



**IN THE FIRST-TIER TRIBUNAL  
GENERAL REGULATORY CHAMBER  
(INFORMATION RIGHTS)**

**Appeal No: EA/2013/0197**

**BETWEEN**

**SANDY HYND  
ON BEHALF OF DEXMAR LIMITED**

**Appellant**

**and**

**INFORMATION COMMISSIONER**

**First Respondent**

**and**

**SHROPSHIRE COUNCIL**

**Second Respondent**

**Before**

**Brian Kennedy QC  
Jean Nelson  
Paul Taylor**

**Representation:**

**For the Appellant: Sandy Hynd**

**For the Second Respondent: Robin Hopkins of counsel**

## **DECISION**

The Tribunal refuses the Appeal.

We direct that the requested information should not be disclosed and the Closed Bundle should remain confidential.

### **Introduction:**

1. The appeal is brought under section 57 of the Freedom of information Act 2000 ("FOIA"). The Tribunal and the parties worked from an open Trial Bundle ("OB") indexed and paginated and from a smaller Closed Bundle ("CB") also indexed and paginated. We have also been provided with an indexed Authorities Bundle ("AB").
2. The impugned decision under appeal is the Decision Notice ("DN") from the Respondent ("the Commissioner") dated the 14th August 2013: Reference FS50491194.

### **Background to the Appeal:**

3. This appeal relates to a request made by Dexmar to Shropshire Council ("the Council"), for information held in relation to an internal audit. Dexmar is a company linked to Mr Hynd, the Appellant, and was at one time the Councils' supplier of its Electronic Document and Records Management System ("EDRMS"). Mr Hynd had complained about the process the Council had followed in selecting a new supplier. The Council took the view that his complaint merited a thorough investigation. This was undertaken by its Audit Services Manager, Ceri Pilawski (the person to whom Mr. Hynd addressed the FOIA request which has given rise to this appeal). Ms Pilawski's investigation included interviewing relevant Council employees about the procurement process which had been followed. Ms Pilawski completed her report in draft form on 1 November 2012 and finalised it on 18 December 2012. The report concluded there had been errors in the process for appointing the new supplier and that Mr Hynd's complaint was well founded, The Council began a further tendering process over the first half of 2013 but Mr Hynd was not awarded the contract.
4. Specifically, on 16 November 2012 Mr. Sandy Hynd, on behalf of Dexmar, wrote to the Council requesting information in the following terms:

*"Can you please provide me with all the information related to your audit of the EDRMS selection process and the information related to your response received by us on 15 November to my letter for 21 November 2012. This should include meeting notes, e mails and copies of any draft reports and will cover the period 19 September 2012 to 15 November 2012."*
5. The Council responded on 30 January 2013. It provided a substantial amount of information within the scope of the request but withheld the remainder. It cited sections 36, 40(2), 42, and 43 FOIA as reg basis for doing so.
6. On 31 January 2013 Dexmar requested an internal review of the Council's handling of the request. It asked the Council to review both the timelines with which it had responded and its application of the exemptions at Section 36 and 42(2) FOIA to specified pages of the audit file.

