

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 March 2021

Public Authority: East Riding of Yorkshire Council
Address: County Hall
Beverley
East Riding of Yorkshire
HU17 9BA

Decision (including any steps ordered)

1. The complainant has requested all minutes relating to meetings involving the 'East Yorkshire Parent Carer Forum' and East Riding of Yorkshire Council ("the Council") from a period of over two years. The Council stated that the entirety of this information was withheld under the exemption provided by section 36(2)(c) of the Freedom of Information Act 2000 ("the FOIA"). The Council subsequently confirmed to the Commissioner that the withheld information was contained across 91 individual documents, and that it considered these 91 documents to fall within the parameters of the request.
2. The Commissioner's decision is that the Council has failed to undertake appropriate searches to comply with the duty imposed by section 1. In respect of that information so far identified which falls within the parameters of the request, the Council has failed to demonstrate that the exemption provided by section 36(2)(c) is engaged. The Council also breached section 17 by issuing a refusal notice outside the time for compliance.

3. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation.
 - Undertake a fresh search for information that would fall within the parameters of the request, and issue a fresh response to the requestor. In preparing this response, the Commissioner advises the Council to refer to the content of this decision notice, and the observations provided in 'Other matters'.
4. The public authority must take these steps 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 pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 18 February 2020, the complainant wrote to the Council and requested information in the following terms:

I would like to request copies of minutes of meetings held between the PCF (Parent Carer Forum) and the Local Authority from 2nd January 2017 - February 14th 2019

To include SEND 0-25 board and all subgroups, task and finish groups, working groups, All the groups that have PCF representatives which represents the wider memberships collective voices.

6. The Council responded on 1 April 2020. It stated that the information was withheld under section 36(2)(c).
7. Following an internal review, the Council wrote to the complainant on 4 May 2020. It maintained its original position.

Scope of the case

8. The complainant contacted the Commissioner to complain about the Council's withholding of the information under section 36(2)(c).
9. The Commissioner considers the scope of this case to be the determination of whether the Council has complied with the terms of the FOIA.

Reasons for decision

Section 1 – General right of access to information

10. The Council has provided the Commissioner with 91 individual documents that it considers fall within the parameters of the request, all of which have been withheld under section 36.
11. The Council has stated that these documents represent the minutes (and related documentation) of meetings involving the East Yorkshire Parent Carer Forum and the Council between the dates of 2 January 2017 and 14 February 2019. These meetings relate to SEND ('Special Educational Needs and Disabilities') matters, and the way in which the Council is delivering related services.
12. The Council has also provided the Commissioner with a schedule that lists these 91 documents under seven specific headings, which the Commissioner understands relate to the specific group that the meeting is for.
13. Having reviewed the withheld information, in conjunction with the schedule, the Commissioner has identified that a proportion of it does not appear to fall within the parameters of the request, due to it relating to meetings held outside the dates specified by the request.
14. The seven groups (with the total number of documents identified by the Council, and if relevant – the total number of documents that the Commissioner identifies as falling outside the dates specified by the request) are:
 - 'SEND (0-25) Group' (9 documents)
 - 'Co-production Task and Finish Group' (6 documents – of which all 6 appear to fall outside the dates specified by the request)
 - 'Information Group' (24 documents – of which 9 appear to fall outside the dates specified by the request)
 - 'Children and Young People's Participation and Engagement Group' (12 documents – of which 3 appear to fall outside the dates specified by the request)
 - 'Quality Assurance Group' (10 documents)
 - 'SEND Feedback' (17 documents – of which 8 appear to fall outside the dates specified by the request)

- 'Training and Development Group' (13 documents)
15. Having considered the above, the Commissioner is not satisfied that adequate steps, under the duty imposed by section 1 of the FOIA, have been taken by the Council to identify that information which would fall within the parameters of the request.
 16. In respect of the 65 individual documents which do fall within the parameters of the request, the Commissioner has proceeded to consider the applied exemption.

Section 36 – Prejudice to the effective conduct of public affairs

17. The Council has stated that it relies on the exemption provided by section 36(2)(c), which states:

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-

[...]

(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

The qualified person

18. In deciding whether the Council has correctly engaged the exemption, the Commissioner has first considered who, within the Council, is the 'qualified person' for the purposes of the exemption.
19. The relevant qualified person for the purposes of this exemption is defined by section 36(5).
20. The ability of the qualified person to determine whether information is exempt cannot be delegated to another person. The reason for asking who gave the opinion is to ensure that the decision was taken by the correct person. If the person who gives the opinion is not the qualified person, then information cannot be exempt.
21. In this case, the Council has confirmed that the qualified person for the purposes of the exemption is the Head of Legal and Democratic Services. The Commissioner accepts that the Council has identified the appropriate person for the purpose of providing a reasonable opinion and has continued to consider whether the qualified person has provided an opinion and when the opinion was provided.

Did the qualified person give an opinion and when was it given?

22. The Council has provided evidence to the Commissioner that the qualified person's opinion was sought and obtained on 30 March 2020, and that the qualified person was provided with a summary of the type of discussions that would take place within the forum, and further, the type of information that would inform these discussions. The Commissioner is therefore satisfied that the qualified person gave an opinion and has continued to consider whether the opinion given was reasonable in the terms of the exemption.

Was the opinion reasonable?

23. The Commissioner has issued guidance on the application of section 36¹. With regard to what can be considered a 'reasonable opinion' it states the following:

The most relevant definition of 'reasonable' in the Shorter Oxford English Dictionary is 'In accordance with reason; not irrational or absurd'. If the opinion is in accordance with reason and not irrational or absurd – in short, if it is an opinion that a reasonable person could hold – then it is reasonable.

