

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 25 April 2022

**Public Authority:** Buckinghamshire Council  
**Address:** The Gateway  
Gatehouse Road  
Aylesbury  
HP19 8FF

#### **Decision (including any steps ordered)**

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1. The complainant requested correspondence relating to the possibility of free parking for patients of a vaccination centre. Buckinghamshire Council ("the Council") relied on section 36 of FOIA (prejudice to the effective conduct of public affairs) to withhold the requested information.
2. The Commissioner's decision is that sections 36(2)(b)(i) and 36(2)(b)(ii) are engaged in respect of this information – with the exception of a single email which he considers to be in the public domain. Where these exemptions are engaged, the balance of the public interest favours maintaining the exemption. As the Council failed to issue its refusal notice within 20 working days, it breached section 17 of FOIA.
3. The Commissioner does not require any further steps.

#### **Request and response**

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4. On 26 January 2021 the complainant requested information of the following description:

"Please can I have a copy of all email correspondence during the course of January generated from and between officers and members (m/m, o/o, m/o, o/m), and third parties (including the Swan Practice and local newspaper) concerning the provision of free car parking for Covid19 vaccination attendees at the Buckingham Community Centre."

5. On 24 February 2021, the Council responded. It refused to provide the requested information. It relied on section 36 of FOIA as its basis for doing so.
6. The complainant requested an internal review on the same day. The Council sent the outcome of its internal review on 23 April 2021. It upheld its original position.

### **Scope of the case**

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7. The complainant contacted the Commissioner on 23 March 2021 to complain about the way his request for information had been handled. At that point, the Council had not had 40 working days in which to complete its internal review.
8. Once the internal review was completed, the complainant confirmed to the Commissioner, on 23 April 2021, that he remained dissatisfied with the Council's response and wished to have a decision on the matter.
9. The Commissioner considers that the scope of his investigation is to determine whether the Council is entitled to rely on section 36 of FOIA to withhold the requested information.

### **Reasons for decision**

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10. Section 36(2) of FOIA states that information is exempt from disclosure if, in the reasonable opinion of the Qualified Person, disclosure of that information:
  - (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 Cabinet of the Welsh Assembly Government.
  - (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.

11. Section 36 is a unique exemption within the FOIA in that it relies on a particular individual (the Qualified Person) within the public authority giving an opinion on the likelihood of prejudice occurring. It is not for the Commissioner to stand in the shoes of that individual and provide his own opinion. The Commissioner's role is to: establish that an opinion has been provided by the Qualified Person; to assure himself that that opinion is "reasonable" and; to make a determination as to whether there are public interest considerations which might outweigh any prejudice.

### **Who is the Qualified Person and have they given an opinion?**

12. The Council provided the Commissioner with a copy of a document, dated 28 March 2022, signed by Ms Sarah Ashmead who holds the role of the Council's monitoring officer. In that document, Ms Ashmead sets out why, in her view, disclosure of the information would have caused harm both at the time the request was responded to and at present.

13. The Commissioner accepts that, as the Council's monitoring officer, Ms Ashmead is entitled to act as the Council's Qualified Person for the purposes of section 36 of FOIA and give her opinion on the likelihood and severity of prejudice resulting from a disclosure.

14. The Council's original response to the complainant (of 24 February 2021) and its internal review indicate that it had sought the monitoring officer's opinion prior to issuing at least one of those responses – although no contemporary record of such opinions was provided to the Commissioner.

15. However, the Commissioner notes that a public authority is permitted to seek a fresh opinion from its Qualified Person at any point up to, or during, his investigation. Providing that the opinion relates to the circumstances as they stood at the point the public authority refused the request and is otherwise reasonable, the Commissioner is obliged to accept that opinion.

16. The Commissioner is therefore satisfied that the Qualified Person did give her opinion and that she did so on 28 March 2022.