7. In relation to Section 36 FOIA Dexmar asked the Council to review its refusal in respect to pages 23, 205, 285, 340 and 352 of the audit file. In relation to Section 40(2) FOIA, Dexmar asked the Council to review its refusal in respect of pages 162, 343, 344 and 418 of the audit file.
8. On 15 February 2013 the Council responded concerning the time it had taken to respond to there quest. On 1 March 2013 the Council provided the outcome of its internal review. It revised its position with respect to Section 40(2) FOIA disclosing pages 162 and 418 and instead of relying on Section 36 FOIA to withhold pages 343 and 344.
9. On 22 March 2013, Dexmar provided the Commissioner with the information he required to commence his investigation. Dexmar explained that concerns had been raised about a tendering exercise carried out by the Council for the provision of a replacement records management system. It seems that Dexmar had been a prospective supplier. The Council's Internal Audit investigated those concerns and, as a potential supplier, Dexmar sought access to the audit file.
10. The Commissioner investigated in the usual way. The scope of the Commissioner's investigation was agreed with Dexmar to be the Council's application of Section 36 FOIA to the withheld information. The Commissioner also considered the timelines with which the Council handled the request.
11. The Council had advised Dexmar that information within the scope of the request included: "correspondence between officers in relation to internal decision making and advice". With regard to the withheld information it told him that: "If such information was disclosed to the public it would be likely to inhibit the free and frank exchange of views or otherwise prejudice the effective conduct of public affairs when deliberating future issues of a similar nature." It was on this basis that the Commissioner understood that the Council considered that Sections 36(2)(b)(ii) and (c) were engaged. For Section 36 FOIA to be engaged, the "qualified person" is required to give a reasonable opinion about the likelihood of prejudice or inhibition arising. The Commissioner, properly, took the view the qualified person's opinion is crucial. If the opinion is not given by the appropriate person, then the exemption is not engaged. This was recognised by the Commissioner at paragraph 19 of the DN.
12. The Commissioner was provided with evidence by the Council which satisfied him that the opinion of the qualified person had been sought and obtained. The Commissioner agreed that the qualified person's opinion was reasonable and that therefore Section 36 FOIA was engaged for the withheld information. See paragraphs 20 - 24 of the DN.
13. The text of the submissions presented to the qualified person suggested to the Commissioner that the Council intended both Section 36(2)(b)(ii) and (c) FOIA to be considered. The qualified person accepted that the application of Section 36(2) was appropriate. See paragraphs 25 - 26 of the DN. In light of the contents of that opinion, the Commissioner was satisfied that it was not unreasonable to reach such an opinion in the circumstances of this case. The Commissioner found that the exemption at Section 36(2)(b)(ii) FOIA was engaged in relation to the withheld information. Having accepted that, by virtue of the qualified person's opinion, Section 36 FOIA was engaged, the Commissioner also found that in correspondence the Council had relied, for the purposes of Section 36(2) FOIA, upon the lower level of likelihood of inhibition arising from disclosure. See paragraphs 30 -31 of the DN. The Commissioner therefore went on to consider the public interest test and in doing so he had regard, inter-alia, to that lower level of likelihood – that inhibition would be likely to occur, as opposed to would

*occur*. The Commissioner, as can be seen from the DN considered the Public Interest test comprehensively but in particular did not find that the withheld information “only” (or exclusively) related to risk logs and internal decision making in the context of the investigatory process. Rather, he found that it related to that material in that context . He did so with the benefit of sight of the withheld (closed) information. This he recognised is a matter of fact open to interpretation, if required, by this Tribunal. Further and contrary to Dexmar's understanding, the Commissioner did not find that the withheld (closed) information was “a free and frank exchange of views” but rather, he found that it was reasonable to accept that its disclosure would be likely to inhibit such a free and frank exchange for the purposes of deliberation. Again it is accepted that it is, if appropriate, for the Tribunal on consideration of the facts to satisfy itself whether or not the opinion of the qualified individual was a reasonable one in all the circumstances of this case.

14. The Commissioner found that the information request engaged Section 36(2)(b)(ii) FOIA (a qualified exemption) and the public interest favoured maintaining the exemption. See the DN.
15. The appellant, having lodged grounds of appeal and seeking an oral hearing made an application to this Tribunal at that hearing on 11 February, to have the second respondent joined as a party and this tribunal granted that application with a hearing date set for 8 May 2014 at which this tribunal directed the Council attend to assist the Tribunal and answer questions. This Tribunal did not direct any witness to attend.
16. The Council in due course and in accordance with the Tribunals directions submitted its response to the Appellants grounds of appeal. It explained that it now sought to withhold only a small number of documents, namely those at pages 7 -14 of the closed bundle.. Those are the handwritten notes of interviews conducted with Council employees as part of the Councils internal audit investigation, the subject of the request.
17. The remaining information, comprising e mails and risk logs/registers was disclosed to the appellant. The Council explained through their skeleton submissions prior to hearing;

