

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 July 2015

Public Authority: London Borough of Lambeth
Address: Town Hall
Brixton Hill
Lambeth
SW2 1RW

Decision (including any steps ordered)

1. The complainant has made a request to the London Borough of Lambeth (the Council) for copies of reports produced about the Campaigns and Information Unit submitted to cabinet members, including reports concerning the "Lambeth Talk" publication. The Council provided some of the requested information it held but withheld a number of reports and attachments under sections 36(2)(b) and (c) (prejudice to the effective conduct of public affairs) of FOIA. It also later introduced section 43(2) (commercial interests) of FOIA as a further ground for refusing the disclosure of parts of this information. The Commissioner has decided that the exemptions provided by sections 36(2)(b) and (c), but not section 43(2), are engaged. He has, however, found that on balance the public interest favours disclosure. The Council should therefore disclose the information in order to comply with the legislation.
2. 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

3. On 10 October 2014 the complainant contacted the Council and requested information of the following description:

Please supply reports about the Campaigns and Information Unit submitted to cabinet members as individuals or to the informal cabinet over the past five years. Include reports concerning the "Lambeth Talk" publications. Please supply the correspondence over the past five years between the Department for Communities and Local Government and the council concerning this Lambeth Talk publication.

4. The Council responded on 7 November 2014 and confirmed that it held information covered by the request. The Council enclosed some of the requested documents, advised that cabinet minutes were reasonably accessible and therefore exempt under section 21 of FOIA and informed the complainant that it was withholding the remainder of the information under sections 36(2)(b)(i) and (ii) of FOIA. The section 36 exemptions to disclosure are qualified by the public interest test and the Council found that on balance the public interest favoured maintaining the exemption.
5. On 12 December 2014 the complainant asked the Council to reconsider its reliance on the section 36(2)(b) exemptions to withhold information. He considered that the Council's failure to specify the nature of this information was unhelpful. The complainant noted, however, that the material supplied did not include any reports prepared about the Campaigns and Information Unit and argued that this information should be disclosed.
6. An internal review was completed and the outcome provided by the Council on 30 January 2015. This found that that the Council had correctly used sections 36(2)(b)(i) and (ii) to withhold information.

Scope of the case

7. The complainant contacted the Commissioner on 4 February 2015 to complain about the Council's decision to refuse the disclosure of information covered by his request.
8. During the course of the Commissioner's investigation, the Council confirmed its position under the legislation with regard to the withheld information. This amended the position set out in the Council's internal review. In relation to section 36(2), the Council has maintained a reliance on both limbs of section 36(2)(b) but also verified its use of section 36(2)(c). In addition, the Council considered that parts of the withheld information were subject to section 43(2) of FOIA. The Commissioner's analysis of the Council's decision to withhold requested information is set out in the body of this notice.

9. The withheld information comprises three reports, including some attachments, dating from April 2013, October 2013 and July 2014. The Council had also initially included another, later report as part of its considerations. It was discovered during the Commissioner's investigation that this report actually post-dated the request and therefore the Commissioner has not had to consider this information within this decision notice.

Reasons for decision

Background

10. The withheld reports were produced by Lambeth Communications (LamCo). This was set up by the Council's communications division in October 2013. The Council has explained that the aims and objectives of LamCo were 1) to provide a consistent income for Lambeth Council; 2) to support efforts to improve and build upon practice and standards across the industry; and 3) to develop partnerships with other local authorities for reciprocal effect. LamCo is not a separate legal entity but a trading division of Lambeth communications.
11. A press release issue on 4 July 2013 stated that LamCo would offer a unique service to local authorities in the following areas:
 - **Deliver exceptional communications.** *Lambeth's communications team have been transformed in recent years, LamCo will use this valuable experience to help other councils improve the way they communication.*
 - **Build long-term relationship based on collaboration and partnership.** *LamCo will use our impressive network of partners to deliver big improvements for their clients and more efficient services. These relationships will benefit Lambeth financially as all profits from LamCo will be used to fund council services.*
 - **Use our experience to communicate the political vision and priorities of local authorities.**
12. The Council has stated that the reports within the scope of the request are about its communications strategy over a period of time. The communications plans were drawn up for the Council as a guide to the communications team and the specific measures within it were taken to Informal Cabinet in order to generate discussion about priorities and emphasis.

