

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 December 2019

Public Authority: Ipswich Borough Council
Address: Grafton House
15-17 Russell Road
Ipswich
IP1 2DE

Decision (including any steps ordered)

1. The complainant has requested information relating to negotiations between a record company and the council regarding a music festival. The council applied a number of exemptions to withhold information, including section 36(2)(i) and (ii) and section 36(2)(c). Following discussions with the Commissioner the complainant agreed to only appeal the application of section 36 to the withheld information.
2. The Commissioner's decision is that the council was correct to apply section 36(2)(i) and (ii), and section 36(2)(c) to withhold the information.
3. The Commissioner does not require the council to take any steps.

Request and response

4. On 7 January 2019, the complainant wrote to the council and requested information in the following terms:

"copies of all correspondence, records and minutes of meetings held by Ipswich Borough Council in relation to [name of company redacted] and Mansion on the Moon."

5. Following an initial notification that the council was delaying its response, the council responded on 29 March 2019. It provided some information however it redacted other information, applying the following exemptions to withhold the information:

- Section 21 – Information reasonably accessible to the applicant by other means
- Section 36 – Prejudice to the effective conduct of public affairs
- Section 40 – Personal Information
- Section 41 – Information provided in confidence
- Section 42 – Legal professional privilege
- Section 43 – Commercial interests

6. Following an internal review the council wrote to the complainant on 7 June 2019. It maintained its position as regards the application of sections 40, 36, 41, 42 and 43.

Scope of the case

7. The complainant contacted the Commissioner on 8 March 2019 to complain about the way her request for information had been handled. Her initial complaint was that the council had failed to respond to the request. Once the council provided its response, the complainant wrote to the Commissioner on 1 April 2019. She said that the council had withheld information under exemptions which she did not consider were applicable.
8. During the course of the Commissioner's investigation the council clarified that it was withholding the information under the exemptions in section 40, 36, 43 and 21. The council also excluded some information under section 42 (legal professional privilege), however this same information also falls within the scope of its arguments under section 36.
9. Further information was provided to the Commissioner to consider which was initially withheld under section 42, however upon consideration of

this information the Commissioner notes that this correspondence dates from *after* the date of the request, and she is not therefore able to include this information within her considerations in this decision notice.

10. Following a discussion between the Commissioner and the complainant on 18 October 2019, the complainant agreed that the Commissioner's investigation should focus on specific matters which the requestor explained were important for her to understand. It was also agreed that these matters would primarily revolve around information withheld by the council under section 36 of the Act. The complainant therefore withdrew her complaint to the Commissioner as regards the application of section 43, section 40(2) and section 21 of the FOIA by the council. However the Commissioner agreed with the complainant that if she identified any information falling within the specific matters of concern which the complainant had raised which had been withheld under exemptions other than section 36, then these sections would also be considered further.
11. However, having read and considered all of the withheld information, the Commissioner has not identified any sections of withheld information falling within the matters of concern specified by the complainant which have been withheld under the other exemptions claimed.
12. The following analysis therefore concentrates on the council's application of section 36 to withhold information.

Reasons for decision.

Background to the case

13. In 2018 announcements were made by local media that a music festival would be held in Ipswich. The intended 'Mansion on the Moon' Festival was publicised in the local media, and the music band, The Libertines were announced as headlining the festival. However on 13 August 2018 it was further announced by the festival organisers that the festival had been cancelled and refunds on tickets already sold would be provided¹.
14. The complainant's request revolves around correspondence and other records relating to the meetings between the festival organisers and the council.

¹ <https://www.eadt.co.uk/news/ipswich-music-festival-at-trinity-park-cancelled-1-5649100>

Section 36

15. The council argued section 36(2) (b)(i) and (ii) and 36(2)(c) of the Act are applicable.

16. 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 –

(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'.

17. Section 36 can only be engaged if, in the reasonable opinion of the qualified person, disclosure would result in any of the effects set out in section 36(2) of the Act.

18. The council clarified that the qualified person in the council is the monitoring officer, who is qualified as such under the provisions of section 35(o) of the FOI Act: *any officer or employee of the public authority who is authorised for the purposes of this section by a Minister of the Crown.*

19. The council provided evidence that the qualified person's opinion was sought on 28 January 2019, that she was shown the withheld information and arguments were provided both for and against the engagement of the exemption and in considering the public interest test. The qualified person provided her opinion on 29 January 2019.

20. The Commissioner is therefore satisfied that the qualified person's opinion was properly sought and obtained for the purposes of the application of section 36.

21. The next step in determining whether the exemption is engaged is to consider whether the opinion of the qualified person was reasonable. The Commissioner's guidance explains that the opinion does not have to be one with which the Commissioner would agree, nor the most reasonable opinion that could be held. The opinion must be in accordance with reason and not irrational or absurd.