*“That disclosure does not indicate that the Council was in any way wrong in withholding the information with which the DN was concerned . As the Council argued at the time and as the Commissioner found in his Decision Notice, the Council had correctly withheld all of the information in his decision notice, the Council had correctly withheld all of the information which appears in the closed bundle.*

*As is well established in FOIA litigation - and is in any event common sense, the sensitivity of some information diminishes over time. Once it was joined to this appeal, the Council took the view that some information could now safely be disclosed. In other words, had Mr Hynd asked for those documents in April 2014, the Council would have disclosed them to him. The Council sees no need to trouble this tribunal with academic points.*

*It should of course be remembered, however, that when assessing a public authority's compliance with its FOIA obligations, the focal time is the time of the request (here, November 2012). At that time, the Council had not even finalised the investigation to which Mr Hynd's request relates. This is explained below. The short point to be made at the outset is this: In such circumstances, it is entirely unsurprising for a public authority to withhold information relating to an incomplete investigation.*

**The Appeal Hearing:**

18. The Council explained that it relied on Section 36(2)(b) and (c) and Section 40(2) of FOIA in withholding the interview notes. The appellant continued to seek the disclosure of those interview notes, which now comprised the remaining disputed information.
19. The Council had secured the attendance of Ms Pilawski to assist the Tribunal and answer questions if called upon to do so. In fact she did give evidence at the oral hearing on 8 May 2014 to which we shall refer later. However the appellant was not satisfied with the evidence of this witness as it was imparted and made an application under Rule 16(1) of the 2009 rules that the Monitoring Officer (the qualified person) be summoned to give evidence. The Tribunal refused this application and explained to the appellant that it wished to be satisfied that a reasonable process had been followed in the obtaining of the Section 36 Opinion and in particular, did the qualified person have before her sufficient information with which to arrive at a reasonable opinion?
20. Ms Pilawski explained how she had not been involved in the process whereby the opinion had been obtained, her involvement being with the substance. Accordingly with the tribunal's permission Ms Pilawski telephoned the Council to ask her colleagues, Roy Morris and Tim Collard, what they had provided to the Monitoring Officer. She then relayed to the Tribunal, in the appellants presence, how they explained the Monitoring Officer had been provided with (a) the disputed information itself, and (b) an explanation as to why (based on the input of Ms Pilawski, Mr Morris and Mr Collard), disclosure of that information would be likely to prejudice the free and frank exchange of views and/or the conduct of public affairs. She also explained that the Monitoring Officer had at all times been fully aware of the factual background, namely the investigation described above and that Section 36 opinion was therefore based not only on the information itself and the input from Council Officers, but also on her own awareness of the issues involved.
21. This Tribunal considered the evidence as to the process which had been followed and explained to the appellant that we could see no basis for finding the opinion to have been unreasonable on procedural grounds. The appellant did not dispute this but insisted that he was concerned more with the substance of the Section 36 opinion. This Tribunal indicated to the appellant that he could question Ms Pilawski about the substance of that opinion and make any submissions he wished on that issue but the appellant, still dissatisfied, repeated his application under rule 16. This Tribunal considered this application again and unanimously refused the application on the grounds that we were satisfied that we had before us all the information we needed in order to assess the reasonableness of the Section 36 opinion and the public interest test. We did inform the appellant that he would be entitled to renew his rule 16 application during the course of the hearing if it emerged that there were particular points which could not be resolved without evidence from the Monitoring Officer. Despite the Tribunals invitation to remain for the rest of the hearing, the appellant departed from the hearing indicating he wished to take no further part since his application had been refused and as far as he was concerned the hearing could not be effective without the Monitoring Officer present to give evidence.
22. The Tribunal considered rule 36(1) of the 2009 rules and decided to continue the hearing as it was, in our view, in all the circumstances in the interests of Justice to do so. In making this decision we were conscious of the time and public resources already arising from this appeal, the disclosure already made and the evidence before us.

**The Legal Framework:**

**23. Section 36(2)(b) and (c) FOIA.**

Relevant to this appeal Section 36(2) provides that:

(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 exchanges 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.

