phrase 'would, or would be likely to' by a number of Information Tribunal decisions. In terms of 'likely to' prejudice, the Tribunal in *John Connor Press Associates Limited v The Information Commissioner*<sup>2</sup> confirmed that 'the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk' (paragraph 15). With regard to the alternative limb of 'would prejudice', the Tribunal in *Hogan v Oxford City Council & The Information Commissioner*<sup>3</sup> commented that 'clearly this second limb of the test places a stronger evidential burden on the public authority to discharge' (paragraph 36).
21. Although in its response to the complainant the council explained that section 36(2)(c) exempts authorities from the obligation to confirm or deny the existence of information where it would, or would be likely to, prejudice the effective conduct of public affairs, in its submission to the Commissioner, it was stated that the qualified person came to the conclusion that disclosure of the information *would* prejudice both the effective conduct of public affairs and the free and frank provision of advice and exchange of views. Therefore, the Commissioner considers that it is appropriate to apply the stronger evidential test.
22. At the Commissioners request, the council provided a copy of qualified person's opinion. The Commissioner notes that the qualified person had access to the withheld information and that the officer who compiles the council's internal audit reports made a submission for non-disclosure but did not recommend that a specific exemption be engaged.
23. The council explained that the qualified person took full account of the Commissioner's published guidance and decisions and came to the conclusion that section 36(2)(c) applied in these circumstances as disclosure of the information would prejudice the council's ability to offer an effective public service or meet its wider objectives or purposes due to the disruption caused by the disclosure or the diversion of resources in managing the impact of disclosure. It further explained the prejudice that would be experienced as follows:

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<sup>2</sup> Appeal number EA/2005/0005

<sup>3</sup> Appeal number EA/2005/0026 & 0030

1. The report was drafted in a way that makes it suitable for internal use only, as it contains very detailed information, and publishing the report would release sensitive information that was not meant for the public domain. Should Internal Audit reports be open to publication, the drafting and presentation of them would ensure provision of the necessary information but would also be couched in a less detailed and more cautious manner.
2. A local authority when investigating or auditing its processes requires some safety in the knowledge that it can consider any flawed processes, obtain evidence from officers and take action to rectify certain situations by way of making recommendations, which results in improved public services being provided. The report was drafted with all of this information provided in detail as well as a detailed conclusion on the basis of the evidence provided and was not drafted in a way that was suitable for the public domain.
3. If this report had been made available to the world at large, there would have been a significant impact on the council, as it would have caused disruption to the council in respect of its procurement processes, which have since been considered and improved upon following audit's recommendations. The council would then be required to manage the impact of such disclosure, as providers tendering for services would question the council's future procurement exercises on the basis of this specific procurement process.
4. The council needs to be able to exercise its functions in respect of investigating and auditing the council's processes in order to improve the services provided to the public (including commercial companies/providers) without fear of inappropriate consequences following from recommendations that have been actioned to rectify situations, and having to manage the after effects of such consequence.
5. Although not referred to in the response to the initial request, it may also be possible to apply section 36(2)(b) with regard to inhibiting the free and frank provision of advice or the free and frank exchange of views for the purposes of deliberation. Some of the information contained in the report reflects people's views of the situation as it happened, so that the audit officer could deliberate and provide recommendations. Officers would feel more inhibited in providing statements to be contained in such reports and the audit officer would feel inhibited in providing such detailed recommendations if this report was to be made public. This would affect the management of auditable situations that arise, as views and information might well be less descriptive, meaning that the

audit officer would be unable to establish fair and robust recommendations on the evidence provided.

24. In relation to the exemption at section 36(2)(c), the Commissioner considers that points 1, 2, and 5 of the council's arguments for withholding the information are not relevant to the prejudice the council claim would result from disclosure, that being the disruption caused by the disclosure or the diversion of resources in managing the impact of disclosure. Therefore, the Commissioner's view is that only points 3 and 4 can be taken into consideration for the purposes of deciding whether the exemption is engaged in relation to section 36(2)(c).
25. However, having viewed the withheld information and on the basis that the qualified person's opinion is only unreasonable if it is an opinion that no reasonable person in the qualified person's position could hold, the Commissioner finds that the opinion of the qualified person was a reasonable one, namely, it was reasonable to consider that disclosure would cause disruption to procurement and consequent diversion of resources. He therefore finds that section 36(2)(c) is correctly engaged.
26. In relation to the exemption at section 36(2)(b), the Commissioner considers that points 1, 2, and 5 are relevant to the prejudice referred to at section 36(2)(b). He accepts that it is a reasonable opinion that if the withheld information was disclosed it would cause officers to be less candid in future audit processes. Whilst the Commissioner does not accept that officers will be put off providing advice and views in full, it is not unreasonable to conclude that information would be less descriptive and couched in a more cautious manner. This would then have a harmful effect on the deliberation process of drawing conclusions from audits. He finds that the opinion of the qualified person is a reasonable one in this instance and therefore finds that section 36(2)(b) is engaged.

