

Freedom of Information Act 2000 ('FOIA')

Decision notice

Date: 23 October 2012

Public Authority: Newham Council
Address: Newham Dockside
1000 Dockside Road
London
E16 2QU

Decision (including any steps ordered)

1. The complainant has requested information relating to the BBCs occupation of a tower block known as Lund Point for use during the Olympic Games. The Commissioner's decision is that the London Borough of Newham ('the council') has incorrectly applied the exemption where disclosure would prejudice the effective conduct of public affairs as the public interest in maintaining the exemption does not outweigh the public interest in disclosing the information. The Commissioner has also decided that the council has not provided sufficient reasons for applying the exemption for information provided in confidence.
2. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the information requested at point 1 of the request subject to redactions for commercially sensitive fees.
3. 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

4. On 14 February 2012 the complainant made the following request for information under the FOIA:

"1...Copies of communications and correspondence (including emails) between Newham Council and the BBC which in any way relates to the BBC's decision to occupy part of the tower block known as Lund point for the use of the Olympic games.

2...A copy of any tenancy agreement and or contract signed by the BBC?

3...Has the BBC and or any organisation acting on its behalf submitted any planning application which in any way relates to the site. If so could you please provide a copy of the application together with any supporting documents and or sketches and or plans and or photographs.

4...Have local residents and or businesses and or tenants complained about the decision to allow the BBC to use the tower block. If so could you please provide copies of the complaints. Please do remove the names and address of any individual residents and or tenants. But please do not redact the names of any businesses who have complained."

5. The council responded on 13 March 2012 and refused to provide the requested information citing the exemption where disclosure would, or would be likely to, prejudice the commercial interests of any person, at section 43 of the FOIA. It stated that the council is in talks with various media outlets and on an array of properties and because these are commercial negotiations it would not be appropriate to provide the details requested. It explained that commercial arrangements are focused to bring the best value for the council by maximising revenue via the Olympics programme and that such revenue will be reinvested in the Mayor's Legacy Fund to provide services for young people and other residents.
6. Following an internal review request, the council wrote to the complainant on 23 April 2012. The council revised its position and provided some information within the scope of the request, confirmed that some information was not held, and refused to provide the remainder citing the exemptions at section 43(2), section 36, section 40(2) and section 21 of the FOIA exceptions as the basis for doing so.

Scope of the case

7. The complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically stated that he was unhappy with the council's decision to apply section 36 to the information requested at point 1 of the request.

The complainant accepts that financial figures can be redacted under section 43(2).

8. During the Commissioner's investigation, the council also applied the exemption for confidential information at section 41 in relation to point 1 of the request
9. Therefore the Commissioner has considered the council's application of section 36 and section 41 of the FOIA in relation to the information requested at point 1.
10. For the avoidance of doubt, the Commissioner has not considered the council's application of the exemptions at section 43(2), section 40(2) or section 21 of the FOIA.

Reasons for decision

Section 36 Prejudice to effective conduct of public affairs

11. Section 36 states that information is exempt from disclosure where, in the reasonable opinion of a qualified person, disclosure would or would be likely to prejudice the effective conduct of public affairs. Section 36 operates in a slightly different way to the other prejudice based exemptions in the FOIA. For section 36 to be engaged, information is exempt only if, in the reasonable opinion of a qualified person, disclosure of the information in question would, or would be likely to, prejudice any of the activities set out in sub-sections of 36(2).
12. During the Commissioner's investigation, the council confirmed that it is applying the exemptions at both section 36(2)(b) and 36(2)(c).
13. Section 36(2)(b) provides an exemption where disclosure would, or would be likely to, inhibit (i) the free and frank provision of advice, or (ii) the free and frank exchange of views for the purposes of deliberation.
14. 36(2)(c) provides an exemption where disclosure would, or would be likely to, otherwise prejudice the effective conduct of public affairs.

Are the exemptions engaged?