24. In determining whether an opinion is reasonable in the context of section 36(2) and whether the exemption is engaged, the Commissioner must consider whether the inhibition or prejudice claimed relates to the specific subsection of section 36(2) that the Council is relying upon.
25. In this case, the Council has stated that it is relying on section 36(2)(c).

Section 36(2)(c)

26. The Commissioner's guidance on section 36 explains that information may be exempt under section 36(2)(c) if its disclosure would, or would be likely to, cause an adverse effect on the public authority's ability to offer an effective public service or to meet its wider objectives or purpose. Such adverse effect does not have to be on the authority in question; it could be an effect on other bodies or the wider public sector.

1

https://ico.org.uk/media/fororganisations/documents/1175/section_36_prejudice_to_effective_conduct_of_public_affairs.pdf

It may also refer to the disruptive effects of disclosure, for example the diversion of resources in managing the effect of disclosure.

27. The guidance explains that section 36(2)(c) is concerned with the effects of making the information public. However, it does not relate, for example, to the internal effect on the public authority of collating information that has been requested or of making decisions on redaction.
28. The Council has confirmed to the Commissioner that the qualified person's opinion is that the adverse effect 'would be likely to' occur. This opinion is based on several factors, which are summarised thus:
 - The withheld information represents the minutes (and associated documents) of meetings between the Council, partner organisations (such as from the NHS), and members of the East Yorkshire Parent Carer Forum.
 - These meetings provide a safe space for the East Yorkshire Parent Carer Forum to bring issues and concerns from the wider community to the attention of the Council and its partner organisations. Discussions about these issues and concerns take place within these meetings, and may include any disagreements between partners, and possible solutions. It may be the case that suggested solutions are not always actioned due to certain reasons, and the public disclosure of such information may cause distress for parent-carers and cause them to lose confidence in the forum, the Council, and partner organisations.
 - Discussions also take place within the meetings to help prepare the local area for the impending SEND Ofsted Inspection, and meeting minutes describe the format of internal and external briefings and readiness information. If this information were to be taken out of context it could damage the validity of the local area's preparations for the Inspection, and result in parental loss of confidence in the Council.
 - Agenda items may also include discussions and information relating to capital projects and budget spending, which may include initial discussion points that may not come to fruition due to a number of factors, e.g., capital projects, or consultation events. Again, if these initial discussions were disclosed to the public, and taken out of context, it may result in a parental loss of confidence in the Council.

The Commissioner's analysis

29. The Commissioner has considered the Council's arguments in relation to section 36(2)(c) being engaged, and further, has reviewed the withheld information.
30. In considering the Council's submissions, the Commissioner has identified that, whilst the Council refers broadly to the prejudice that it considers disclosure of the information would cause, limited evidence has been provided that allows the Commissioner to understand how and why, in respect of the varied documents and the different groups that they relate to, this prejudice would occur.
31. For example, the documents relating to the Training and Development Group meetings appear to relate heavily to personnel matters, whilst those documents relating to the Quality Assurance Group contain specific case studies relating to SEND matters.
32. Furthermore, within each document there are clearly different topics of information, such as that relating to meeting administration, or substantive issues of discussion about SEND matters.
33. It is also relevant for the Commissioner to note that the information derives from a period of over two years, and the Council has seemingly failed to address any resultant differences in sensitivity from the passage of time.
34. Having reviewed the information, and the circumstances of its creation, the Commissioner recognises that there is likely to be a proportion of it that will require the consideration of an exemption. Furthermore, the Commissioner recognises that the information contains a significant amount of personal data that will fall under the exemption provided by section 40 of the FOIA; whilst the majority of this is of the attendees and other professionals, there are also detailed references to specific casework.
35. However, the arguments provided by the Council under section 36(2)(c) do not clearly account for the significant breadth of information that has been withheld. It is also evident that the qualified person was not provided with a copy of the withheld information, which suggests that they were unable to provide a reasonable opinion that took this breadth into consideration.
36. Having considered the above, the Commissioner is not satisfied that the Council has adequately addressed the content of the 65 individual documents in respect of the exemption that it has sought to engage. On

this basis the Commissioner has found that the Council has failed to demonstrate that the exemption is engaged.

Section 17 – Refusal of request

37. Section 17 specifies that a refusal notice must be provided no later than 20 working days after the date on which the request was received.
38. In this case, the Council did not seek to rely upon section 36(2)(c) until outside of 20 working days. As such, the Council breached section 17.

Other matters

39. Ordinarily, where the Commissioner has found that an exemption is not engaged in respect of withheld information, she will order that a public authority disclose the information to the public. However, in the circumstances of this case, the significant volume of information so far identified, in conjunction with the deficiency in the Council's searches for held information, and the likely need to consider exemptions (including that of section 40 of the FOIA), means the Commissioner has not taken this step.
40. The Commissioner reminds the Council that in cases where a public authority seeks to withhold information, this should be done with careful consideration of the actual content of the information. In respect of each of the exemptions contained within Part II of the FOIA, the Commissioner has published detailed guidance for public authorities on their application.
41. The Commissioner also reminds the Council that in cases where a significant volume of information is requested, and a public authority is concerned by the resources required to respond to the request (which may include the potential consideration of exemptions), then section 12 (and section 14(1) when appropriate) provide exclusions from the duty to respond. In respect of these exclusions, the Commissioner has published detailed guidance for public authorities on their application.

Right of appeal

42. 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

43. 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.
44. 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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