Section 36(2) – prejudice to the effective conduct of public affairs

13. The Council has applied sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) to the withheld information. These exemptions state that information is exempt information if, in the reasonable opinion of a qualified person, disclosure under the legislation:

(b) would, or would be likely to, inhibit –

(i) the free and 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

14. Unlike other exemptions in FOIA, an exemption in section 36(2) can only be engaged where a public authority has consulted with a qualified person defined in the legislation and it is the qualified person's opinion that the harm stated in the exemption would, or would be likely to, arise through disclosure.

15. To find that an exemption in section 36(2) is engaged, the Commissioner must be satisfied not only that the qualified person gave an opinion on the likelihood of prejudice occurring but also that the opinion was reasonable in the circumstances. In other words, the qualified person must have reasonably concluded that there is a link between disclosure and a real and significant risk of the prejudice that the relevant exemption is designed to protect against. A public authority may rely on more than one exemption in section 36(2) as long as the qualified person has offered a view on each of the exemptions cited and the arguments advanced correspond with the particular exemption. If a link is not made, the Commissioner will be unable to find that the opinion was a reasonable with regard to that exemption.

16. The Commissioner's guidance on section 36¹ explains that information may be exempt under section 36(2)(b)(i) or (ii) if its disclosure would, or would be likely to, inhibit the ability of public authority staff and others to express themselves openly, honestly and completely, or to explore extreme options, when providing advice or giving their views as

¹ https://ico.org.uk/media/for-organisations/documents/1175/section_36_prejudice_to_effective_conduct_of_public_affairs.pdf

part of the process of deliberation. The guidance says that the rationale for this is that inhibiting the provision of advice or the exchange of views may impair the quality of decision making by the public authority. The exemptions are therefore about the processes that may be inhibited rather than what is necessarily in the information itself.

17. Section 36(2)(c), on the other hand, refers to the prejudice that may *otherwise* arise from disclosure, although the legislation does not define what is meant by the use of the term *otherwise*. The Commissioner considers, however, that the prejudice envisaged must be different to that covered by any other exemption relied upon in section 36(2). Differently constituted Information Tribunals have previously found that the exemption may potentially apply to circumstances where disclosure could disrupt a public authority's ability to offer an effective public service.

The qualified person

18. The Council has informed the Commissioner that the person consulted in his role as the qualified person was the monitoring officer. The withheld material was discussed verbally on 7 November 2014 after the request had been received and on 11 January 2015 when the Council was carrying out an internal review. According to the Council, the qualified person's advice was always that sections 36(2)(b) and 36(2)(c) applied and suggests the failure to reference section 36(2)(c) in the responses to the complainant was merely an oversight.
19. The discussions with the qualified person were not recorded in detail and therefore the Council has retrospectively completed the section 36 template form² produced by the Commissioner for this purpose. The monitoring officer certified that the record was an accurate representation of his views.
20. Section 36(5) of FOIA describes what is meant by a 'qualified person' in the legislation. For further guidance, the Ministry of Justice also previously produced a list of qualified persons by type of authority³. This confirms that a monitoring officer is a qualified person for a local authority within the meaning of the Local Government Act 1972 in

² https://ico.org.uk/media/for-organisations/documents/1176/section_36_record_of_the_qualified_persons_opinion.doc

³ <http://webarchive.nationalarchives.gov.uk/20100512160448/http://www.foi.gov.uk/guidance/exguide/sec36/annex-d.htm>

England, which includes the Council. The Commissioner is therefore satisfied that the person consulted about the request was a qualified person according to this description. Furthermore, the Council has provided sufficient evidence for the Commissioner to accept that the qualified person had approved the application of the section 36(2) exemptions. The Commissioner has therefore next had to consider whether the qualified person's opinion with regard to sections 36(2)(b) and (c) was reasonable.