15. In order to establish whether each of the exemptions has been applied correctly the Commissioner has:
 - Ascertained who is the qualified person or persons for public authority in question;

- Established that an opinion was given;
 - Ascertained when the opinion was given; and
 - Considered whether the opinion given was reasonable.
16. With regard to the first two criteria, the Commissioner has established that for both exemptions the reasonable opinion was given by Helen Sidwell, Director of Legal, People and Change. The Commissioner is satisfied that Helen Sidwell, being the council's Monitoring Officer, is a qualified person for the purposes of section 36(5) of the FOIA.
17. In relation to the third criterion, the council has provided dates of when the opinion was sought and given in respect of the exemptions and the Commissioner is satisfied that the opinion was provided after the receipt of the request and before the internal review response when section 36 was first applied.
18. With regards to the fourth criterion, in deciding whether an opinion is reasonable the Commissioner will consider the plain meaning of that word, that being, in accordance with reason; not irrational or absurd. If it is an opinion that a reasonable person could hold, then it is reasonable. This is not the same as saying that it is the *only* reasonable opinion that could be held on the subject. The qualified person's opinion is not rendered unreasonable simply because other people may have come to a different (and equally reasonable) conclusion. It is only unreasonable if it is an opinion that *no* reasonable person in the qualified person's position could hold. The qualified person's opinion does not even have to be the *most* reasonable opinion that could be held; it only has to be *a* reasonable opinion.
19. The Commissioner has also been guided by the Tribunal's indication, in the case *Guardian Newspapers & Brooke v Information Commissioner & BBC*¹, that the reasonable opinion is limited to the degree of likelihood that inhibition or prejudice may occur and thus 'does not necessarily imply any particular view as to the *severity* or *extent* of such inhibition [or prejudice] or the *frequency* with which it will or may occur, save that it will not be so trivial, minor or occasional as to be insignificant' (paragraph 91). Therefore, when assessing the reasonableness of an opinion the Commissioner is restricted to focussing on the likelihood of that inhibition or harm occurring, rather than making an assessment as

¹ Appeal numbers EA/2006/0011 & EA/2006/0013

to the severity, extent and frequency of prejudice or inhibition of any disclosure.

20. With regard to the degrees of likelihood of prejudice the Commissioner has been guided on the interpretation of the phrase 'would, or would be likely to' by a number of Information Tribunal decisions. In terms of 'likely to' prejudice, the Tribunal in *John Connor Press Associates Limited v The Information Commissioner*² confirmed that 'the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk' (paragraph 15). With regard to the alternative limb of 'would prejudice', the Tribunal in *Hogan v Oxford City Council & The Information Commissioner*³ commented that 'clearly this second limb of the test places a stronger evidential burden on the public authority to discharge' (paragraph 36).
21. Although in its internal response to the complainant the council stated that disclosure *would* prejudice the effective conduct of public affairs, in its submission to the Commissioner, it stated that the qualified person came to the conclusion that disclosure of the information *would be likely to* prejudice both the effective conduct of public affairs and the free and frank provision of advice and exchange of views. Therefore, the Commissioner considers that it is appropriate to apply the lesser evidential test.
22. At the Commissioners request, the council provided a copy of qualified person's opinion. The Commissioner notes that the withheld information was described to the qualified person; she was not shown a copy of the requested correspondence.
23. The council stated that disclosing information covering the preliminary stages of the parties' agreement, including the drafting and redrafting of documents, administration matters and operational matters regarding the BBC's delivering on the lease agreement, would prejudice the effective conduct of public affairs as it could inhibit free and frank exchange of views and opinion and may prejudice the council undertaking these kinds of transactions in the future.
24. It further explained the prejudice that would be experienced as follows:

² Appeal number EA/2005/0005

³ Appeal number EA/2005/0026 & 0030

- "1. Some correspondence relates to the exploration of ideas and options amongst local authority officers and respective stakeholders. Local government officers and their partners need to be able to think through all the implications of particular options. In particular, they need space to be able to undertake rigorous and candid assessments of the risk and benefits of particular programmes and projects without feeling that their views would later be released into the public domain, especially on a matter that is still current. This could also undermine the local authority's ability to participate in future similar projects. As such, disclosure would prejudice the effective conduct of public affairs; inhibit the free and frank provision of advice and the free and frank exchange of views within local government.
2. The parties should be free to gather information and enter into commercial transactions in fulfilling their role (BBC- as a public service broadcaster and LBN- as a local authority) without the inhibition that there would be public disclosure of their work in progress.
3. Given the level of media interests in this matter, we consider that releasing information regarding the formative stages of discussions/draft stages of documents would likely to give rise to further questions and comments which will prejudice public affairs as it will detract from the necessity to formulate proposals and options for proper debate and consideration. There is the likelihood that the media/residents would focus on the parties' positions during the preliminary stages of the agreement which may or may not have changed as the project develops. This could result in the Council having to divert resources in order to manage the potential disruptive effect from disclosure, which is clearly not in the public interest."
25. The Commissioner has viewed the withheld information and notes that it mainly relates to administrative and operational matters such as arranging meetings, arranging the wayleave agreement⁴, chasing responses, requesting updates and correcting typos. Also included are drafts of the lease between the council and the BBC and comments on particular aspects of the lease, the BBCs operating agreement, floor and location plans and photos of the hoist, and a structural engineer's design philosophy of the proposed alterations to Lund Point.

