

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 February 2014

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 requested minutes and papers from a meeting of the Information Governance Group of the London Borough of Tower Hamlets (the Council). The Council refused to disclose this information under the exemptions provided by the following sections of the FOIA: 36(2)(b)(i) & (ii) (inhibition to the free and frank provision of advice and exchange of views) and 36(2)(c) (other prejudice to the effective conduct of public affairs).
2. The Commissioner's decision is that the Council cited these exemptions correctly and so it was not obliged to disclose the requested information.

Request and response

3. On 17 April 2013, the complainant wrote to the Council and requested information in the following terms:

"Please could you provide me with all the papers for the most recent meeting of the Information Governance Group together with the resultant minutes."

4. The Council responded on 17 May 2013. It disclosed to the complainant the agenda of the meeting in question, but withheld the meeting minutes and papers referred to in the meeting. The Council cited the exemptions provided by the following sections of the FOIA:

- 36(2)(b)(i) (inhibition to the free and frank provision of advice)
- 36(2)(b)(ii) (inhibition to the free and frank exchange of views)
- 36(2)(c) (other prejudice to the effective conduct of public affairs)
- 43(2) (prejudice to commercial interests)

5. The complainant responded on 23 May 2013 and requested an internal review. The Council responded with the outcome of the internal review on 20 June 2013. The conclusion was that the partial refusal under the exemptions cited previously was upheld. The Council also at this stage indicated that it believed that section 14 (vexatious requests) applied.

Scope of the case

6. The complainant contacted the Commissioner on 25 July 2013 to complain about the partial refusal of his information request. The complainant indicated at this stage that he did not agree that the exemptions cited by the Council applied. The complainant also made specific points about the Council not making clear in the refusal notice or internal review response whether section 36 had been cited on the basis of the opinion of the appropriate qualified person and also suggested that the Council had inappropriately disclosed information about him on the website *whatdotheyknow.com*.
7. The section 36 point raised by the complainant is covered in the analysis below. On the issue of what the complainant believes was an inappropriate disclosure by the Council, the Commissioner notes that it was the choice of the complainant to conduct his correspondence with the Council via *whatdotheyknow.com*. Whilst public authorities should exercise caution about what they publish via that website, the complainant could have avoided this issue by choosing to conduct his correspondence with the Council in private.
8. The complainant also suggested that the Council provided insufficient explanations for the exemptions it cited when refusing his request, and that the Council responded to the request one day late. On the issue of the detail of the explanations for the exemptions cited, whilst there may be some room for improvement here, particularly in the level of detail included in the refusal notice, the Commissioner views the level of explanation provided in the refusal notice and internal review combined to be sufficient for the requirements of section 17 of the FOIA.
9. The complainant made the specific point that the Council did not specify subsection (2) of section 43 in the refusal notice. The Commissioner

notes however that the refusal notice did refer specifically to prejudice to commercial interests, thus making it clear that subsection (2) was relied upon, and that, in any event, subsection 43(2) was specified in the internal review response.

10. As to whether the refusal notice was provided one day outside 20 working days, the version of the request that was made available to the ICO by the complainant via *whatdotheyknow.com* does not record the time on which that request was made. If, for example, it had been at 23.59 on 17 April 2013, it would not be regarded as having been received by the Council until 18 April 2013 and, therefore, the response would have been provided on the twentieth working day following receipt. As it is not possible to verify that the request was received by the Council on 17 April 2013, the Commissioner finds no breach of the FOIA through the timing of the response.
11. During the handling of this case, the Council contacted the complainant again on 27 January 2014 and disclosed a document to him that had been in draft form at the time that the request was made. The complainant was also referred to where information was available from another Council. The information covered by that response is not included within the scope of this notice.

Reasons for decision

Section 36

12. The Council cited sections 36(2)(b)(i), which provides an exemption where disclosure would be likely to inhibit the free and frank provision of advice, and 36(2)(b)(ii), which provides the same where disclosure would be likely to inhibit the free and frank exchange of views. It has also cited section 36(2)(c), which provides an exemption where disclosure would otherwise be likely to prejudice the effective conduct of public affairs. The approach of the Commissioner to section 36(2)(c) is that the identified prejudice should not be covered by any of the other exemptions in part II of the FOIA.
13. These exemptions can only be cited on the basis of the reasonable opinion of a specified qualified person (QP). The task for the Commissioner here is to establish whether these exemptions were cited on the basis of an opinion from the specified QP, and whether that opinion was reasonable.
14. The now archived website *foi.gov.uk* records that the nominated QPs for local authorities are the Monitoring Officer and the Chief Executive. In this case, the Council has supplied to the ICO evidence that the

Monitoring Officer acted as QP and that the opinion was given on 13 May 2013. These exemptions were, therefore, cited on the basis of an opinion from the correct QP.

