



**First-tier Tribunal  
(General Regulatory Chamber)  
Information Rights**

**Appeal Reference: EA/2018/0117**

**Before**  
Judge Stephen Cragg Q.C.

**Tribunal Members**  
Ms Marion Saunders  
Mr David Wilkinson

**Determined, by consent, on written evidence and submissions**

**Between**

**Jackie Wren**

and

**The Information Commissioner**

Appellant

Respondent

## DECISION AND REASONS

### INTRODUCTION

1. On 30 August 2017, as part of its consultation on its proposed local plan Tandridge District Council (the Council) held an exhibition for the benefit of local residents. Two Councillors who belong to the same group as the Appellant (who is also a Councillor) set up a stall opposing aspects of the plan. At the exhibition the Council's chief executive requested that the stand be taken down. The Appellant made a complaint about the chief executive and her behaviour towards the Appellant and the other two councillors.
2. The leader of the Council sought advice from the chief executive of another local authority as to how to deal with the complaint. The request was made on 22 September 2017 and the reply was received on 28 September 2017.
3. The Appellant sought the content of this exchange in the request for information made on 5/6 October 2017 as follows:-

The advice the council received from *[the other chief executive]*, the instructions sent to *[the other chief executive]* and any emails to and from him about this matter, including all information about the complaints that the council provided to him, not just emails between council officers and ourselves.

4. On 18 October 2017, the Council declined to provide the information, relying both on s36 FOIA and s42 FOIA. The decision was upheld following an internal review on 31 October 2017, and the Appellant complained to the Commissioner on 5 November 2017.
5. In her decision notice the Commissioner upheld the reliance on s36 FOIA, but did not consider s42 FOIA (legal privilege).

6. In her decision notice the Commissioner explained that she had reviewed the withheld material and 'saw within it no evidence of wrongdoing by TDC'. The Commissioner also said that:-

...the content of the still undisclosed withheld information comprised: a briefing to the other chief executive, sent to him on 15 September 2017 by TDC but not received until 22 September 2017; and the advice from the other chief executive given to TDC on 28 September 2017

7. In addition the decision notice states that :-

The Commissioner found that the relevant correspondence bore privacy markings making clear the expectation of both TDC and the other chief executive that their views were being exchanged in the expectation of confidence.

The Commissioner saw that the other chief executive was a neutral party and a senior individual within a nearby council located within the same county as TDC but not adjacent to it geographically. She noted that the other chief executive's council appeared to have no interest in the outcome of the TDC matter.

#### SECTION 36 FOIA

8. It is appropriate at this stage to set out the relevant parts of section 36 of FOIA, associated provisions and recent case law which explains how the application of s36(2)(c) FOIA should be considered by the Commissioner and the Tribunal. Section 36 reads materially in this case: -

**36. – Prejudice to effective conduct of public affairs.**

(1) This section applies to –

(a) ...

(b) information which is held by any other public authority

(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 –

(a) ...

(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,

(c)...

(3) ...

(4) ...

(5) In subsections (2) and (3) "qualified person"--

...(o) in relation to information held by any public authority not falling within any of paragraphs (a) to (n), means—

(i)...

(ii) ...

(iii) any officer or employee of the public authority who is authorised for the purposes of this section by a Minister of the Crown.

9. Section 36 FOIA is not one of the exemptions excluded from the 'public interest' test, and therefore, by section 2 FOIA:-

(1)..

(2) In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) [the right to have information communicated] does not apply if or to the extent that—

(a) ...

(b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

10. In relation to who would be the appropriate Qualified Person (QP) in this case, the Commissioner's guidance on s36 FOIA refers to the latest Ministry of Justice list which states that for a local authority, the QPs are 'the Monitoring Officer, Chief Executive, Clerk to the Council, Chairman of the Council'. In this case the Monitoring Officer took the role as QP.

11. The correct approach to a case where the s36(2) FOIA exemption is invoked following the opinion of a QP, is explained in the recent Upper Tribunal (UT)

case of *Information Commissioner v Malnick and ACOBA* [2018] UKUT 72 (AAC) (*Malnick*). At paragraphs 28 and 29 of the UT's judgment is this:-

28. The starting point must be that the proper approach to deciding whether the QP's opinion is reasonable is informed by the nature of the exercise to be performed by the QP and the structure of section 36.