⁴ A wayleave agreement is an agreement under which a property owner gives a service provider (for example, an electricity or telephone services provider) a right to install pipe or cable passing through or over the owner's property.

26. Although the council did not specifically state which of the points above relate to which exemption, the Commissioner considers that point 1 is relevant to the prejudice referred to at section 36(2)(b). Although the Commissioner could only identify limited information relating to the assessment of risks and benefits, such as the structural engineer's design philosophy which refers to the risks and benefits in relation to removing internal walls and widening doors, on the basis that the qualified person's opinion is only unreasonable if it is an opinion that no reasonable person in the qualified person's position could hold, he accepts that it is a reasonable opinion that if the withheld information was disclosed it could lead to less rigorous and candid assessments of the risks and benefits of future programmes and projects being undertaken. Whilst the Commissioner does not accept that officers will be put off exploring ideas and options, and undertaking assessments and providing views in full, it is not unreasonable to conclude that views could be expressed in a less descriptive and more cautious manner. This could then have a harmful effect on the council's participation in future similar projects. He therefore finds that the opinion of the qualified person is a reasonable one in this instance and that section 36(2)(b) is engaged.
27. In relation to point 2, the Commissioner requested the council to clarify what it meant by 'work in progress' given that the lease between the BBC and the council was signed in December 2011 and the internal review was carried out in April 2012. The council stated that 'work in progress' referred to the discussions leading up to the signing of the lease rather than the agreement being on going at the time of the request.
28. The Commissioner considers that point 2 of the council's arguments for withholding the information appears to be a blanket exemption for information relating to pre contract negotiations which is inappropriate under the FOIA. However, although the Commissioner considers that public authorities would still gather information and enter into commercial negotiations even if there was public disclosure of their 'work in progress', in this specific case, and on the basis that the qualified person's opinion is only unreasonable if it is an opinion that no reasonable person in the qualified person's position could hold, he considers that the argument is relevant to the exemption at section 36(2)(c). This is because it is possible that the effective conduct of public affairs would be prejudiced if either the council or the BBC were inhibited from entering into commercial transactions through public disclosure of their work in progress.
29. In relation to point 3, the Commissioner agrees that releasing information regarding the formative stages of discussions/draft stages of documents could result in further questions and comments but does not

see how that would prejudice public affairs, in the form of detracting from the necessity to formulate proposals and options for proper debate and consideration, given that the lease agreement was signed before the request for information was made. However, the Commissioner does find the opinion that such further questions and comments would be likely to prejudice the effective conduct of public affairs, in the form of the diversion of resources in order to manage the potential disruptive effect, to be a reasonable one. He therefore finds that the exemption is engaged in relation to section 36(2)(c).

Public interest test under section 36

30. Sections 36(2)(b) and (c) are qualified exemptions and therefore the Commissioner must consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure of the information. The Tribunal in *Guardian Newspapers & Brooke v Information Commissioner & BBC*⁴ indicated the distinction between the consideration of the public interest under section 36 and consideration of the public interest under the other qualified exemptions contained within the FOIA:

“The application of the public interest test to the s36(2) exemption involves a particular conundrum. Since under s36(2) the existence of the exemption depends upon the reasonable opinion of the qualified person it is not for the Commissioner or the Tribunal to form an independent view on the likelihood of inhibition under s36(2)(b), or indeed of prejudice under s36(2)(a) or (c). But when it comes to weighing the balance of public interest under s2(2)(b), it is impossible to make the required judgment without forming a view on the likelihood of inhibition or prejudice.” (Paragraph 88)

31. As noted above, the Tribunal indicated that the reasonable opinion is limited to the degree of likelihood that inhibition or prejudice may occur and thus ‘does not necessarily imply any particular view as to the *severity* or *extent* of such inhibition [or prejudice] or the *frequency* with which it will or may occur, save that it will not be so trivial, minor or occasional as to be insignificant’ (paragraph 91). Therefore, the Commissioner’s view is that whilst due weight should be given to reasonable opinion of the qualified person when assessing the public interest, the Commissioner can and should consider the severity, extent and frequency of prejudice or inhibition to the subject of the effective conduct of public affairs.