22. The Commissioner would emphasise that section 36 is concerned with the processes that may be inhibited by disclosure of information, rather than what is in the information itself. The issue is whether disclosure of the information would inhibit the processes of providing advice or exchanging views (section 36(2)(b)) or would otherwise prejudice the effective conduct of public affairs (section 36(2)(c)).
23. In *Information Commissioner v Malnick and ACOBA [2018] UKUT 72 (AAC)*, the Upper Tribunal (UT) found that the First Tier Tribunal (FTT), in finding that section 36 was not engaged in EA/2016/0055, had erred in law by taking into account matters of public interest when deciding whether an opinion of the qualified person was reasonable for the purpose of section 36(2), which is concerned with substantive but not procedural reasonableness. The decision on the issue of reasonableness cannot therefore take into account any wider public interest factors.
24. The qualified person provided reasons why she considers that the exemption applies. These partially relate to the complainant's specific purpose and motive in making the request. The Commissioner is clear however that the council cannot take into account the identity of a requestor when making its consideration as to the application of section 36. Nonetheless, the reasons also relate more widely to the council's ability to manage its affairs, discuss policy and deliberate on projects within a safe space, away from the public eye. These can be taken into account and fall squarely within the remit of the exemption in section 36 of the Act.
25. The Commissioner accepts that the issue surrounds commercially sensitive negotiations, and that the withheld information relates to the commercial interests of a number of parties. Correspondence internally within the council is sensitive as it relates, in part, to the council's interactions with the third parties during the negotiations, and advice and deliberations regarding the negotiations as they developed between the parties over the period of time. These negotiations included the provision of commercially sensitive information.
26. The Commissioner accepts that it is reasonable for the qualified person to consider that there was a need for a safe space to deliberate upon the negotiations as they developed, and that the correspondence retained its sensitivity even at the time that the request was received, after the festival had been cancelled.
27. Additionally the qualified persons view is reasonable in determining that matters still have the potential to end up before the courts, that the council could feasibly become involved in this, and it is reasonable to

protect its position by applying section 36 to information which could prejudice its ability to represent and defend its interests if disclosed.

28. Having reviewed the withheld information the Commissioner is therefore satisfied that it was reasonable for the qualified person to conclude that section 36(2)(b)(i) and (ii) applied to it. She is also satisfied that it was reasonable for the qualified person to apply section 36(2)(c) to cover any sections of information which do not fall specifically within the scope of section 36(b)(i) or (ii) due to the nature of the information.
29. As a qualified exemption, section 36 is subject to a public interest test. Having accepted the opinion of the qualified person as reasonable, the Commissioner must consider whether the public interest in maintaining the exemptions claimed outweighs the public interest in the information being disclosed.

The Public interest

The public interest in the disclosure of the information

30. The central public interest in the disclosure of the information relates to providing greater transparency surrounding the events which ultimately led to the music festival being cancelled. The Mansion on the Moon festival was publicised and tickets sold, and if it had gone ahead this would have benefited the local community economically.
31. The council had involvement in aspects of the festival, including being the landowner of the site involved, and it also had involvement in the discussions surrounding the project as a whole from the outset.
32. A disclosure of any information on the reasons for the cancellation would be in the public interest, particularly if any fault for the cancellation could be attributed to any decisions or actions of the council. The complainant argues that that may be the case and is seeking to obtain evidence to that effect.
33. There is also a general public interest in creating transparency and accountability on the actions and decisions taken by the council generally.

The public interest in the exemption being maintained.

34. The central argument surrounding the application of section 36 in this instance relates to the protection of the council's ability to have full and frank discussions within a 'safe space'. The aim of the exemption is to protect an authority's ability to discuss policy decisions, plan projects and to protect the content of those discussions even after the decisions

have been reached whilst there is still the prospect of litigation being launched by interested parties.

35. The council requires the safe space in order to protect its ability to form strategies during negotiations, and to advance and protect its legal position in negotiations it is undertaking. It is also required in order for it to carry out due diligence on the project, and discuss the issues surrounding this. Such discussions will often be full and frank, and discuss information which retains its sensitivity even after the project is complete or has been cancelled.
36. There is a public interest in allowing the council to analyse the situation as negotiations developed, to provide advice and assist officers undertaking the negotiations, to allow scrutiny by senior management over the development of a significant project, and in allowing free and frank discussions to occur between officers and managers regarding the above.

The Commissioner's conclusions

37. The Commissioner has expanded upon the public interest arguments both for and against disclosure in the confidential annex, which has been provided to both parties with this decision notice.
38. Having considered the withheld information, together with all of the arguments submitted by the complainant and the council, the Commissioner's decision is that public interest rests in the exemption being maintained.
39. The Commissioner's decision is therefore that the council was correct to rely upon section 36(2)(b)(i) and (ii), and section 36(2)(c) to withhold the information.

Right of appeal

40. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

41. 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.
42. 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
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