29. In particular, it is clear that Parliament has chosen to confer responsibility on the QP for making the primary (albeit initial) judgment as to prejudice. Only those persons listed in section 36(5) may be QPs. They are all people who hold senior roles in their public authorities and so are well placed to make that judgment, which requires knowledge of the workings of the authority, the possible consequences of disclosure and the ways in which prejudice may occur. It follows that, although the opinion of the QP is not conclusive as to prejudice (save, by virtue of section 36(7), in relation to the Houses of Parliament), it is to be afforded a measure of respect. As Lloyd Jones LJ held in *Department for Work and Pensions v Information Commissioner* [2016] EWCA Civ 758 (at paragraph 55):

"It is clearly important that appropriate consideration should be given to the opinion of the qualified person at some point in the process of balancing competing public interests under section 36. No doubt the weight which is given to this consideration will reflect the Tribunal's own assessment of the matters to which the opinion relates."

12. The UT then continued to describe the two stages involved in deciding whether information is exempt under s36 FOIA at paragraph 31:-

31.....first, there is the threshold in section 36 of whether there is a reasonable opinion of the QP that any of the listed prejudice or inhibition ("prejudice") would or would be likely to occur; second, which only arises if the threshold is passed, whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing it.

13. The UT then emphasises that the 'QP is not called on to consider the public interest for and against disclosure...the QP is only concerned with the occurrence or likely occurrence of prejudice' (paragraph 32). Going on, the UT explains:-

32...The threshold question under section 36(2) does not require the Information Commissioner or the FTT [First Tier Tribunal] to determine whether prejudice will or is likely to occur, that being a matter for the QP. The threshold question is concerned only with whether the opinion of the QP as to prejudice is reasonable. The public interest is only relevant at the second stage, once the threshold has been crossed. That matter is decided by the public authority (and, following a complaint, by the Commissioner and on appeal thereafter by the tribunal).

33. Given the clear structural separation of the two stages, it would be an error for a tribunal to consider matters of public interest at the threshold stage.

14. The UT also decided that when considering whether the QP's opinion was reasonable 'we conclude that "reasonable" in section 36(2) FOIA means substantively reasonable and not procedurally reasonable' (paragraph 57).

#### DECISION MAKING PROCESS

15. In this case the QP's opinion was received from the Monitoring Officer, and there is a witness statement dated 18 February 2018 from the QP. This explains that the QP gave his initial advice on 18 October 2017, and came to the conclusion that s36(2)(b)(ii) applied because disclosure of the requested information would, or be likely to, inhibit the free and frank exchange of views, about an important matter involving a complaint about the Council's chief executive and how to respond to the complaint. The Commissioner makes it clear that she was of the view that the section 32(2)(b)(ii) exemption was 'engaged'.

16. In relation to the public interest test, the Commissioner states that she gave some weight to the QP's opinion on prejudice while reaching her own view on the case. The Appellant's case was that there was an overriding public interest in disclosure given the nature of the complaint against the chief executive and a plausible suspicion of wrongdoing on the part of the Council in withholding correspondence about the complaint. The Appellant said there had been a

large number of comments on the local newspaper Facebook page about the issue, and keeping the information secret undermined faith in the integrity of the Council and its chief executive. The Commissioner's investigation revealed there had been twenty contributions on the newspaper Facebook page supporting the Appellant and two supporting the Council.

17. The Council in response raised the 'chilling effect' of being made to disclose advice that was intended to be confidential on the future provision of advice and exchange of views on similar matters, and that this was a public interest that outweighed the public interest in disclosure.

18. The Commissioner accepted there was a public interest in transparency and holding public officials to account, and also set out the limits of the 'chilling effect' arguments in circumstances where senior officials were expected to be robust and impartial whether their advice was made public or not. However, as the issue was still 'live' at the time of the request the Commissioner was of the view that the 'chilling effect' argument in relation to ongoing discussions was likely to be more persuasive (the request was made only a week or so after the advice was received). She gave weight to the fact that the advice had been given and views exchanged in an expectation on confidence. On balance she decided that the public interest was in favour of non-disclosure at the time of the request and at the time of the internal review.