Public interest arguments in favour of disclosing the requested information

32. The council acknowledged that the public interest is served by promoting transparency in the accountability of public funds, ensuring

that public money is being used effectively, and that the local authority is getting value for money when entering into commercial transactions with companies.

33. It also stated that it considered the following public interest arguments in favour of disclosing the requested information:
1. Promoting accountability and transparency by public authorities for decisions taken by them. Placing an obligation on authorities and officials to provide reasoned explanations for decisions made will improve the quality of decisions and administration.
 2. Promoting accountability and transparency in spending public money. The Public interest is likely to be served, for instance in the context of private sector delivery of public services, if disclosure of information ensures greater competition and better value for money that is public.
 3. Allowing individuals to understand decisions made by public authorities affecting their lives and, in some cases, assisting individuals in challenging those decisions.
34. The Commissioner considers that the 'default setting' of the FOIA is in favour of disclosure. This is based on the underlying assumption that disclosure of information held by public authorities is in itself of value because it promotes better government through transparency, accountability, public debate, better public understanding of decisions and informed and meaningful participation of the public in the democratic process.
35. The Commissioner also considers that there is a general public interest for accountability in the use of public funds and a specific public interest in the use of public funds for the Olympics and Paralympics. Although the council received a fee for providing the lease, this money came from the BBC which is also a publicly funded organisation.

Public interest arguments in favour of maintaining the exemptions

36. The council restated its reasons as to why the exemption applies as public interest arguments in favour of maintaining the exemption.
37. It also stated that disclosure would make it less likely that companies or individuals would provide the local authority with commercially sensitive information in future and consequently undermine the ability of the local authority to fulfil its public role. The Commissioner considers that this argument is relevant to one of the prejudices the council claim would result from disclosure under section 36(2)(c); that being that the council

and the BBC should not be inhibited from gathering information and entering into commercial transactions in fulfilling their public roles.

Balance of the public interest arguments

38. Where, as with this case, a qualified exemption is engaged the information must still be disclosed unless, in all circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing it.
39. The council have stated that the disclosure of some information in the internal review response adequately fulfils the public interest test requirement. It also stated that the BBC's broadcasting operation in respect of the subject matter of the request is still current and that the BBC regularly builds temporary broadcast facilities for its coverage of events and disclosing details of such practices could materially affect the BBC's future opportunities in maintaining its normal business practices with third party landlords which could have a material effect on BBC production budgets.
40. Having seen the withheld information, the Commissioner will consider where the balance of the public interest lies.
41. In relation to the exemption at section 36(2)(b), the Commissioner has considered the argument that the public interest in maintaining the exemption lies in maintaining space to undertake rigorous and candid assessments of the risks and benefits of particular projects and programmes. He accepts the qualified person's opinion that disclosure of information relating to the exploration of ideas and options may dissuade officers and stakeholders from being free and frank in the future which would be detrimental to the effective conduct of public affairs, although he recognises that officers have a duty to carry out their roles.
42. However, when considering the public interest, the Commissioner should give such 'chilling effect' arguments appropriate weight according to the circumstances of the case and the information in question. As stated in the Tribunal case *Department for Education and Skills v the Information Commissioner*⁵ and endorsed as a statement of principle in the *Export Credits Guarantee Department High Court case*⁶;

⁵ Appeal number EA/2006/0006

⁶ 2008 EWHC 638

"The central question in every case is the content of the particular information in question. Every decision is specific to the particular facts and circumstances under consideration. Whether there may be significant indirect and wider consequences from the particular disclosure must be considered case by case."

