

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 19 September 2017

Public Authority: London Borough of Sutton

Address: Civic Offices
Throwley Way
Sutton SM1 1EA

Decision (including any steps ordered)

1. The complainant has requested information from London Borough of Sutton ("the Council") in relation to an Executive meeting held in 2011. The Council provided some of the requested information, however it withheld part of the information ("the withheld information"). The Council cited sections 36(2)(b)(i) and (ii) of the FOIA as a basis for non-disclosure.
2. The Commissioner's decision is that sections 36(2)(b)(i) and (ii) of the FOIA are engaged in relation to the specific withheld information, however the public interest in disclosure of the information outweighs that in maintaining the exemptions in all the circumstances of the case.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - To disclose to the complainant the information previously withheld under sections 36(2)(b)(i) and (ii) of the FOIA.
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 16 December 2015, the complainant wrote to the Council and requested information in the following terms:

"Please can you forward to me the recording of the Executive meeting of 7th November 2011?"

6. The Council responded on 17 December 2015. It stated that it could provide most of the requested recording, however it could not provide some of it, i.e. the part where the meeting went into private session. It did not specify an applicable FOIA exemption at that time.
7. The complainant contacted the Council on the same day, stating that the part of the requested information being withheld by the Council was the part that he required. Following an internal review the Council wrote to the complainant, stating that the relevant section of the recording was exempt from disclosure under sections 36(2)(b)(i) and 36(2)(b)(ii) of the FOIA.

Scope of the case

8. The complainant contacted the Commissioner to complain about the way his request for information had been handled.
9. The scope of the case is the relevant section of the recording which is required by the complainant ("the withheld information").
10. The Commissioner has considered whether or not the Council has correctly applied sections 36(2)(b)(i) and (ii) to the withheld information.

Reasons for decision

11. Section 36 of FOIA states that information is exempt from disclosure if in the reasonable opinion of the qualified person, disclosure:
 - (b) would or would be likely to, inhibit –
 - (i) the free and frank provision of advice, or
 - (ii) the free and frank exchange of views for the purposes of deliberation, or
 - (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.
12. This exemption is also subject to the public interest. So, in addition to demonstrating to the Commissioner that one or both limbs of section 36 of the FOIA is engaged, the public authority must also consider the

public interest arguments for and against disclosure and demonstrate that the public interest rests in maintaining the exemption.

13. In determining whether any of these limbs of the exemption has been correctly engaged, the Commissioner is required to consider the qualified person's opinion as well as the reasoning which informed that opinion. Therefore the Commissioner must:
 - Ascertain who the qualified person is,
 - Establish that they gave an opinion,
 - Ascertain when the opinion was given, and
 - Consider whether the opinion was reasonable.
14. The Council confirmed that the qualified person, who is the Council's Monitoring Officer, received a submission which described the withheld information and outlined the arguments for and against disclosure. The Monitoring Officer did not hear the specific recording which forms the withheld information.
15. The Commissioner, having established the qualified person's opinion and how it was sought and provided, now needs to consider whether this opinion is a reasonable opinion to hold. It is important to highlight that it is not necessary for the Commissioner to agree with the opinion of the qualified person in a particular case. The opinion also does not have to be the only reasonable opinion that could be held or the 'most' reasonable opinion. The Commissioner only needs to satisfy herself that the opinion is reasonable or, in other words, it is an opinion that a reasonable person could hold.
16. The qualified person may apply the exemption on the basis that the prejudice to the relevant interests protected by section 362(b) either 'would' occur or 'would be likely' to occur. This means that there are two possible limbs upon which the exemption can be engaged. The term 'would be likely' to inhibit is interpreted as meaning that the chance of any inhibition or prejudice should be more than a hypothetical possibility; there must be a real and significant risk. The alternative limb of 'would' inhibit is interpreted as meaning that the qualified person considers it is more likely than not that the inhibition or prejudice would occur.
17. The qualified person has stated that her opinion is that the prejudice 'would be likely' to occur. It is on this basis that the Commissioner will consider whether the qualified person's opinion is reasonable.