21. When deciding on the reasonableness of the qualified person's opinion, the test to be applied is whether the opinion is one that a reasonable person *could* hold and not whether it is the *most* reasonable opinion. The critical issue is that the arguments being advanced by the qualified person not only correspond with the factors described in the exemption but also correspond with the information to which the exemption has been applied.
22. The qualified person's opinion is about whether the prejudice or inhibition would or would be likely to occur. 'Would' prejudice means it is more likely than not that the prejudice would occur. 'Would be likely' is a lower standard but nevertheless requires that there is a real and significant risk of the prejudice or inhibition occurring.
23. As stated, the Commissioner considers it appropriate to view the section 36 form retrospectively completed by the Council as an accurate representation of the qualified person's opinion. The record itself contains sections for the arguments put forward in favour of applying the exemptions and a section for counter arguments. The record also has space for the qualified person's opinion itself.
24. The section containing the qualified person's opinion begins by explaining the role of the Informal Cabinet. It states that the Informal Cabinet does not have any powers to make official decisions but is designed for the cabinet in their political capacity to have oversight of the direction of travel for the organisation. The record continues by addressing the exemptions in turn.

Section 36(2)(b)(i)

25. The qualified person considers that soundings of the Informal Cabinet were not intended to be the subject of public scrutiny or transparency precisely because the Informal Cabinet only has an advisory capacity and does not have any formal powers. He stresses the argument that disclosure would reveal and internal thinking processes and may inhibit the imparting or commissioning of advice. It also states that members would not feel free to express themselves 'openly, honestly or completely or to explore extreme options'. The qualified person

considered that disclosure 'would be likely' to have the inhibitive effect described.

26. The Commissioner has had regard to the purpose for which the Informal Cabinet meets and particularly its primary function of giving advice on important issues. He is satisfied not only that the opinion relates to the exemption in question but is also one that a reasonable person could hold.

Section 36(2)(b)(ii)

27. The qualified person's opinion with regard to the exemption is similar in many respects to the opinion given on the application of section 36(2)(b)(i) of FOIA. In relation to section 36(2)(b)(ii), however, the qualified person places greater emphasis on the argument that members would not feel to express themselves 'openly, honestly or completely or to explore extreme options'. The qualified person goes on to argue that this would ultimately be detrimental to the quality of decision making. The Commissioner again applied the lower standard of likelihood – 'would be likely' – in terms of the inhibitive effects occurring.
28. The Commissioner accepts that the Informal Cabinet is a forum for members to exchange views on a policy direction of travel with a view to establishing the implications of the policy. He considers that a reasonable person could form the view that exposing this forum to public scrutiny may have an inhibitive effect on the contribution of members, which would in turn affect the quality of the output from the forum. Insofar as this would weaken the integrity of the Informal Cabinet itself, the Commissioner finds reasonable the qualified person's opinion that there is a real risk that disclosure could lead to the prejudice described by the exemption.

Section 36(2)(c)

29. The qualified person decided that the Council needs a safe space to examine Communications and Information issues, particularly where there are sensitivities around the policy message, to enable the effective conduct of public affairs. The qualified person argued that placing the information in the public domain would be likely to disrupt the Council's work and would divert resources in dealing with enquiries about the items discussed at the meetings. According to the qualified person, this may compromise established protocols for publishing information that are set down which could be exploited. Again the lower standard, 'would be likely', was considered to apply.
30. As stated, section 36(2)(c) may be applied in circumstances where disclosure may have a disruptive effect on a public authority, for

example because of the diversion of resources in managing the effect of disclosure. The Council advises that reports are presented to the Informal Cabinet in order to generate discussion about priorities and to create a debate about where policy should be focused. The Commissioner understands that this may mean the information put before the Informal Cabinet may refer to options, whether realistic or not, that could be picked up on by the public and enquired about. The Commissioner is therefore prepared to accept that it was not unreasonable for the qualified person to conclude that disclosure would be likely to have a disruptive effect.