**24. Section 40(2) and (3) of FOIA provide in relevant part that:**

(2) Any information to which a request for information relates is also exempt information if -

- (a) it constitutes personal data which do not fall within subsection (1), and
- (b) either the first or the second condition below is satisfied.

(3) The first condition is:-

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene -
  - (i) any of the data protection principles...

**The Issues:**

25. (a) In all the circumstances of this appeal are Section 36(2)(b) and (c) engaged and if so, does the public interest lie in disclosure or withholding of the remaining withheld information and/or (b) is Section 40(2) and/or (3) engaged and if so to what effect.

**The Evidence:**

26. As indicated above, the Tribunal had the advantage of hearing evidence from Ceri Pilawski, Audit Services Manager with the Council. She gave her evidence under oath and the Tribunal found her evidence credible and straightforward. We will not rehearse all of her evidence here but only that which is pertinent to the issues we have to decide upon. She explained she has over twenty years experience in a senior audit role and has been with the Council in that role since October 2009. She led the internal audit review into EDRMS Procurement review for which the final report was issued in December 2012. She explained how that review is the focus of the appellants request for information under FOIA. She explained how Clair Porter, the Monitoring Officer (who is the qualified person) provided the exemption rules and was kept verbally updated of the findings of the audit report. She had met with Ms Porter once or twice a week informing her of her progress. It was mostly about the procurement contract. In relation to the substance of her opinion Ms Porter was fully aware of the background of the request. In particular she, Ms Porter was in regular contact with Roy Morris and Tim Col-

lard about the exemptions and in particular the reasons for applying the Section 36 exemption. She explained that Tim Collard was a Senior Legal representative and reported directly to the Monitoring Officer and reported on all relevant issues.

27. When cross examined by the appellant however she agreed that she alone and not supplied Ms Porter with all the information on which she had based her opinion and she could not provide any insight into the basis for that opinion. She agreed that she had not been privy to all the meetings between Mr Morris or Mr Collard and Ms Porter and was not personally involved with the application of Section 36. She had only provided the audit file and supplementary information.
28. The appellant explained that he was not saying that there was insufficient evidence put forward to make the decision on the Section 36 opinion. As he put it, the qualified person could have made the wrong opinion and this witness was not in a position to establish otherwise. He was taking no point on the procedure.
29. The witness indicated that she would be willing to contact Roy Morris and Tim Collard by phone to determine what information they provided to Ms Porter. This Tribunal adjourned the hearing for this to be done.
30. After a brief adjournment the witness returned to give evidence and confirmed she had spoken to Roy Morris. He had confirmed to her that he completed the exemptions to be claimed and discussed the information and reasons for claiming the exemptions with Ms Porter. She explained how Tim Collard had confirmed that he had switched parts of the request from Section 40 to Section 36 and had then gone with Roy Morris to Ms Porter to go over the details of the case and seek permission.
31. At this stage of the evidence the appellant protested that the only evidence he would accept was that of the qualified person and made his application under Rule 16(1) of the 2009 rules for the Tribunal to summons the qualified person.
32. The Tribunal agreed to consider this application but insisted this witness be allowed to give her remaining evidence. Ultimately the appellant chose to leave the proceedings despite advice from the chair of the panel to stay and an invitation to renew his Rule 16(1) application at later stage if appropriate to do so. The Tribunal indicated that if after the witness evidence there were good grounds for allowing the Rule 16(1) application it would be further considered. The appellant, against the advice given, chose to take his papers and depart from the hearing completely. The Tribunal considered the position and decided in all the circumstances of the case that it was in the interests of Justice to continue the hearing in the absence of the appellant. We took into consideration that time and input from all parties already committed to this appeal, all the evidence before the Tribunal and the fact that the appellant had failed to demonstrate what was or could be unreasonable about the opinion arrived at by the qualified person. He had given no grounds for any basis that the opinion was other than reasonable.
33. In addition to her evidence on the process by which the Section 36 opinion had been obtained Ms Pilawski also gave pertinent evidence on the following matters.
34. She explained that her report was in draft format at the time of the appellant's request. It was finalised on 18 December 2012. The Council decided to start the tendering exercise afresh. The re-tendering exercise took place over the first half of 2013. To her knowledge, there had been no complaints about the process followed or the outcome of that process.

