

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 July 2012

Public Authority: London Borough of Tower Hamlets
Address: Town Hall
Mulberry Place
5 Clove Crescent
London E14 2BG

Decision (including any steps ordered)

1. The complainant has requested information about a Cabinet meeting of the public authority, the London Borough of Tower Hamlets ("LBTH") held on 8 June 2011. LBTH refused to provide this. It cited exemptions at section 36 (effective conduct of public affairs) and section 42 (legal professional privilege) as its bases for refusal.
2. The Commissioner's decision is that LBTH is entitled to withhold the requested information under section 42(1) of FOIA. No steps are required.

Request and response

3. On 29 June 2011, the complainant wrote to LBTH and requested information in the following terms:

"All emails and written documents concerning the minutes of the Cabinet held on 8 June 2011, including but not restricted to, each version of the minutes as originally produced and subsequently amended. I wish to see these because I want to understand the policy decisions taken about the exclusion of any mention of the contribution of Labour councillors to the meeting and who these decisions were taken by, and if they were taken in line with the Council's constitution."

Please include copies of material which you hold in the form of paper and electronic records, including Outlook diary. Please include any notes attached to diary appointments.

I would like the above information to be provided to me in paper and electronic format".

4. The LBTH responded on 4 August 2011. It refused to provide the requested information. It cited FOIA section 36(2)(c) (Effective Conduct of Public Affairs) and section 42 (Legal Professional Privilege) as its bases for doing so. It had already written to the complainant on 7 July 2011 to provide an explanation as to its obligations when recording minutes of Cabinet meetings and to explain more about the work of the Overview and Scrutiny Committee (see below).
5. Following an internal review the LBTH wrote to the complainant on 21 October 2011. It upheld its original position although it provided more detail about its view regarding the balance of public interest.

Scope of the case

6. The complainant contacted the Commissioner to complain about the way his request for information had been handled. Specifically, he disputed the application of both section 36 and section 42 in this case.
7. The Commissioner has considered whether the LBTH is entitled to rely any of the exemptions it has cited as a basis for refusal.
8. In correspondence with the Commissioner, LBTH confirmed that it was relying on section 36(2)(b)(i) and section 42(1) for all the information it held within the scope of the request. It explained that section 36(2)(b)(i) more precisely reflected its position with respect to the prejudice that, in its view, was likely to arise in relation to the effective conduct of public affairs.

Reasons for decision

Background

9. During the Commissioner's investigation, LBTH explained that it prepares a record of decisions made at Cabinet meetings as soon as is reasonably practicable after each meeting and that this record is published online.¹ It added that the publication of the records of decisions allows Members to determine whether decisions should be "called-in" by LBTH's Overview and Scrutiny Committee. The minutes are prepared by the clerk of the Council from their notes and, in accordance with LBTH's constitution, they are formally agreed by the Proper Officer of the Council. Although the minutes are then presented for consideration and adoption at the next Cabinet meeting they do not have to be formally agreed by them. The minutes can be sent out separately as an official record of the decision, the reasons for the decision and the alternative options that were considered. LBTH explained that the minutes were not to be a verbatim account and should not contain the names of councillors who are not members of the Cabinet but who ask questions at the meeting. It explained that there were, therefore, two documents that were routinely published. Firstly, a record of decisions taken was published. Secondly, the minutes presented to and considered by the Cabinet were published.
10. It explained that the process follows the requirements of the Local Government Act 2000 and the Local Authorities (Executive Arrangements)(Access to Information) (England) Regulations 2000.
11. The Commissioner notes that Regulation 3 of the aforementioned regulations appears to accord with LBTH's explanation of its obligations with respect to recording decisions at Cabinet meetings.²

Section 42 – Legal professional privilege exemption

12. Section 42(1) of FOIA provides that information is exempt from disclosure if the information is protected by legal professional privilege and this claim to privilege could be maintained in legal

¹<http://moderngov.towerhamlets.gov.uk/ieListMeetings.aspx?CommitteeId=320>

² <http://www.legislation.gov.uk/uksi/2000/3272/contents/made>

proceedings. It is a qualified exemption which means it is subject to a balance of public interest test.