31. For the reasons explained, the Commissioner has found that the exemptions in section 36(2)(b) and (c) are engaged. He must therefore go on to consider the public interest test. When assessing the public interest, the Commissioner acknowledges that the qualified person's opinion relating to the inhibitive and prejudicial effect of disclosure should be afforded a degree of weight befitting his seniority. In deciding where the balance of the public interest lies, however, the Commissioner must make up his own mind on the severity, extent and frequency of the inhibition and prejudice.

Public interest test

32. The Commissioner considers together the balance of the public interest with respect to the exemptions in section 36(2), looking in turn at the arguments for and against disclosure.

Public interest arguments in favour of disclosure

33. The Commissioner understands that some weight must always be attached to the public interest in the general virtues of openness, transparency and accountability. The complainant has argued that the case for disclosure is further strengthened in this case because of the nature of the information that has been requested. To illuminate the complainant's position, the decision notice reproduces below the relevant extracts of his letter of 12 December 2014 requesting an internal review, which set out his arguments for disclosure.

As I understand it the Informal Cabinet is in receipt of reports written by council officers and is advised at the time of discussion by council officers. Local Government Officers are publicly paid officials who are required to act impartially, irrespective of the political affiliation of elected members. Reports sent to cabinet members or to the informal cabinet must surely of themselves be impartial? Their disclosure could not possibly inhibit whatever discussions subsequently take place. Unless other exemptions applied such as commercial confidentiality, I would expect to be

supplied with such reports. By its nature, meetings of the informal cabinet are secret; the public is banned. I have no access to the discussions which take place nor to any material which the cabinet members may sponsor or supply for themselves privately. The Informal Cabinet is free to have whatever exchanges of view it likes, uninhibited, but surely the blanket of secrecy cannot apply to reports supplied by local government officers in the course of their public duty.

[...] There is a wider principle at stake here. In these circumstances the informal cabinet would be enabled to determine its policies and issue its instructions entirely in secret. The public cabinet meeting would be rendered a mere rubber stamp. There is thus a case for ensuring that private party meetings of cabinet members be supplied only with officer reports which were identical with those supplied to the public cabinet meeting. There cannot be two classes of reports, those used in secret to inform the actual decisions of the cabinet and another set of reports produced for public consumption at the public cabinet meeting.

34. The Council has also acknowledged the general benefits of enhanced transparency and accountability, which it accepts would allow individuals to understand decisions made by public authorities affecting their lives and, in some cases, assist individuals in challenging those decisions.

Public interest arguments for maintaining the exemption

35. In relation to sections 36(2)(b)(i) and (ii), the Commissioner has previously accepted the qualified person's view that disclosure would be likely to deter staff and councillors from being as free and frank in their discussions. This is known as the chilling effect. The Council argues that the weakening of the decision-making process and the possibility that less detailed reports and records of discussions would be kept in the future is clearly not in the public interest.
36. With regard to section 36(2)(c), the Council states that the public ultimately gains from it being able to operate effectively, which includes decisions made on the expenditure of money. The Council claims that the publication of the reports would be likely to compromise the safe space in which it develops policy and make decisions for effective management.
37. In relation to the consideration of the public interest test more generally, the Council has argued the following:

The qualified person opinion view is that maintaining the private thinking spaces of the informal Cabinet and its ability to obtain advice and guidance on matters pertaining to the effective running of communications outweighs the interests in making minutes received about the Communication and Information Unit over the past 5 years public. Disclosure of the contents of the reports at informal cabinet would not promote accountability or transparency. The represent opinions and view rather than facts. They would not further the understanding of and participation in public debate but would serve to confuse matters as they represent consideration of options rather than of Council decisions. The Council is subject to other methods of scrutiny and I find that the effective conduct of public affairs is best served by maintaining the privacy of the informal Cabinet in addressing the reports it receives through the normal channels and not making these reports public. The Council wishes to be open and transparent about the business and takes active steps to keep the people of Lambeth informed through a variety of media. The consideration means that the outcome of the discussion of reports at informal cabinet are published and formally ratified through other sets down processes. This consideration means that outcome of discussions of information contained within the reports has or will be published or communicated.