### **What was the opinion and was it reasonable?**

17. It is not the role of the Commissioner to substitute his own opinion for that of the Qualified Person. The Qualified Person is best placed to know the circumstances of their organisation and the significance of the

information concerned. It thus follows that the bar for finding that an opinion is "reasonable" is not a high one.

18. A "reasonable" opinion need not be the most reasonable opinion available. It need only be within the spectrum of opinions that a reasonable person might hold and must not be irrational or absurd.
19. The Commissioner considers that an opinion is likely to be unreasonable if it fails to make out the grounds for the exemption or if the information is already in the public domain.
20. The Qualified Person stated that:

"the underlying context of the request, and within which such deliberations took place was whether (or not) any element of free parking should be introduced at a Buckingham car park to facilitate vaccination attendance. At the time, the vaccination programme was in full flow. There was clearly a currency to the deliberations. As such, it was in my Opinion important that a safe space for assessing the potential implications, should be maintained. This is because the quality and integrity of these deliberations would impact directly on the efficacy of any proposal that would then need to be considered as part of the formal processes determining any car parking charges. [NB a web page explaining such processes was published in March 2021].

"In my view, sections (b)(i) (advice) and (b)(ii) (free exchange of views) were therefore rightfully engaged.

"Consequent to this, I also considered that section (c) was engaged: this was because a premature articulation of the deliberations about the feasibility of the procedural and policy implications would be likely to have the consequence of a diverting resources at a particularly busy time of pandemic recovery. The place for informed public engagement on the merits of any actual and viable proposal was within the formal procedures and consultations.

"The purpose of the deliberation was to assess whether the proposal was fully viable or not. As there would be no point in raising public concern or anticipation if this were not to be forthcoming."

21. The Qualified Person went on to note that:

"The process then, as now, involves informal consideration between officers, local councillors and cabinet members, as to whether certain proposals (such as free parking) should come forward for public consultation or not. These involve triaging legal, financial and policy issues as well as pragmatic liaison with any third parties who may

need to be involved. This is a mechanism designed to ensure that any proposals that actually do come forward are soundly based in procedural and policy terms – the better to sustain a meaningful consultation and reasonable decision-making.”

22. Finally, the Qualified Person noted that:

“There is a formal requirement to consult the public about any proposed free parking arrangement: in order to make this meaningful, it is important that the Council has the opportunity rigorously to test the procedural, legal, financial and policy implications of any given options before the public is asked to comment.

“The processes followed were clearly preparatory, involving an assessment of feasibility, taking place between officers, cabinet members, and the local ward councillors primarily – with the clear intention of seeking everyone’s advice and views as to whether any such proposal would be viable or not.

“Alternative views e.g. suggesting whether free parking should be created at any time, can be expressed by the public and politicians in other ways – lobbying, addressing formal meetings etc. These options are always available in addressing concerns to a democratic organisation. And the need of the public to know why free parking cannot be applied to ‘parts’ of a car park, and therefore what the proper approach is, this can be met through public statement (as it was to the requester). It does not require the disclosure of the free and frank deliberations themselves.”

23. The Commissioner notes that the Qualified Person’s opinion places considerable emphasis on the need for a “safe space” in which to discuss new policy ideas that were considered to be ongoing or “live”.

24. The Upper Tribunal in *Maurizi v The Information Commissioner & The Crown Prosecution Service* [2019] UKUT 262 (AAC) ruled that the correct point to assess the balance of the public interest is the point at which the public authority finally decides to refuse (or comply with) the request – in practice, when it concludes its internal review. Whilst that decision was about assessing public interest, the reasoning it sets out for adopting such an approach would, in the Commissioner’s view, apply equally to the assessment of any prejudice that might or might not occur.

25. In this case, the Council appears to have concluded, shortly before the request was made that it no longer wished to pursue a free parking scheme. Therefore, whilst the deliberations would appear to have concluded at the point the request was made, the Commissioner could

accept that the Council may have needed a little extra time in which to communicate the outcome of those deliberations rather than have the content of the deliberations placed into the public domain.

