

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 31 October 2016

Public Authority: Derby City Council
Address: The Council House
Corporation Street
Derby
DE1 2FS

Decision (including any steps ordered)

1. The complainant has requested an unredacted copy of Appendix 4 of Derby City Council's Risk and Control Register for its Pay and Review Project. The Council provided the complainant with a redacted copy of this document. The redactions were made in reliance on section 40(2) – in respect of the names of personnel involved in the project, and on section 36(2)(c), in respect of three identified risks and their controls.
2. The Commissioner's decision is that Derby City Council has correctly applied sections 40(2) and 36(2)(c) to the information it is withholding.
3. The Commissioner requires the public authority to take no further action in this matter.

Request and response

4. On 15 January 2016, the complainant wrote to Derby City Council and requested information in the following terms:

"I was looking at the Corporate Communications bulletin at the Personnel Committee meeting on the 14th January 2016. I notice a reference to the above appendix* in the Committee report but it is not contained in the report.

Would I be able to have sight of that report please?"

- * Appendix 4: Risk and Control Register for the Pay and Review Project [0].
5. The Council responded to the complainant's request on 15 January, advising him that appendix 4 is restricted by 'an Exclusion of Press and Public declaration' and that the Committee's decision was that it should continue.
 6. The complainant wrote back to the Council and asked for his request be considered as an appeal. The complainant expressed his belief that the information can be released, asserting that, Corporate risks and the control of them are not something that can be withheld under the Freedom of Information Act.
 7. The Council responded to the complainant on 26 January 2016, advising him that the Council was considering the application of sections 41 and 22 of the FOIA and consequently it would need to extend the time for complying with his request in order to consider the public interest.
 8. The Council made its substantive response to the complainant on 17 March 2016. The Council's response was to issue a refusal notice which advised the complainant that parts of the information is subject to the application of two exemptions; namely section 40(2) - Personal Information and section 36 – where disclosure of the information would prejudice the effective conduct of public affairs.
 9. The complainant responded to the Council's refusal notice by asking it to review its handling of his request.
 10. In respect of the Council's application of section 40(2), the complainant asked the Council to confirm whether it had sought the consent of the data subjects for their personal data to be disclosed.
 11. The complainant challenged the Council's application of section 36 stating; "The expenditure of public money particularly in remuneration issues is very much in the Public Interest. The document in question is one that considers options of how to manage the risks associated with equal pay review. Equal Pay has very large financial implications associated with it and as such should be released. I would ask that that the full information be released as it is very much in the Public Interest to do so. The processes by which the Council spends public money should very much be available to the public and I would request a full disclosure".
 12. Having carried out its internal review, the Council wrote to the complainant on 24 April 2016 to advise him of its final decision. The Council' review stated:

“In respect of the application of Section 40(2) and 40(3)(b): Personal Information – The redactions in the document relate to the actual names of officers which is deemed personal data. Given the sensitivity of the Pay and Reward exercise, it was deemed that disclosure could lead to individuals being targeted by disgruntled employees if their names were released. I agree with this decision to withhold the names. Where employees are deemed to be senior managers (i.e. tier 3 and above), then the Council has always taken the decision to disclose names.

In respect of the application of Section 36: Prejudice to the effective conduct of public affairs – I agree with the Officer who carried out the PIT that the -

Disclosure of risk 3 could lead to exploitation and encourage legal challenge and could impact on the outcome and speed of the project.

Disclosure of risk 4 would highlight a current weakness within the organisation that could lead to legal challenge.

Disclosure of risk 6 could exacerbate the real possibility of increasing tensions in the fragile relations between DCC and schools.”

Scope of the case

13. The complainant contacted the Commissioner on 21 April 2016 to complain about the way his request for information had been handled. The complainant asserted to the Commissioner that the reasons given by the Council for withholding the withheld information do not appear to be a valid.
14. The complainant advised the Commissioner of the purpose behind his request, stating his belief that the information might shed some light on how well his job had been evaluated and the risks the Council might feel or believe existed having carried out the process. The complainant considers that the withheld information might support any challenge he wished to make concerning how his job was evaluated.
15. The Commissioner has investigated whether the Council has handled the complainant's request in accordance with the FOIA and whether the Council is entitled to rely on section 40(2) and 36 of the FOIA to withhold information from public disclosure.

Background information relevant to the complainant's request

16. The withheld information relates to the Council's third attempt at conducting an equal pay review. Two attempts have previously been made without success.
17. The Council has prioritised the pay and review project as one of the key projects required to enable it to adhere to the Single Status Agreement 1997 and ensure legislative compliance with the Equal Pay Act 2010.
18. The Council's previous attempts have resulted in uncertainty for its employees. There have been negative reactions among individual employees and groups of employees, particularly where members of staff are subject to change under the review.
19. Industrial action and protests have taken place as a result of the review and these have been publicised locally and nationally.