43. Upon examination of the withheld information, and as stated above, the Commissioner could only identify limited information relating to the assessment of risks and benefits. The Commissioner couldn't identify any content that is so candid it would hinder the free and frank provision of advice or exchange of views so severely or so frequently or extensively that would outweigh the public interest in disclosure.
44. In relation to the argument under section 36(2)(c) that public authorities should be free to gather information and enter into commercial negotiations in fulfilling their role without the inhibition that there would be public disclosure of their work in progress, the Commissioner couldn't identify any significant content, apart from information relating to fees which the complainant accepts can be redacted, that would cause the stated prejudice to occur so severely or so frequently or extensively that would outweigh the public interest in disclosure. The Commissioner also notes that this particular transaction, relating to London hosting the Olympics and Paralympics, was unique and therefore disclosure of this particular information is unlikely to cause the stated prejudice on an extensive or frequent basis.
45. In relation to the argument under section 36(2)(c) that the media or residents would focus on the parties' positions during the preliminary stages of the agreement which may or may not have changed as the project develops, resulting in the council having to divert resources in order to manage the potential disruptive effect, the Commissioner does not accept that the disruption or diversion in resources experienced by the council following disclosure would be severe, extensive or frequent enough to outweigh the public interest in disclosure. In reaching this conclusion the Commissioner has taken into account the content of the withheld information and the fact that the lease was signed in December 2011, before the request was made, and a copy of the lease was released at internal review with only minor redactions under section 43(2).

Conclusion on the public interest test

46. The Commissioner has considered the public interest arguments taking into account the severity, frequency and extent of the claimed prejudice. He has given due weight to the opinion of the qualified person but has concluded that in the circumstances of this case the public interest in maintaining the exemption does not outweigh the public interest in disclosure of the

requested information in relation to both the exemptions at section 36(2)(b) and the exemption at section 36(2)(c).

Section 41 Information provided in confidence

47. During the Commissioner's investigation, the council stated that in addition or alternatively to section 36, the exemption at section 41 of the FOIA applies. A public authority is able to raise a new exemption or exception either before the Commissioner or the First Tier Tribunal and both must consider any such new claims.
48. Section 41(1) provides that information is exempt if it was obtained by the public authority from any other person and the disclosure would constitute an actionable breach of confidence.

Was the information obtained from another person?

49. The first step is for the Commissioner to consider whether the information was obtained by the council from any other person in order to satisfy the requirement of section 41(1)(a).
50. The withheld information in this case is as described in paragraph 25. The Commissioner's guidance on section 41⁷ states that this exemption will not apply to information that the public authority has generated itself. This reflects the fact that the exemption is not just concerned with the sensitivity of the information but that it also requires the information be obtained from another party. Therefore section 41 cannot apply to the large proportion of the withheld information which constitutes emails sent by the council.
51. The Commissioner does however consider that some of the withheld information, for example the BBC's operating agreement and the structural engineer's design philosophy of the proposed alterations to Lund Point, has been obtained from another party and has therefore gone on to consider whether the disclosure would constitute an actionable breach of confidence.

Actionable claim for breach of confidence

52. Whilst it is not the only test for establishing confidence, the Commissioner finds that the appropriate test for this case is that which is

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http://www.ico.gov.uk/for_organisations/guidance_index/~//media/documents/library/Freedom_of_Information/Detailed_specialist_guides/CONFIDENTIALINFORMATION_V4.ashx

set out in the case of *Coco v Clark* [1969] RPC 41. According to the decision in this case a claim for breach of confidence can be established where:

"... three elements are normally required if ... a case of breach of confidence is to succeed. First, the information itself ... must 'have the necessary quality of confidence about it'. Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it..."

53. All three elements must be present for a claim to be made and, for that claim to be 'actionable' within the meaning of section 41(1)(b) of the FOIA, a public authority must establish that an action for breach of confidence would, on the balance of probabilities, succeed. This requires consideration of whether or not there would be a public interest defence to such a claim.

54. The council stated that;

"It has been an established principle, including by the Information Commissioner, that commercially sensitive information obtained during negotiations is confidential. This was underlined by a confidentiality agreement that was signed between the Council and the BBC (see Clause 13 of the lease agreement).

We consider that the information has the necessary quality of confidence as it is more than trivial and is not already in the public domain. The potential detriment to the BBC has been outlined above, and we feel that there is a high likelihood that the BBC could take legal action against the council for breach of confidence.

We do not consider that there are any overriding public interest factors in favour of releasing the information."

55. The Commissioner notes that the confidentiality agreement contained at clause 13 of the lease relates to the lease itself which was disclosed, subject to minor redactions for commercially sensitive information, in the internal review response. Therefore, the Commissioner does not consider that the council has provided adequate detail for him to conclude that the correspondence which is the subject of this decision notice has been imparted in circumstances creating an obligation of confidence.

He has therefore concluded that the council has not sufficiently demonstrated the necessary components for section 41 to apply in this case.

Right of appeal

57. 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

58. 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.
59. 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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