26. However, by the point at which the Council completed its internal review (23 April 2021), the initial deliberations had concluded and the Council had made a public statement. The Commissioner does not therefore consider it reasonable to suggest that there was an ongoing need for a safe space at that point – and the Qualified Person's opinion does not explain why the safe space needed to be maintained in April 2021.
27. Therefore, to the extent that the Qualified Person's opinion refers to the need to retain a safe space around this particular decision, the Commissioner does not consider that this is a reasonable opinion.
28. However, the Commissioner also notes that the Council's internal review stated that the Qualified Person considered that:

“the release of the internal emails concerning the provision of free car parking for Covid19 vaccination attendees would be likely to inhibit current **and future** free and frank exchanges of views of officers for purposes of deliberation and that this is likely to impede the ability of officers to freely and frankly express their views on issues of consequence to the public.

“[The Qualified Person] maintains this would prejudice the effectiveness of the Council and have an adverse effect on our ability to offer effective public services due to the potential disruption caused by the disclosure and/or the diversion of resources in managing the impact of disclosure. There is a continued need for a safe space for officers to consider sensitive issues free from external interference and distraction to ensure the authority's ability to make fully informed decisions.” [emphasis added]
29. The Commissioner considers that such arguments amount to a “chilling effect” argument.
30. A chilling effect is distinct from a safe space – although the two concepts overlap. However, whereas a safe space refers to the need protect a specific set of discussions that are ongoing in relation to a specific policy, the chilling effect refers to the need to preserve the ability of officials to provide free and frank opinions as part of any policy discussions that may take place in future.
31. In the Commissioner's view it is reasonable to suppose that disclosure of information such as that being withheld here might cause the officials or councillors involved to be more circumspect in offering advice or in debating ideas in future. As the Qualified Person's opinion is reasonable

in this respect it follows that sections 36(2)(b)(i) and 36(2)(b)(ii) are thus engaged for the vast majority of the email chains that fall within scope.

32. However, there is one email within the chains that the Commissioner considers to be in the public domain. This email was sent from the Council's Cabinet Member for Communities and Public Health to one of the local ward councillors and set out a number of reasons why a free parking scheme would be problematic. That email was sent on 21 January 2021 and the ward councillor concerned posted its contents on his (public) facebook page the following day.<sup>1</sup> Having compared the post with the withheld information, the Commissioner is satisfied that the contents of the email have been faithfully reproduced.
33. Given that this post was (and at the date of this notice, still is) freely available to anyone who wishes to read it, the Commissioner considers that this email is in the public domain and, consequently it would be unreasonable to believe that prejudice could result from its disclosure.
34. Whilst the Commissioner does not consider that this email is covered by an exemption, given that it was the complainant himself who drew the facebook post to the Commissioner's attention, it is reasonable to believe that he (the complainant) already has access to it. It would therefore not be proportionate to require the Council to disclose this email.

### **Public interest test**

35. Even where the Qualified Person has identified that disclosure of information would be likely to cause prejudice, a public authority must still disclose that information unless it can demonstrate that the public interest favours maintaining the exemption.
36. Given that the Commissioner has accepted the possibility that disclosure of the remaining emails might cause prejudice, there will always be an inherent public interest in preventing that from occurring. However, the weight that should be attached to that public interest will be determined by the severity of the prejudice and the likelihood of it occurring.

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[https://www.facebook.com/permalink.php?story\\_fbid=1113148372447859&id=224571504638888](https://www.facebook.com/permalink.php?story_fbid=1113148372447859&id=224571504638888)