Balance of the public interest arguments

38. When deciding where the balance of the public interest lies, the Commissioner has taken into account the purpose for which the requested information was created, the value of that information to the public and his findings on the qualified person's opinion.
39. To support its decision to withhold the requested material, the Council has drawn a distinction between information relating to the discussions of the Informal Cabinet and information linked to the Council's official decision-making systems. In the Council's view, only the latter category of information would have value to the public in terms of accountability. The Council has further explained that a number of issues referred to in the reports remain live, in that the implications of policy and strategy development are likely to extend far beyond the dates the reports were prepared and presented.
40. In response to the Commissioner's queries, the Council has confirmed that no reports to the Informal Cabinet have previously been released. As a purely advisory group, the guidance provided by the Informal Cabinet has not necessitated official ratification elsewhere. Official papers though will reflect the wider process of decision-making and discussion. The Council has further explained that the governance has

been altered so that there are now Outcome panels for cabinet portfolio holders. It advises that the commissioners have overseen the budget setting process, which in turn has developed the commissioning plans. There is an overarching Community Plan that sets out strategic direction. This has replaced traditional service plans and therefore the Informal Cabinet does not sit within a formal process of ratification.

41. The Commissioner understands that organisations, particularly ones the size of the Council, may operate a number of different systems in order to reach considered and rounded decisions. It is also recognised that public authorities will on occasion require space in which to discuss and analyse fully the different opportunities and choices available to it. This is not an absolute principle, however, and a tension exists within FOIA between ensuring a public authority has room in which to explore difficult options and its advocating of transparency for the sake of accountability.
42. In the Commissioner's view, the distinction made by the Council in relation to the importance to the public of the different categories of information is problematic. Specifically, the Commissioner considers that it raises two possibilities, the combination of which is not entirely satisfactory from a freedom of information point of view. On the one hand, the Council appears to want to downplay the importance of the role of the Informal Cabinet by emphasising its lack of formal decision-making powers. It considers that the public interest in accountability is already served by the scrutiny of official records. On the other hand, the Council has emphasised the need for safe space for a forum that the Commissioner understands occupies a constructive position in the development of policy.
43. The Commissioner considers that some significance must be placed on the views of the Informal Cabinet by the decision-makers in the Council otherwise there would no reason for the discussions taking place. It is also noticeable that the Informal Cabinet considers important policy directions of travel. In the Commissioner's view, this would add weight to the case for disclosure. The Commissioner has therefore gone on to consider the timing of the request.
44. As stated, the Council considers that the issues recorded in the documents are still live. Although the reports were produced some time before the request, and well over a year before in the case of the earliest report, the Council argues that the Informal Cabinet was looking at longer-term strategies which meant that the proposals remained current.
45. The nature of longer-term planning means that policy issues will evolve and it will not necessarily be easy to identify exactly when an original

policy strand is no longer live or has effectively been superseded. From the submissions provided, however, the Commissioner is satisfied that the substance of the communication strategies referred to in the reports were still the subject of discussion at the time the request was made. The question for the Commissioner is therefore whether the public interest in preserving the safe space for decision-making outweighs the public interest in transparency. The Commissioner's view is that it does not.