### **Public interest test under section 36**

27. Sections 36(2)(b) and (c) are qualified exemptions and therefore the Commissioner must consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure of the information. The Tribunal in *Guardian Newspapers & Brooke v Information Commissioner & BBC*<sup>4</sup> indicated the distinction between the consideration of the public interest under section 36 and consideration of

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<sup>4</sup> Appeal numbers EA/2006/0011 & EA/2006/0013

the public interest under the other qualified exemptions contained within the FOIA:

“The application of the public interest test to the s36(2) exemption involves a particular conundrum. Since under s36(2) the existence of the exemption depends upon the reasonable opinion of the qualified person it is not for the Commissioner or the Tribunal to form an independent view on the likelihood of inhibition under s36(2)(b), or indeed of prejudice under s36(2)(a) or (c). But when it comes to weighing the balance of public interest under s2(2)(b), it is impossible to make the required judgment without forming a view on the likelihood of inhibition or prejudice.” (Paragraph 88)

28. As noted above, the Tribunal indicated that the reasonable opinion is limited to the degree of likelihood that inhibition or prejudice may occur and thus ‘does not necessarily imply any particular view as to the *severity* or *extent* of such inhibition [or prejudice] or the *frequency* with which it will or may occur, save that it will not be so trivial, minor or occasional as to be insignificant’ (paragraph 91). Therefore, the Commissioner’s view is that whilst due weight should be given to reasonable opinion of the qualified person when assessing the public interest, the Commissioner can and should consider the severity, extent and frequency of prejudice or inhibition to the subject of the effective conduct of public affairs.

### **Public interest arguments in favour of disclosing the requested information**

29. The council submitted that, in disclosing the requested information, it would be acting in the utmost transparency. It stated that companies and providers tendering for future services may benefit from the knowledge of the particular procurement process at that time but did not explain why this would be in the public interest.
30. The council also stated that as the information was attended to in October 2008 and the request received in January 2010, the passage of time may have an impact on disclosure.
31. The Commissioner was informed that redaction of the information was considered but due to the nature of the way the information was drafted, redaction was not considered feasible.
32. The Commissioner considers that the ‘default setting’ of the FOIA is in favour of disclosure. This is based on the underlying assumption that disclosure of information held by public authorities is in itself of value because it promotes better government through transparency, accountability, public debate, better public understanding of decisions



and informed and meaningful participation of the public in the democratic process.

33. The Commissioner also considers that there is a general public interest for accountability in the use of public funds.

### **Public interest arguments in favour of maintaining the exemptions**

34. The council submitted the following arguments in favour of maintaining the exemptions:

1. The content of the report is very detailed and contains sensitive information.
2. The issues raised in the report have already been dealt with and services improved as a result. Releasing the information would have a detrimental effect on the improvements made.
3. Companies/providers that may have benefited from disclosure would have no cause of action due to the time that has passed since the Report and this also lessens the beneficial impact that releasing the information would have had.
4. There was an ongoing investigation being carried out at the time of the request, which would have been adversely affected by disclosure.
5. It would cause significant harm to the Council bringing up past issues that have been resolved and learned from.
6. Officers providing evidence for auditing purposes need to feel that they can provide free and frank views of a situation without worrying that what they say may be made public.
7. The audit officer requires the above views in order to formulate a recommendation, so inhibited views may affect deliberations and the robustness of the recommendations that this officer is able to provide. Also, the audit officer needs to be able to provide a free and frank recommendation that will improve services, without being concerned that what is said will be in the public domain.

35. The Commissioner considers that points 1, 2, 3, and 4, of the council's arguments in favour of maintaining the exemption are not relevant to the prejudice the council claim would result from disclosure under section 36(2)(c), that being the disruption caused by the disclosure or the diversion of resources in managing the impact of disclosure, or relevant to the prejudice that would result from disclosure under section 36(2)(b), namely the inhibition of officers in relation to audit processes. Therefore, the Commissioner's view is that these general public interest

considerations should not be given weight when deciding where the public interest lies.

36. However, the Commissioner agrees that it would cause harm to the council to bring up past issues that have been resolved and learned from in that there would be disruption and a diversion of resources. The Commissioner also agrees that the audit process requires free and frank views.

### **Balance of the public interest arguments**

37. Where, as with this case, a qualified exemption is engaged the information must still be disclosed unless, in all circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing it.
38. The council have stated that there is little benefit in releasing the information to the public at large therefore the balance is in maintaining the exemption for non-disclosure. It has stated that the information is too detailed and sensitive to be released and would affect the way the council meets its objectives in the future and cause unnecessary disruption. It has claimed that the ability of the auditor to carry out her functions would be seriously impaired and this impact does not lessen with the passage of time.
39. Having seen the withheld information, the Commissioner will consider where the balance of the public interest lies.
40. The Commissioner notes the council states on its website that it follows comprehensive tendering procedures to ensure compliance with the City Councils Contract Procedure Rules and EU procurement law and names those procedures as follows:
- Contract Procedure Rules, as laid down in our Constitution
  - 2006 Public Procurement Regulations England, Wales and Northern Ireland
  - European Union (EU) Procurement Directives.