37. The Commissioner has accepted as reasonable that the lower bar of prejudice is engaged. This means that that the chance of prejudice occurring does not have to be more likely than not, but there must still be more than a remote or hypothetical chance. Whilst it is easier to demonstrate that the lower bar of likelihood is met, the weight to be attached to that prejudice is also lower.
38. The complainant felt strongly that there was a public interest in disclosure of the requested information. He considered that there were high levels of local interest in and concern about, the Council's decision. He argued that the decision was "politically driven" and therefore there was an increased public interest in understanding exactly what had gone on.
39. In explaining why the public interest should favour maintaining the exemption, the Council pointed to the prejudice that the Qualified Person had indicated would be likely to result from disclosure and the importance of being able to debate controversial matters in private when those matters are at an early stage of development.
40. The Council also noted that, had it decided to press ahead with a proposal, that would have triggered a public consultation in which local people could have made their views known.
41. Finally, the Council pointed to the official statements that it had made which outlined its approach to parking and argued that these satisfied the public interest in transparency.
42. In the Commissioner's view the balance of the public interest should favour maintaining the exemption in this case.
43. Firstly, the Commissioner recognises that the issue of parking charges is one that usually has resonance, both nationally in general and in these particular local circumstances. Ensuring that the local population (particularly vulnerable or hard to reach groups) had easy access to vaccinations was also a key national public health target at the time of the request.
44. The Commissioner also notes that the online statement that the Council drew his attention to merely sets out the generic process for varying any parking management order already in place (which would be necessary to modify or suspend charges). It says nothing about why the Council did not decide to invoke the process in this specific case.
45. Furthermore, the Commissioner notes that, because the Council decided not to instigate the process, the public were unable to express either support or opposition to the proposal because the consultation that would have formed part of the process was not triggered. That increases



the public interest in understanding why the Council decided not to instigate the process in the first place.

46. Equally, the Commissioner considers that the Council's argument about an unreasonable diversion of resources does not carry considerable weight. The fact that the Council has taken the view that such a scheme is not desirable should not prevent others from promoting an alternative point of view. Disclosure of the withheld information would assist the local population in understanding why the Council had reached the view that it did and would allow interested parties to challenge the Council's rationale. That is part and parcel of the democratic process.
47. Finally, the Commissioner notes that he will usually only afford limited weight to chilling effect arguments. Senior officials are expected to be robust and not easily dissuaded from offering frank advice and opinions. The Commissioner notes that many of the authors of the emails are either elected members or relatively senior members of staff within the Council. They should therefore have lower expectations that their views on policy will remain private than more junior, unelected officials.
48. However, all that being said, the Commissioner is not sufficiently persuaded that the public interest in disclosure would outweigh the public interest in maintaining the exemption.
49. Firstly, the Commissioner recognises that parking charges are always a controversial topic – and one which arouses strong feelings. Whilst there are legitimate reasons for introducing parking charges (or retaining existing ones), these arguments are politically unpopular.
50. Removing parking charges is always likely to be popular, but it is not always the best decision in the long term. If councillors and officials feel inhibited from advising against such proposals (as the Commissioner has accepted they may) in case they come to be seen as being personally responsible for higher charges, that could lead to poorer quality debate and poorer quality decision making.
51. In addition, the Commissioner notes that the email identified above, that has been reproduced in a facebook post, sets out a comprehensive case for not suspending parking charges. Most of the points drawn out in the email chains are summarised in that email.
52. Therefore, in the Commissioner's view, anyone wishing to understand why the Council decided not to suspend restrictions need only read that email. They might not agree with the arguments, but they are unlikely to learn any more of substance from the remaining email chains than is contained in this email – which is already in the public domain.

53. In the Commissioner's view, disclosing the remaining emails would add very little to the public's understanding of the decision the Council had reached – but it would be likely to inhibit members of the Council from discussing controversial matters freely and frankly in future.
54. The Commissioner's view therefore is that the balance of the public interest lies in maintaining the exemption.

### **Procedural Matters**

55. Section 17(1) of the FOIA states that when a public authority wishes to withhold information or to neither confirm nor deny holding information it 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."
56. The Commissioner notes that, in this case, the Council issued its response on the 21<sup>st</sup> working day after the request was submitted. The Commissioner is therefore obliged to record a breach of section 17 of FOIA.

## Right of appeal

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57. 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: 0203 936 8963

Fax: 0870 739 5836

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

58. 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.
59. 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 .....**

**Roger Cawthorne**  
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