46. For the reasons that have been explained, the Commissioner disagrees with the Council that there is no or little public interest in the requested information because the Informal Cabinet has no formal decision-making powers. On the contrary, the Commissioner has taken into account the explanation of the Informal Cabinet's role and the important nature of the issues being discussed and considers that the Informal Cabinet represents an influential part of the policy-making process.
47. The Commissioner does place some weight on the Council's need for a safe space in which to debate matters. The Commissioner also considers, however, that the information would quickly lose its usefulness for the public if the Council waited for all the long-term issues and strategies being discussed to be resolved one way or another. The Commissioner has also not been provided with enough evidence for him to conclude that the public interest in the disclosure of the information has effectively been offset by transparency in other stages or areas of decision-making. In this regard the Commissioner is more disposed towards the complainant's argument which says that the existence of a discussion chamber that avoids proper public scrutiny is unlikely to help engender trust in the decisions made by the Council.
48. From a review of the withheld information, the Commissioner has further decided the prejudice that would be likely to occur is not severe enough to justify withholding the information. Although the Commissioner has accepted that there would be a chilling effect through disclosure, he considers that the officials involved in the preparation and discussion of the reports should be robust enough to withstand some scrutiny of their work. Unlike the Council, the Commissioner also considers that the public would not be surprised that the Council would seek to consider a variety of different options when deciding on a policy or, generally speaking, by the nature of the issues being discussed. He therefore disagrees that disclosure would therefore only serve to confuse the public. In any event, the Commissioner considers there is nothing to prevent the Council from accompanying the disclosure with a statement that explains the nature of the discussions in question and confirms that the reports did not represent settled policy decisions.

49. The Commissioner has therefore found that in all the circumstances the public interest in disclosure outweighs the public interest in maintaining the exemption.

Section 43(2) – commercial interests

50. Section 43(2) of FOIA states that information is exempt information if its disclosure under the legislation would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it). A commercial interest relates to a person's ability to participate competitively in a commercial activity, ie the purchase and sale of goods or services. The section 43(2) exemption is prejudice-based, which means a public authority is required to demonstrate that a three-stage test is met.
51. First, the harm that is envisaged would, or would be likely to, occur should relate to the applicable interest described in the exemption. Second, there is a causal relationship between the potential disclosure of the withheld information and the prejudice that the exemption is designed to protect against. Third, there is a real risk of prejudice arising through disclosure, with a public authority able to demonstrate that either disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. Section 43(2) is also qualified by the public interest test. Accordingly, even if it is found that the exemption is engaged, a public authority must consider whether on balance the public interest favoured disclosure.
52. The Council informed the Commissioner during his investigation that in addition to the section 36(2) exemptions considered above it was also seeking to rely on section 43(2) to withhold parts of the requested information. The Council argues that the disclosure of this would information may weaken LamCo's position in what it states is a very competitive market.
53. The Council considers that the information reveals key aspects of LamCo's work, expenditure and strategies, which could be exploited by competitors in future public procurement opportunities. The Commissioner is satisfied that the argument is relevant to section 43(2) in that it relates to the harm that could occur to a party's, namely LamCo's, commercial interests and therefore the first step of the prejudice test is met. He has therefore gone on to consider the second step of the prejudice test, which requires a public authority to establish a causal relationship between disclosure and the prejudice being claimed.
54. The Commissioner accepts that the Council has genuine concerns about the release of information that could place a trading division at a

commercial disadvantage. The Commissioner, however, considers that the Council has not clearly made out a link between the information that has been withheld and the prejudice. In the Commissioner's view, the Council has not explained how a competitor would be able to capitalise on the information, nor is this evident from the information itself.

55. In the Commissioner's guidance on section 43(2)⁴, under the heading 'e) Is the information commercially sensitive', he states that companies compete by offering something different from their rivals. The difference will often be the price at which the goods or services can be delivered, but that difference may also relate to quality or specification. Information which identifies how a company has developed that unique element is more likely to be commercially sensitive. Based on his analysis of the submissions provided, the Commissioner considers that the information in question does not qualify as information that reveals something unique which could later be used against LamCo.
56. The Commissioner has therefore found that the Council's application of section 43(2) falls down at the second hurdle of the prejudice test. As the Commissioner has decided that the exemption is not engaged, he has not been required to go on to consider the public interest test.

⁴ https://ico.org.uk/media/for-organisations/documents/1175/section_36_prejudice_to_effective_conduct_of_public_affairs.pdf

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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

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

Rachael Cragg
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