15. The complainant raised the issue when contacting the ICO of the Council not being specific in its correspondence with him about who had acted as QP. Whilst it is good practice for a public authority to give as full an explanation as possible when refusing a request, there is no specific requirement when citing section 36 to inform the requester of who acted as QP. The Council did not, therefore, breach the FOIA in this regard.
16. Turning to whether the QP's opinion was reasonable, the documentation supplied by the Council to the ICO records that the QP viewed the withheld information to assist in the formation of their opinion. This also records that the basis for the opinion on sections 36(2)(b)(i) and (ii) was that participants in future meetings would be likely to be inhibited due to concern that the record of their contributions may be disclosed.
17. A separate section 36(2)(c) argument was articulated at the internal review stage. At that point the QP referred to the Information Governance Group's main responsibility being information security. The opinion of the QP was that disclosure would be likely to prejudice its efforts in this regard by providing "*inside knowledge*" that might lead to the security of the Council's systems being compromised.
18. Having viewed the withheld information, the Commissioner's view on the reasonableness of the QP's opinion is as follows. In relation to the meeting minutes, the Commissioner accepts that inhibition to participants in these meetings in future as a result of disclosure is a reasonable argument and so the opinion of the QP was reasonable. The exemptions provided by sections 36(2)(b)(i) and (ii) are therefore engaged for the two sets of meeting minutes (the second set of which is within the scope of the complainant's request as it was circulated at the meeting specified in the request) included within the withheld information.
19. Turning to the papers that were circulated at the meeting, the first of these is titled "*Incident Summary*". This lists information security incidents and what the Council has done in reaction to these. The Commissioner accepts that disclosure of this information may have an inhibiting effect on individuals drafting similar reports in future. He is also of the view that the section 36(2)(c) argument about information security is relevant to this information. The Commissioner finds that the opinion of the QP was reasonable and so sections 36(2)(b)(i), (b)(ii) and (c) are engaged in relation to this document.

20. The two remaining documents are titled "*Information Security Policy*" and "*Information Security Policy Exception report*". In relation to the "*Information Security Policy Exception report*", the Council has stated that this was in draft form at the time of the request. That it was being drafted at that time means that it is clear why sections 36(2)(b)(i) and (ii) are relevant in that the drafters may have been inhibited through disclosure of a version of this document that had not been finalised. In relation to that document, therefore, the Commissioner finds that the opinion of the QP was reasonable.
21. As to the "*Information Security Policy*", the opinion of the QP here appeared to be that section 36(2)(c) should apply due to the "*inside knowledge*" argument referred to in paragraph 17 above. Whilst it has not been explained specifically how the QP believed that disclosure of this particular information could render the Council's IT systems vulnerable, the Commissioner does accept that this information describes the Council's systems and so the reasoning given for the QP's opinion appears relevant to the content of this information. The Commissioner concludes, therefore, that the QP's opinion was reasonable and so the exemption provided by section 36(2)(c) is engaged in relation to this document.
22. The next step is to consider the balance of the public interest. The Commissioner has accepted that the opinion of the QP that disclosure would result in inhibition and prejudice was reasonable; the role of the Commissioner here is not to challenge or reconsider his conclusion on the reasonableness of that opinion. Instead, his role is to consider whether the public interest in disclosure equals or outweighs the concerns identified by the QP. In forming a view on the balance of the public interest, the Commissioner has taken into account the general public interest in the openness and transparency of the Council, as well as those factors that apply in relation to the specific information in question here.
23. Covering first factors that favour disclosure of the information in question, the Commissioner recognises that there is a legitimate public interest in disclosure of information recording the information governance efforts of the Council. This interest covers particularly where there are weaknesses in the information governance procedures that the Council has in place. Where errors in information governance have occurred, this could, for example, lead to an inappropriate disclosure of personal data held by the Council, which would most likely relate to residents within the Council's jurisdiction. The Commissioner's view is that there is a valid public interest in disclosure on these grounds in order that the public, and particularly residents of the area covered by the Council, are aware of and understand the information governance efforts of the Council.

24. Further to this, the Commissioner's view is that a disclosure of information that would lead to an improvement in the information governance practices at the Council would be in the public interest. As disclosure of information about previous information governance failings may lead to improvements in avoiding such incidents in future, the Commissioner regards this as a valid factor in favour of disclosure of the information.
25. Turning to factors that favour maintenance of the exemptions, the Commissioner has found that the QP's opinion that inhibition and prejudice would be likely to result was reasonable. When considering other prejudice-based exemptions, the Commissioner takes the approach that the wording "*would be likely*" as it is used in the FOIA indicates that there is a real and significant risk of prejudice, rather than a remote chance.
26. The Commissioner has, therefore, accepted that it was reasonable for the QP to be of the opinion that there was a real and significant risk of disclosure leading to inhibition and prejudice. It is in the public interest for the Council to avoid inhibition and prejudice to its information governance and security capabilities. This is a valid public interest factor in favour of maintenance of the exemptions.
27. In particular, the Commissioner recognises that disclosure which has a negative impact upon the information governance and security arrangements of the Council would lead to the possibility of harm or distress to the residents of Tower Hamlets, and any other individuals whose personal data is held by the Council. This harm or distress would be as a result of accidental or inappropriate disclosure of personal data. There is a public interest in avoiding this outcome and this is a valid factor in favour of maintenance of the exemptions.
28. The Commissioner has recognised valid factors in favour of disclosure of the information, particularly as this may lead to an improvement in the records management practices of the Council. However, when combining the weight of the public interest in avoiding the outcome that the QP found would be likely with that in avoiding accidental or inappropriate disclosures of personal data, the Commissioner finds that the factors in favour of disclosure do not match the weight of those in favour of maintenance of the exemptions.
29. The conclusion of the Commissioner is, therefore, that the public interest in the maintenance of the exemptions outweighs that in disclosure. The Council was not, therefore, obliged to disclose the requested information. As this conclusion has been reached on section 36, it has not been necessary to go on to also consider section 43(2).

Reference: FS50506410

Right of appeal

30. 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: GRC@hmcts.gsi.gov.uk

Website: <http://www.justice.gov.uk/tribunals/general-regulatory-chamber>

31. 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.
32. 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

Jon Manners
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