13. There are two categories of legal professional privilege: advice privilege and litigation privilege. In this case, the category of privilege the LBTH is relying on is advice privilege. This privilege is attached to confidential communications between a client and its legal advisers, and any part of a document which evidences the substance of such a communication, where there is no pending or contemplated litigation. The information must be communicated in a professional capacity; consequently not all communications from a professional legal adviser will attract advice privilege. For example, informal legal advice given to an official by a lawyer friend acting in a non-legal capacity or advice to a colleague on a line management issue will not attract privilege. Furthermore, the communication in question also needs to have been made for the principal or dominant purpose of seeking or giving advice. The determination of the dominant purpose is a question of fact and answer which can usually be found by inspecting the documents themselves.
14. Having viewed the withheld information, the Commissioner is satisfied that it falls within the description of information set out in section 42. The dominant purpose of the detail recorded in the withheld information is the seeking of, or provision of, legal advice regarding the preparation of minutes so that they accord with LBTH's legal obligations. This advice is sought from and provided by a professional legal adviser who is an officer of LBTH. The Commissioner understands that this person's role includes providing advice on the correct way to prepare the minutes of Cabinet meetings so that those minutes accord with the requirements of the relevant legislation described above. The Commissioner is therefore satisfied that the withheld information attracts legal professional privilege and is therefore exempt from disclosure on the basis of section 42(1).

Public interest test

15. As noted above, section 42 is a qualified exemption and therefore the Commissioner must consider the public interest test at section 2 of FOIA. He must determine whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

16. In considering the balance of the public interest under section 42, although the Commissioner accepts that there is a strong element of public interest inbuilt into legal professional privilege, he does not accept, as previously argued by some public authorities, that the factors in favour of disclosure need to be exceptional for the public interest to favour disclosure. The Information Tribunal in *Pugh v Information Commissioner* (EA/2007/0055) was clear:

*"The fact there is already an inbuilt weight in the LPP exemption will make it more difficult to show the balance lies in favour of disclosure but that does not mean that the factors in favour of disclosure need to be exceptional, just as or more weighty than those in favour of maintaining the exemption."*³ (Para 41).

17. Consequently, although there will always be an initial weighting in terms of maintaining the exemption, the Commissioner recognises that there are circumstances where the public interest will favour disclosing the information. In order to determine whether this is indeed the case, the Commissioner has considered the likelihood and severity of the harm that would be suffered if the advice were disclosed by reference to the following criteria:

- how recent the advice is; and
- whether it is still live.

18. In order to determine the weight that should be attributed to the factors in favour of disclosure the Commissioner will consider the following criteria:

- the number of people affected by the decision to which the advice relates;
- the amount of money involved; and
- the transparency of the public authority's actions.

Arguments in favour of maintaining the exemption

19. For obvious reasons, the complainant did not advance any arguments in favour of maintaining the exemption, nor did the Commissioner require him to do this.

³<http://www.informationtribunal.gov.uk/DBFiles/Decision/i107/Pugh.pdf>

20. The public authority put forward the following arguments in favour of maintaining the exemption:

- There is a strong public interest in local authority officers having access to full and frank legal advice in order to avoid contraventions of the law and maladministration. It drew attention to the creation of the statutory monitoring officer function in section 5 of the Local Government and Housing Act 1989 as an indication of the established public interest in the proper exercise of this role.
- Disclosure would interfere with an officer's deliberations where they have sought legal advice.
- The documents which are published in relation to the decision making process in the Cabinet meetings add both transparency and certainty to the process. A balance needs to be struck between maintaining transparency of decision making and maintaining certainty in the process for preparing minutes. Disclosure would undermine this.

Arguments in favour of disclosure

21. The complainant advanced the following arguments in favour of disclosure:

- There has been considerable inconsistency in the recording of Opposition member contributions in previous minutes.
- The role of the Opposition is to scrutinise the work of the Cabinet. Where the contributions of Opposition councillors at Cabinet meetings are, in effect, written out of the minutes, this gives rise to concerns about the impartiality of officials.
- Aside from those parts of the meeting that are exempt from the press and the public, all legal advice is either contained in the circulated reports or given during the public meeting. Any legal advice given to the Clerk in producing the minutes should therefore directly relate to the requirements listed in the constitution and any other matters requiring legal advice would have already have been tabled or discussed at the public meeting.
- The minutes in question cover a public meeting. Publishing notes pertaining to that meeting would not be detrimental to transparency of public access – *"if anything it would enhance it"*.

- The minute taker (who is the Clerk of the Council) follows a protocol (in liaison with the Assistant Chief Executive Legal Services) when deciding what to include in the minutes in order to fulfil a statutory obligation to provide a written record as outlined in the Council's constitution. Disclosure would show that decisions taken as to content were taken on those grounds and not on any other grounds.
22. LBTH explained that, in its view, there were no weighty arguments in favour of disclosure. It said that there was a public interest in transparency in relation to the decision making process but this is served by the fact that LBTH publishes records of decisions, proposed minutes and agreed minutes (in that order) in respect of Cabinet meetings.