35. She further confirmed that she stood by her earlier written submission to the tribunal at pages 80 - 81 of the OB. The tribunal regard the contents of this letter from her as significant and it confirms her legitimate concerns that in any of her fact finding discussions there is an expectation of a full and frank debate. Knowledge and certainty of confidentiality can greatly assist in securing material information or advice from officers with the public authority. Her concern is that if officers know that their information may be disclosed, it is likely to alter their behaviour and responsiveness and impact detrimentally on their level of cooperation with any future investigations. This view she confirms is shared with her counterparts on other public bodies that carry out similar work. There is, she explained, an understanding that in the application of any public interest test there is a clear consensus that the potential release of information supplied in confidence or on a voluntary basis to an auditor is likely to be prejudicial to the investigation process. In essence she had indicated in her evidence herein that the Council takes a zero tolerance approach in relation to fraud, corruption and bribery, and she is fully in support of transparency and accountability and supports the publication of information deemed to be in the public interest, her concern that disclosure of sensitive information such as the withheld information herein, (e.g. written notes of individual interviews with officers) the Council encourages officers to come forward as whistle blowers, or where there is an internal investigation underway, to cooperate fully with the investigating officer. Officers, she explained, even in a confidential situation, are sometimes uncomfortable in disclosing information that they consider sensitive to an issue: the knowledge and certainty of confidentiality can greatly assist in securing such information or advice from them.
36. She further explained to the Tribunal that the Council conducted approximately 18 - 20 audit investigations in any given year. The scope and seriousness of the issues involved varied, but they commonly involved interviewing employees and taking notes of these interviews, as was done in this case. Her evidence was that the expectation of confidentiality applied to all such interview notes. Employees expected that a summary of their input and the Council's conclusions about that input could be made public, as for example in the form of the investigation report which was disclosed in this instant case. Employees expected, she explained, however, that first hand records of exactly what they had said and how they had expressed themselves in interview would remain confidential absent some sufficiently compelling reason for disclosure.
37. In response to questioning from Tribunal member, Mr. Taylor, she explained that the expectation of confidentiality was based on the Council's established practice for conducting audit investigation, rather than from any express promise that such notes would have been disclosed. She also explained to Mr. Taylor that Council employees did, in her view, understand that despite the expectation described above, information held by the Council was in principle amenable to disclosure under FOIA.
38. Mr, Taylor also asked what the consequences would be of employees refusing to be sufficiently forthcoming in interviews. The witness explained that the Council had no powers, in undertaking non-statutory audit investigation, to compel witnesses to provide detailed answers. Negative inferences could, however be drawn about a witnesses answers.
39. Tribunal member Ms Nelson further asked about the expectations of confidentiality and the witness confirmed that this was not expressly articulated to interviewees, but it was their uniform understanding based on the Council's habitual practice as described earlier.



40. The witness further informed the Tribunal that if her audit investigations pointed to potential grounds for disciplinary action against employees, then it was her duty to raise those matters with the appropriate officers at the Council.