Section 36(2)(b)(i) and (ii)

18. The Council has argued that disclosure of the withheld information would inhibit both the free and frank provision of advice and the exchange of views for the purposes of deliberation. It argued that the withheld information consists of discussions which were supposed to be held in closed session. Committee members involved in the discussions would have had an expectation that they would remain confidential.
19. The Commissioner recognises that disclosure of the withheld information could make individuals less free and frank in the expression of their views and in the provision of advice, if they believed that their opinions voiced in discussions of this nature would not be kept confidential. She has considered this in the context and purpose of the discussions that took place and she accepts that the individuals' contributions to these exchanges were important and relevant to the decision-making process.
20. As such, the Commissioner is satisfied that sections 36(2)(b)(i) and (ii) are engaged, that the qualified person's opinion that the disclosure would be likely to inhibit the free and frank exchange of views for the purposes of deliberation and the free and frank provision of advice, is a reasonable one. Although the qualified person did not listen to the exact recording when giving her opinion, the opinion was based on the principle that disclosure of such discussions would lead to less free and frank discussions and provision of advice in the future, i.e. would have a 'chilling effect.'
21. In light of the above the Commissioner is satisfied that the opinion of the qualified person is a reasonable one and that therefore the exemptions provided by sections 36(2)(b)(i) and (ii) are engaged.

The public interest test

22. Section 36 is subject to the public interest test. This means that the requested information can only be withheld if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure. In assessing the public interest in maintaining the section 36(2)(b)(i) and (ii) exemption the Commissioner will consider the impact on the willingness of individuals who take part in such discussions to exchange views, engage in debate, and provide frank and candid advice and opinions.

Public interest arguments in favour of maintaining the exemption

23. The Council states that the withheld information consists of confidential advice and views provided by Councillors in closed session. The Council argues that disclosure of the withheld information would be likely to inhibit the free and frank provision of advice and exchange of views for the purposes of deliberation. The main principle of the Council's argument is that it is important that Councillors have a safe space, i.e. closed session, within which they can freely share honest and critical views without fearing that they will eventually make their way into the public domain. It considers that taking this assurance away would create a chilling effect and lead to less forthright views being shared in future, thereby prejudicing future decision-making.
24. The Council argues that the public interest in maintaining this space is greater than the public interest in transparency. It states that the perceived loss of such a space would be likely to lead to a loss of confidence amongst those expressing opinions and providing advice. The Council considers that this would be likely to lead to reticence in future discussions, ultimately leading to less effective decisions being taken.

Public interest arguments in favour of disclosure

25. The Council acknowledges that there is a general public interest in transparency. This would help further the public's understanding of the way in which the Council operates and its accountability in respect of important issues.
26. The complainant argues that disclosure of the withheld information would enhance the Council's transparency and demonstrate that it is adhering to the values of honesty, openness and accountability. It would be in the public interest for a Council to demonstrate its adherence to those values.

Balance of the public interest arguments

27. Having perused the withheld information, the Commissioner must consider where the balance of the public interest lies. In doing so, she has taken into account the opinion of the qualified person that disclosure would be likely to cause the inhibition described. This carries a certain amount of weight through to the public interest test.
28. However, the exact weight that should be given to maintaining the exemption depends on the particular circumstances of the case. This

means that, whilst the Commissioner accepts that the opinion of the qualified person that inhibition would be likely to occur is reasonable, she will go on to consider the severity, extent and frequency of that inhibition to determine where the balance of the public interest lies.