Balance of public interest

23. Looking first at the likelihood and severity of any harm that might arise and, as noted above, the Commissioner has considered the age of the advice and whether it is still live. With regard to the age of the advice the Commissioner accepts the argument advanced on a number of occasions by the Tribunal that, as time passes, the principle of legal professional privilege diminishes. This is based on the concept that if advice is recently obtained it is likely to be used in a variety of decision making processes and that these processes are likely to be harmed by disclosure. However, the older the advice the more likely it is to have served its purpose and the less likely it is to be used as part of any future decision making process.
24. In many cases the age of the advice is closely linked to whether the advice is still live. Advice is said to be live if it is still being implemented or relied upon and therefore may continue to give rise to legal challenges by those unhappy with the course of action adopted on that basis.
25. In this case, the legal advice is relatively recent. Although the final version of these minutes was published, the Commissioner is satisfied with LBTH's assurances that the drafting of minutes is the subject of regular review to ensure that the final version accords with the requirements of the Local Government Act 2000 and the Local Authorities (Executive Arrangements)(Access to Information) (England) Regulations 2000.

26. In the Commissioner's view, this means that considerable weight can be added to the public interest in maintaining the exemption. It is likely that LBTH will need to refer to the advice given here when preparing minutes in the future for comparison and/or seek additional advice on the same topic. It is, therefore, recent advice which, in effect, remains live.
27. Turning now to arguments in favour of disclosure, the Commissioner acknowledges that the minutes address points relating to the expenditure of public funds that affect a large number of people. However, the Commissioner does not agree that the disclosure of the drafts would add considerably to the public interest in understanding more about how decisions are made regarding the expenditure of public funds. This is because a considerable amount of information on this topic is already made available by LBTH in the manner described above on a regular basis.
28. The complainant's arguments focus on concerns that the contributions made by others attending the Cabinet meeting were not fully reflected in the minutes. The complainant is also concerned that there have been inconsistencies in the recording of these contributions. The Commissioner agrees that, where there is doubt as to consistency, this adds weight to the public interest in understanding more about the drafting process. However, he does not agree that this point adds sufficient weight to the public interest such that disclosure is necessary in this case.
29. The Commissioner notes that decisions made by the Cabinet are subject to, among other checks, LBTH's Overview and Scrutiny Committee. LBTH explained that records of decisions are produced as promptly as possible after the Cabinet meeting so that this Committee has a timely opportunity to scrutinise the decisions in question. LBTH also explained that minutes of these meetings contain far more detail as to the content of the discussion. This would appear to be borne out by evidence on LBTH's own website.⁴
30. The Commissioner also notes that the complainant has other routes open to him where he has concerns about the impartiality of officials. He could raise it with the Chief Executive of LBTH and,

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<http://moderngov.towerhamlets.gov.uk/ieListDocuments.aspx?CId=327&MIId=3424&Ver=4>

where he is unhappy with that person's response, he could draw the matter to the attention of the District Auditor. Concerns as to maladministration may be dealt with by the Local Government Ombudsman.

31. The complainant provided no evidence to show that he had explored these options. The Commissioner would emphasise that a complainant is not required to exhaust all other avenues for complaint before making a request under FOIA or before making a complaint to him under FOIA. However, in some cases, this may prove to be the most practical and expeditious approach to resolve an underlying issue. Even if unsuccessful, the outcome of such complaints may provide evidence which adds weight to the public interest in disclosure under FOIA. For example, they may show a clear gap in transparency on a particular topic that is yet to be addressed or which has been insufficiently addressed by current processes. In this case, the complainant has provided no evidence, beyond his own expressions of dissatisfaction to show that the process for recording Cabinet decisions is insufficiently transparent.
32. The Commissioner does not believe that the privilege which the information attracted when created has diminished significantly, if at all, in this case. The Commissioner is satisfied that disclosure of the information relating to both requests would be very likely to lead to a loss of candour by officials requesting advice from the LBTH's legal officers. Although he notes that the complainant has concerns regarding the impartiality of officials when preparing minutes of Cabinet meetings, he does not believe that the public interest in assuaging these concerns through disclosure outweighs the public interest in maintaining the exemption.

Section 42 - Conclusion

33. The Commissioner has concluded that the public interest in maintaining the exemption at section 42(1) outweighs the public interest in disclosing the requested information. He has given particular weight to the importance of allowing officials to seek candid professional legal advice in private.
34. In light of the Commissioner's findings in respect of section 42(1) he has not considered whether the requested information is also exempt from disclosure on the basis of section 36(2)(b)(i) of FOIA.

Right of appeal

35. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

36. 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.
37. 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

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