**Reasons:**

41. The Tribunal agree with, and adopt the reasoning of the Commissioner in his analysis of the Public Interest Test in paragraphs 38 to 48 of the DN. We too recognise a public interest in favour of disclosure of the disputed information but find that in the particular circumstances of this case, the balance is in favour of non-disclosure of the withheld information.
42. The Tribunal accepts the following pertinent submission made on behalf of the Council.
- a) the Council now seeks only to withhold the notes of interviews with Council employees made in the course of the investigation and does so in reliance of Section 36(2) as well as Section 40(2). As submitted part of its concern is systemic, i.e. it is concerned with the integrity and effectiveness of investigation of this kind; this is why the Council relies on Section 36(2) and we acknowledge and accept this reasoning.
  - b) A further aspect of its concern is described as “*fairness to individual employees*” who expect their input as recorded in the interview notes to remain confidential; this is why the Council relies on Section 40(2) and we recognise and accept this as a legitimate and reasonable concern.
43. The Tribunal accept that those concerns justify the withholding of the interview notes under FOIA. We accept that as against those concerns, there is very little public interest (for Section 2(2)(b) purposes) or legitimate interest (for the purposes of fairness and condition 6(1) under the Data Protection Act 1998) in the disclosure of the withheld information.
- c) The qualified person’s opinion in respect of the interview notes is at page 74 OB and the reasoning is explained in Ms Pilawski’s letter at page 80 -81 referred to above. We note that separate opinions were provided for the interview notes which remain in dispute (page 74 OB) and the e mails and risk logs which have now been disclosed (page 75 OB). The qualified Person’s reasoning is explained separately for those two categories. As stated above we see no evidence, or even any realistic suggestion from the appellant, that the opinion in this case was unreasonable by any standard. This is all the more so in light of the timing of the request, bearing in mind the audit at that point in time the report was only in draft form.
  - d) We accept that on the facts of this case the public interest in maintaining the exemptions is weighty. In light of the evidence before this Tribunal we are persuaded “*par adventure*” that it is very strongly in the public interest that investigations of this nature are as rigorous and effective as possible. Investigators must have a safe space in which to discuss points with witnesses. Witnesses and those providing input into an investigation must feel confident that what they say to the investigator will, for a reasonable period of time and absent some overriding public interest - not be disclosed more widely than is necessary. Without that confidence, interviewees, we are persuaded, are much less likely to speak freely and frankly during their interviews. This, we accept, would disproportionately undermine this important aspect of public affairs.

e) We accept entirely, on the evidence given, the Council's concern with how disclosure of this information could prejudice future investigations. We accept that disclosure of these interview notes at the time of the appellant's request would have set a precedent which would have been likely to limit the flow of information between investigators and interviewees. This we agree would be strongly against the public interest on the facts of this case.

f) As referred to above we also accept the relevance and significance of the timing of the request. It was made when the report existed in draft form only. At the time of the request the interview notes were fresh and this we find strengthens the public interest in non disclosure.

g) We further accept the submission that there is very little incremental public interest in the disclosure of these particulate interview notes. The appellant has not made the case, nor is it otherwise clear, how their disclosure would materially add to the public understanding of the Council's investigation. The final report and the other disclosed information, in our view, provided ample information for a comprehensive understanding of the Council's investigation.

h) In relation to concerns expressed by the appellant, we note that the disclosed interview notes are different in nature to the withheld ones. The disclosed notes are about the clarification of Council procedures, they are not individuals' accounts of the events being investigated. We also note that the Council's Monitoring Officer (in this case also the qualified person for Section 36 purposes) firmly endorses the letter at pages 80 -81 OB.

44. In the factual circumstances outlined above and for the reasons given the Tribunal refuses this appeal
45. Obiter, the Tribunal wish to comment on an assertion by the appellant that the witness who gave evidence on behalf of the Public Authority wilfully and deliberately misrepresented the Tribunal in her evidence before us. The appellant has made this unfair allegation after he chose (despite advice from the Tribunal Chairman to remain to hear all the evidence) to leave the hearing.
46. Had the appellant remained, as advised, for the rest of the evidence, he would have had the opportunity to let the witness explain any inaccuracies in her recollection of some facts without reference to her notes. For the avoidance of doubt the Tribunal accept entirely the bona fides of this witness and do not accept any criticism of her as suggested by the appellant. His accusations are unfair and inappropriate in the circumstances.
47. Again, for the avoidance of doubt and the sake of completeness the tribunal invited the witness to respond to these hurtful and damaging assertions. She did so by way of a statement of 11 June 2014 and therein she explained fully any inconsistencies in her evidence by reason of an inability to access the relevant notes and records. The Tribunal accept entirely her explanation.

Signed:

Brian Kennedy QC

30th July 2014.