29. The Commissioner notes there is a public interest inherent in section 36(2)(b), being a prejudice-based exemption, in avoiding harm to the decision-making process. She has taken into account that there is automatically some public interest in maintaining this exemption to avoid such harm.
30. The main arguments advanced by the Council relate to the concepts of a 'safe space' and a 'chilling effect.' The Commissioner, having perused a transcript of the withheld information, notes that the topic under discussion was far from being a live issue at the time of the request – the information was well over four years old at that time. In relation to the specific information contained in the recording, the individuals would at the time of the request have had no need of a 'safe space' in which to exchange those specific deliberations and advice, therefore the Commissioner does not accept that a 'safe space' was still required in respect of the particular withheld information in this case.
31. The chilling effect argument is that disclosure of information would be likely to inhibit free and frank discussions in the future and that the loss of frankness and candour would be likely to damage the quality of advice and deliberation and lead to poorer decision making. The Council argues that the advice and opinions of the individuals were provided in the expectation that these discussions would remain confidential. Therefore, disclosure of these would be likely to lead to a future reticence to express such opinions or provide such advice, as the fear would be that these may be eventually disclosed into to the public domain.
32. However, both the Commissioner and the Information Tribunal have frequently been unconvinced of a wide-ranging chilling effect as alleged by public authorities, expressing scepticism that the disclosure of information on one issue or policy would affect the frankness of exchange of views on another unrelated issue or policy. For example, in *Friends of the Earth v Information Commissioner and Export Credits Guarantee Department*¹ (para 61), the Tribunal commented:

¹ EA/2006/0073

"It is not enough in this Tribunal's view to fall back on a plea that revelation of all information otherwise thought to be inviolate would have some sort of 'chilling effect'.

33. The Commissioner's guidance on section 36(2) states that:

"Chilling effect arguments operate at various levels. If the issue in question is still live, arguments about a chilling effect on those ongoing discussions are likely to be most convincing. Arguments about the effect on closely related live issues may also be relevant. However, once the decision in question is finalised, chilling effect arguments become more and more speculative as time passes. It will be more difficult to make reasonable arguments about a generalised chilling effect on all future discussions."

34. 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. In this case, as stated in paragraph 39 above, the withheld information was over four years old at the time of the request. The Commissioner does not accept that there would be a 'chilling effect' in relation to the specific withheld information, however she accepts the opinion of the qualified person that future discussions may be inhibited, as the individuals may be more cautious.

35. The Commissioner has considered the public interest arguments presented in this case and has given due weight to the opinion of the qualified person and has considered the likely extent, frequency and severity of any impact of disclosure on the free and frank provision of advice and exchange of views for the purposes of deliberation in the context of this particular case and this particular information.

36. The Council has stated that the qualified person's opinion was formed on the principle that, if individuals believe that there is a risk of their advice and opinions, which they thought they were providing in confidence, making their way into the public domain, this would be likely to inhibit the provision of such advice and opinions in the future. However, in relation to the specific withheld information, i.e. the discussions which were recorded, the Council accepts that, due to the passage of time, there would not be anything specifically contained in that information which, if disclosed, would be likely to cause prejudice to future discussions.

37. The Commissioner notes that the withheld information is the audio recording of discussions which took place in the closed session part of a particular Executive meeting, which is a session in which private matters are discussed and members of the press and other public are

not permitted to attend. The Commissioner notes that the circumstances of this case are unique in that closed session discussions are not normally recorded – this one was recorded in error.

38. Having noted the above circumstances, the Commissioner considers that such a situation, where there exists a recording that is not supposed to have been made, is highly unlikely to arise again in the future. Therefore, any fears of individuals that their deliberations and advice exchanged in closed sessions could be routinely disclosed to the public can be allayed by the assurance that such sessions are unlikely to be recorded again, so fear of future disclosure should not be an issue.
39. Having considered the unique circumstances of the case, the age of the information, and the likelihood of such circumstances arising again, the Commissioner considers that the public interest in this case favours disclosure of the withheld information, as disclosure would still show that the Council was demonstrating the values to which a public authority should adhere. If there is an assurance given to relevant individuals that information of this nature is unlikely to exist again in the future, then future discussions are unlikely to be inhibited and unlikely to undermine the efficacy of the Council's decision-making processes.
40. The Commissioner 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 withheld information and so the withheld information should be disclosed.

Right of appeal

41. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504
Fax: 0870 739 5836
Email: GRC@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

42. 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.
43. 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

Deirdre Collins
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