### THE APPEAL

19. The Appellant filed an appeal dated 12 June 2018. She disputed whether the QP was conflicted out of acting as QP, and that his opinion was unreasonable in any event. She takes issue with the fact that his initial advice was oral and there is no supporting contemporaneous documentation to support it, and whether he had sufficient knowledge at the time he gave his opinion. She was of the view that disclosure would not have inhibited free and frank

discussion, or would have been likely to cause prejudice, or would have had a 'chilling effect' in the future. She disputed that the case was still live at the time of the request. She did not think the test for confidentiality in the Commissioner's guidance was met.

#### THE TRIBUNAL'S CONSIDERATION

20. We are satisfied that the Monitoring Officer gave a reasonable opinion as a QP in this case. Although there is no contemporaneous record of his opinion, he has provided a witness statement which states the matters he took into account and that he had access to the instructions sent to the other chief executive. Although the QP was also the person who had communicated the request from the leader of the Council to the other chief executive we are satisfied, as argued by the Commissioner in her Response to the appeal, that in that role he was simply a messenger and did not communicate any view on the merits or otherwise of the Appellant's complaint.
21. In our view, it was reasonable of the QP to form the opinion on 18 October 2017 that there would be likely to be a chilling effect on the giving of free and frank advice in the future if the information were disclosed. In our view, it is certainly not unreasonable to form the opinion that if requests for advice and the advice itself are disclosed in matters as sensitive as complaints against the chief executive, then there will be less willingness to seek such advice in equally sensitive matters in the future.
22. The Appellant raises a number of issues such as the capacity in which the advice was sought from the other chief executive, and whether the dispute was in fact 'live' at the time the QP gave his opinion, but these points, if valid, would not make the QP opinion unreasonable in our view. As the QP's opinion is not unreasonable, and applying the approach in *Malnick*, we find that the exemption in s36(2)(b) FOIA applies.



23. As that is the case, we must move on to consider the arguments for and against disclosure in the public interest. In doing so we must give the QP's opinion on prejudice appropriate consideration.
24. We agree with the Commissioner on the issue of public interest. Like the Commissioner, we have viewed the withheld information and cannot see in it any evidence of wrongdoing by the Council. Also, like the Commissioner we accept that there is some public interest in transparency in the Council's dealings with sensitive and difficult issues. However, we also accept the Commissioner's views that in this particular case, that public interest is outweighed by the need for the Council to have a safe space to discuss and seek advice on sensitive issues. Giving appropriate consideration, as we must, to the QP's reasonable opinion on prejudice for the purposes of s36(2)(b) FOIA, only serves to support that conclusion.

#### SECTION 42 FOIA

25. Having reached the finding that the exemption under s36(2)(b) FOIA has been properly applied, it is not necessary for us to reach a conclusion as to whether the withheld information is exempt under section 42 FOIA. The correct approach for us to follow in such circumstances is now set out in paragraph 109 of the Upper Tribunal's decision in the case of *Information Commissioner v Malnick and ACOBA* [2018] UKUT 72 (AAC) :-

109. We summarise the effect of our analysis on the role of the FTT where a public authority has relied on two exemptions ('E1' and 'E2') and the Commissioner decides that E1 applies and does not consider E2. **If the FTT agrees with the Commissioner's conclusion regarding E1, it need not also consider whether E2 applies.** However it would be open to the FTT to consider whether E2 applies... On the other hand, where the FTT disagrees with the Commissioner's conclusion on E1 it must consider whether E2 applies and substitute a decision notice accordingly. **(emphasis added)**

## CONCLUSION

26. Therefore, we dismiss the appeal in this case. Our decision is unanimous.

Signed

**Stephen Cragg QC**

Judge of the First-tier Tribunal

Date: November 2018.

(Case considered by Panel on 2 November 2018).

Promulgation date: 4 December 2018.