Links are also provided to the Contract Procedure Rules and the Procurement Strategy.

41. In relation to the exemption at section 36(2)(c), given the identification of the procurement process as detailed above, and that the procurement exercise in question was reported on in October 2008 but the request was made in January 2010, the Commissioner does not accept that the disruption or the diversion in resources experienced by the council

following disclosure would be severe, extensive or frequent enough to outweigh the public interest in being accountable for the use of public funds and being transparent about a previous process, particularly as the issues raised in the report have been dealt with and services improved as a result.

42. In relation to the exemption at section 36(2)(b), the Commissioner has considered the argument that the public interest in maintaining the exemption lies in securing the continued cooperation of officers in the audit process. He accepts the qualified person's opinion that disclosure of information provided by individuals may dissuade employees from being free and frank in the future which would be detrimental on the ability of the auditor to carry out her functions. Although the Commissioner recognises that officers have a duty to be open and honest in audit processes, he acknowledges that where individuals may be seen to be at fault they may take action to minimise their degree of culpability.
43. However, when considering the public interest, the Commissioner should give such 'chilling effect' arguments appropriate weight according to the circumstances of the case and the information in question. As stated in the Tribunal case *Department for Education and Skills v the Information Commissioner*<sup>5</sup> and endorsed as a statement of principle in the *Export Credits Guarantee Department High Court case*<sup>6</sup> ;  

"The central question in every case is the content of the particular information in question. Every decision is specific to the particular facts and circumstances under consideration. Whether there may be significant indirect and wider consequences from the particular disclosure must be considered case by case."
44. Having viewed the withheld information, the Commissioner notes that although some of the information isn't entirely anodyne, he couldn't identify significant content that is so candid it would hinder the free and frank provision of advice or exchange of views so severely or so frequently or extensively that would outweigh the public interest in disclosure.
45. Whilst the Commissioner accepts the qualified person's opinion that also a 'chilling effect' leading to poorer quality advice and decision making

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<sup>5</sup> Appeal number EA/2006/0006

<sup>6</sup> 2008 EWHC 638

would occur, knowing that advice might be subject to future disclosure under FOIA could actually lead to better quality advice being provided. In this case, being aware that the audit report could be disclosed in response to a Freedom of Information request could equally ensure that recommendations are thorough and robust which in turn would ensure that future procurement processes are improved.

47. The fact that the council have confirmed that there is no other information in the public domain relating to the internal audit investigation increases the public interest in disclosure in this case.

### **Conclusion on the public interest test**

48. The Commissioner has considered the public interest arguments taking into account the severity, frequency and extent of the claimed prejudice. He has given due weight to the opinion of the qualified person but has concluded that in the circumstances of this case the public interest in maintaining the exemption does not outweigh the public interest in disclosure of the requested information in relation to both the exemption at section 36(2)(b) and the exemption at section 36(2)(c).

### **Procedural requirements**

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#### **Section 1 – General right of access to information & Section 10 – Time for compliance**

49. Sections 1(1)(a) and 1(1)(b) of the FOIA state that any person making a request for information is entitled to be informed by the public authority whether it holds the information and if so, to have that information communicated to him.

50. Section 10(1) states:

“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.”

51. The Commissioner considers that the council did not deal with the request in accordance with section 1(1)(a), section 1(1)(b) and section 10(1) of the FOIA, in that it did not inform the complainant that recorded information was held, or disclose that information within the statutory time limit.

#### **Section 17 – Refusal of request**

52. Section 17(1) of the Act states:

"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."

53. In this case, the council failed to issue a refusal notice within the statutory time limit in breach of section 17(1).
54. The council also failed to identify that it wished to rely on the exemption at section 36(2)(b) until the Commissioner's investigation in breach of section 17(1).
55. When notifying the Commissioner that it wished to rely on the exemption at section 36(2)(b), the council also didn't specify the subsection of the exemption in question in breach of section 17(1)(b).

## **Other matters**

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### **Internal review**

56. Paragraph 39 of the Code of Practice issued under section 45 of the Act (the 'Code') recommends that complaints procedures should:

"...provide a fair and thorough review of handling issues and of decisions taken pursuant to the Act, including decisions taken about where the public interest lies in respect of exempt information. It should enable a fresh decision to be taken on a reconsideration of all the factors relevant to the issue."

57. Paragraph 40 of the Code states that in carrying out reviews:

"The public authority should in any event undertake a full re-evaluation of the case, taking into account the matters raised by the investigation of the complaint."

58. As he has made clear in his published guidance on internal reviews, the Commissioner considers that internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner's view of a reasonable time for completing an internal

review is 20 working days from the date of the request for review. In this case the Commissioner notes that the public authority has not provided an internal review to date. The public authority should ensure that internal reviews are carried out promptly in future.

## Right of appeal

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59. 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: 0116 249 4253

Email: [informationtribunal@hmcts.gsi.gov.uk](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

60. 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.
61. 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** .....

**Lisa Adshead**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**