Reasons for decision

Section 36 – Prejudice to the conduct of public affairs

20. The Council has provided the Commissioner with an unredacted copy of the information which it previously disclosed to the complainant.
21. The information which the Council is withholding in reliance on section 36(2)(c) has been clearly identified. The withheld information is comprised of three risks associated with the Pay and Reward project. Each risk is described and is given a numerical indication of its perceived likelihood and impact. Control measures are also identified and these too are given a number indicating their likelihood and impact.
22. Section 36 allows a public authority to withhold recorded information if its disclosure would prejudice the effective conduct of public affairs.
23. 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."

24. 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.
25. 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.
26. The Council's qualified person's opinion was sought on 25 February 2016. He was provided with a copy of the complainant's request, a copy of the withheld information and details of the concerns put forward by the Pay and Reward project lead personnel.
27. The qualified person was advised that section 36 may apply to the information and he was asked to determine whether the application of section 36 was correct and he was briefed on the implications for the Council if the information was to be released.
28. Additionally, the qualified person was provided with a detailed report which outlined the Council's consideration of the public interest in both maintaining the exemption and in the disclosure of the withheld information.
29. The Council has advised the Commissioner that, in the opinion of its qualified person, section 36(2)(c) is engaged.
30. In the Council's opinion, disclosure of the withheld information would prejudice the effective conduct of public affairs. This is because the equal pay review is essential to its contractual obligation under the Single Status Agreement 1997 and it is essential staff remuneration is in line with the statutory obligations provided by the Equal Pay Act 1970.
31. The Council asserts that the risks it has identified are "real, actual or of substance" and that disclosure is capable of having a detrimental effect on the outcome of the Pay and Reward project.
32. These risks have been identified by senior members of the project team and by the Council's Director of Governance.

33. The Council emphasises that this is its third attempt at undertaking an equal pay review. This illustrates that there are internal issues which have a bearing on whether the project is successfully implemented.
34. The previous failed attempts have had a detrimental impact on the Council's relationship with between its employees and their Trade Union representatives. Protests have taken place and numerous members of staff have refused to sign up to the new terms & conditions. They have also used social media to vocalise their dislike to the outcomes of the review.
35. It has not been difficult for the Council to determine that "unhappy" members of its staff would be likely to exploit any weaknesses in the project: It is these weaknesses that the risk assessment highlights.
36. Having considered the Council's representations in this matter, the Commissioner is satisfied that the Council's qualified person has given an opinion. She must now consider whether that opinion is reasonable.
37. 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": It needs to be an opinion reasonably held by a reasonable person.
38. The "reasonable test" is not a high hurdle to overcome: It is not necessary for the Commissioner to agree with the opinion given; she only needs to recognise that a reasonable person could hold the opinion he or she has given. In this case, the Commissioner is satisfied that a reasonable opinion has been given. It is clear to the Commissioner that the qualified person had access to the withheld information and to advice detailing the prejudice and public interest considerations both for and against release.
39. Whilst the contents of the withheld information are 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.

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

The Public Interest

40. The Council's application of section 36(2)(c) 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.
41. 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), she 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

42. 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.
43. Disclosure of information held by public authorities may assist the public in its understanding of how public authorities make their decisions and carry out their functions. This in turn fosters trust in public authorities. Disclosure may also allow greater participation by the public in the Council's decision making process and to make appropriate challenges to those decisions.
44. In this case, the requested information relates to the risks associated with the Council's Pay and Rewards review: It concerns the conduct of the Council as a Local Authority and to a project which impacts on the pay of all of its employees. Significant weight must therefore be given to the disclosure of the withheld information because of the number of employees directly affected.
45. The effect of the Council's pay and rewards scheme extends to the wider public because the amount of public funds the project concerns by way of the employee's salaries and to the funds required in facilitating the project.
46. Having examined the withheld information, the Commissioner finds there is some public interest in the public having knowledge that the Council is exercising due diligence by identifying the risks involved in its review process. The Commissioner recognises that the public should be properly assured that the Council is acting in a considered manner.

Public interest arguments in favour of maintaining the exemption

47. The public interest for withholding the redacted information is illustrated through a consideration of the prejudice which would likely flow from its disclosure.
48. The Commissioner notes that this is the third time that the Council has attempted its Pay and Reward review. She is mindful of the interests of both the Council and of its employees for the review to be successfully concluded.
49. The public interest gained from disclosure in terms of transparency and accountability is likely to be offset by the detrimental effects which would flow should the review process fail and need to be repeated.
50. The Pay and Reward review has been a lengthy process. During this period there have been strikes and dismissals and the Council has been

required to re-engage and consult with trades unions. The Council considers that it would not be beneficial for its employees to have to repeat these same events.

51. The possibility of jeopardising the review process by disclosing the withheld information would likely lead to further uncertainty and place further strain on employee relations.
52. Likewise, the potential of having to repeat the review process would have a collateral prejudicial impact on the wider public. Additional costs which would be required which would inflate the cost of the review and this would not be an effective use of public funds. Such funding would have to be found from the Council's general budget and this could put further strain on the services which the Council provides to its customers, and may result in further job losses.

The Commissioner's decision

53. The Commissioner must give some weight to the principles of accountability and transparency.
54. The amount of weight the Commissioner gives to these factors is reduced by the Council's disclosure of the information – albeit redacted, which it has already been made. In the Commissioner's opinion, the disclosed information indicates that the Council is serious in its intention to secure a completed Pay and Rewards review and that it is live to the potential risks which could flow should this review fail.
55. Due to the on-going circumstances associated with this request, the Commissioner is obliged to give greatest weight to those factors which favour the continued withholding of the redacted information. She has decided that the Council has correctly applied section 36(2)(c) to the redacted information and the Council is therefore entitled to continue to withhold that information.

Section 40(2) – the personal data of a third party

56. The Council has disclosed to the complainant the names of the Senior Responsible Officer and the Programme Manager. It has relied on section 40(2) of the FOIA to withhold the names of the Project Manager and the Work-stream leads.
57. Section 40(2) provides an exemption from the duty to disclose information which is the personal data of any third party and where disclosure would breach any of the data protection principles contained in the DPA or section 10 of that Act.

58. In order to rely on the exemption provided by section 40, the requested information must constitute personal data as defined by the DPA. The DPA defines personal data as:

'...data which relate to a living individual who can be identified

a) From those data, or

b) From those data and other information which is in the possession or, or is, likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect to the individual.'

59. In the Commissioner's opinion this information is undoubtedly personal data.

60. The Commissioner is required to consider whether disclosure of the name and email addresses of the senders and recipients of the requested emails would breach any of the data protection principles contained in Schedule 1 of the DPA. She considers that the first data protection principle is the one most relevant in this case.

The first data protection principle

61. The first data protection principle has two components:

1. Personal data must be processed fairly and lawfully, and

2. Personal data shall not be processed unless one of the conditions in Schedule 2 of the DPA is met.

The Council's representations

62. The Council's position is that disclosure of the withheld names would contravene the third, sixth and seventh data protection principles and it has advanced arguments in support of this position.

63. The Commissioner has noted the arguments advanced by the Council. She considers these arguments to be relevant to the first data protection principle.

64. The Commissioner accepts that the names of the individual officers are not fundamental to the request itself: Whilst they are contained within the report they are not of central focus of the risk register.

65. Likewise the Commissioner accepts that the redaction of the names was a decision to protect the data subjects from harm and distress, given the sensitivity around the Pay and reward exercise. It is not hard for the Commissioner to foresee that disclosure could lead to individuals being targeted by disgruntled employees and referenced in social media posts and she is advised that this has happened in the past.
66. The Council has also advised the Commissioner that named persons had reached a consensus to refuse consent to disclose their names. The Council therefore believes that to go against such a mandate would expose it to the charge that it lacks suitable organisational measures to avoid unauthorised processing of personal data.
67. The Council accepts that the redacted names relate to the public or professional lives of these persons. Nevertheless it points to the real prospect of their details being accessed through other means, such as the electoral register, and thereby perpetuate threats beyond their professional roles and into their private lives.
68. The Council has stressed that the named persons hold a reasonable expectation that their names would not be released. This expectation was created following a discussion about this disclosure at a team meeting.
69. Whilst the individuals were not consulted in regards to this specific request, a consensus had already been reached by the team and this was recorded by the Project Manager. The unanimity of this decision was based on the potential distress that the names of individual officers would experience should their names be disclosed.
70. In additions to its own general position, the Council has provided the Commissioner with a record of the views of a senior member of the Pay and Rewards project. The record concerns the risks to team members should their names be made public and there is mention of an employee's name being published on the internet under the title, 'The people behind the JE shambles.' This was taken as a potential invitation for a wide range of people to take some action against the team.
71. Additionally, the Council points out that there have been several negative posts on social media about the Pay & Reward project, the concern raised is that, should specific names were to be released, they would be included in the negative posts and therefore cause harm and distress to the employees concerned.

The Commissioner's conclusions

72. The Commissioner has considered the Council's representations. Taking account all of the Council's arguments, the Commissioner has

determined that disclosure of the redacted names would be unfair to those persons and would therefore contravene the first data protection principle.

73. Given the Commissioner's determination of "unfairness", it is not necessary for her to consider whether any of the conditions in Schedule 2 of the DPA would warrant the disclosure of the personal information. However the Commissioner would add that it is difficult to adduce a necessary legitimate interest which would warrant the disclosure of the redacted names.
74. The Commissioner's decision is that the Council is entitled to rely on section 40(2) of the FOIA to withhold the redacted names contained on the Pay and Reward Risk and Control Register which the Council has previously disclosed to the complainant. She requires no further action to be taken by the Council in this matter.

Right of appeal

75. 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

76. 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.
77. 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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