

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 August 2018

Public Authority: London Borough of Lewisham

Address: Laurence House
1 Catford Road
SE1 4RU

Decision (including any steps ordered)

1. The complainant has requested evidence submitted to an independent Inquiry which was set up following allegations against the public authority in relation to the New Bermondsey site in South London. The public authority withheld the information held within the scope of the request relying on the exemptions at sections 21, 36(2)(b)(ii), 36(2)(c), 42 and 43(2) FOIA.
2. The Commissioner's decision is that the public authority was entitled to rely on the exemptions at sections 36(2)(b)(ii) and 36(2)(c) FOIA.
3. No steps required.

Request and response

4. The complainant wrote to the public authority on 14 December 2017 in the following terms:

"I would be grateful to know whether the evidence to Lord Dyson's Inquiry will be published? How can Members interrogate this wealth of information?"

5. The public authority initially treated the request as a normal course of business enquiry and responded on 20 December 2017 outside the terms of the FOIA. It explained that Lord Dyson had published his report on the Inquiry website but that he will not be publishing the documentary evidence that he received nor will the public authority be publishing the evidence that it submitted.

6. Following further exchanges between the complainant and the public authority, it advised him on 15 January 2018 that it would be handling his request above under the terms of the FOIA.
7. The public authority provided its response pursuant to the FOIA on 2 February 2018. It denied the request on the basis of section 36(2)(b)(ii) and section 36(2)(c) FOIA.
8. The Commissioner understands the complainant requested an internal review of this decision on 2 February 2018.
9. The public authority wrote back to the complainant on 5 February 2018 with details of the outcome of the internal review which effectively upheld the original decision.

Scope of the case

10. The complainant contacted the Commissioner on 7 February 2018 to complain about the way his request for information had been handled, specifically the decision to withhold the information requested.
11. During the course of the investigation the public authority clarified that the information it holds comprises of all evidence the public authority itself submitted to the Inquiry including evidence submitted by its members and officers. However, where individuals employed by the public authority were called on to submit evidence, the public authority played no role in the production of the individual's statement. The evidence was entirely that of the individual. Furthermore, Lord Dyson conducted a further stage of information gathering in person. He interviewed many of the individuals who had submitted witness statements in his chambers in person, in private. External parties are also likely to have submitted their own evidence to the Inquiry. The council is not privy to any of this information. The public authority also additionally sought to apply the exemptions at sections 21, 42 and 43(2) FOIA to various parts of the information held.
12. The scope of the Commissioner's investigation therefore was to consider whether the public authority was entitled to withhold the evidence it submitted to the Inquiry on the basis of the exemptions at sections 21, 36(2)(b)(ii), 36(2)(c), 42 and 43(2) FOIA.

Reasons for decision

Background

13. The New Bermondsey site is roughly 30 acres in South London. It comprises industrial buildings, a few dwellings and the football ground of Millwall Football Club (the Millwall land). Renewal Group Limited (Renewal) acquired much of the freehold of the site. The public authority owns the freehold of other parts of the site including the Millwall land. Renewal has obtained planning permission to redevelop the site and set up Surrey Canal Sports Foundation Limited (SCSF) to deliver the development of a sports facility called Energize at a cost of £40 million on part of the site.
14. On 7 March 2012 the public authority resolved in principle to make a CPO¹ in relation to parts of the site not yet owned by Renewal. This included the Millwall land. Millwall Football Club opposed the decision. On 20 December 2013 the public authority entered into a conditional contract with Renewal to sell the Millwall land.
15. On 7 September 2016 the public authority resolved to use CPO powers in relation to the Millwall land. This decision was subsequently called in by the public authority's Overview and Scrutiny Business Panel on grounds including that it was uncertain whether the development scheme was viable. Investigation of this matter was adjourned on 28 September 2016 due to an investigation of a separate allegation as to whether Renewal was marketing the site for sale. Officers of the public authority conducted an investigation and found that Renewal was not doing so. Millwall Football Club was critical of both this finding and the decision to appoint Renewal as a developer.
16. Subsequently allegations emerged in the media that the public authority had been misled into making a pledge of £500,000 to SCSF by what was said to be a misrepresentation by Renewal and SCSF that Sport England had pledged a sum of £2 million towards the Energize project. Some allegations had also surfaced about the propriety and professionalism of the public authority's officers.
17. It was against this backdrop that the public authority decided to refer the allegations to an independent third party for adjudication. The Right Honourable Lord John Dyson, a retired Justice of the Supreme Court was

¹ Compulsory purchase order.

recommended to the public authority by the Chairman of the Bar Council to conduct the Inquiry which ran from April to November 2017. Lord Dyson's findings and conclusions were provided in a report to the public authority and was subsequently published.² The report concluded that "there was no impropriety, lack of due diligence or breach of code of practice on the part of any Council officer or member.....[it] also concluded that the Council was not misled by any misrepresentation, misinformation or withholding of information in relation to the decision to make the pledge of £500,000 and there was no inadequacy in the Council's inquiry....." (paragraph 415).

Application of exemptions

Withheld Information

18. As mentioned, the withheld information comprises of the evidence submitted by the public authority to the Inquiry. The public authority has explained that the withheld information which the Commissioner has seen, comprises of witness statements and all documents submitted by the public authority in the "Core and Associated Bundle." It explained that the public authority had erred on the side of caution and submitted all relevant documents about the New Bermondsey Development to which the Inquiry relates.
19. Although it sought to apply other exemptions (ie other than the section 36 exemptions) to specific parts of the withheld information, the public authority argued that the Commissioner should not consider the withheld information item-by-item. Rather, the Commissioner should consider the fact that the information was requested because of its character of being evidence submitted to the Inquiry. The complainant's stated interest is to see the "wealth of information" submitted to the Inquiry. The information was not requested due to its original character, for instance, that it is a report or an email. Accordingly, even though some of the information had a different primary purpose prior to its submission as evidence, in the context of the request it must be considered qua evidence to the Inquiry.
20. The Commissioner considered the submission above specifically in light of the application of section 21 FOIA³ to a small part of the withheld

² <https://newbermondseysurreycanalindependentinquiry.files.wordpress.com/2017/11/new-bermondsey-inquiry-final-report-november-2017.pdf>

³ A public authority may rely on section 21 FOIA³ to withhold information it considers is otherwise reasonably accessible to an applicant by other means. In this case, the public

information. The Commissioner agrees with the public authority that the request must be considered qua evidence to the Inquiry. Consequently, although some of the information had been published and is reasonably accessible to the complainant, the Commissioner considers that the published information has been withheld in the context of the request to interrogate the evidence submitted to the Inquiry. Therefore, the information should be considered on that basis particularly with respect to the application of the section 21. The published information alone is without context within the stated objective of the request.

21. For the avoidance of doubt, the Commissioner is satisfied that the withheld information is not environmental information within the meaning of regulation 2(1) of the Environmental Information Regulations 2004⁴. She considers that the information is too remotely linked to the elements and factors mentioned in regulation 2(1) and will not inform the public in any substantive way about matters affecting the environment or enable them to participate in decision making in that respect.

Sections 36(2)(b) and 36(2)(c)

22. The relevant provisions in section 36 state⁵:

“Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act—

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.”

authority applied the exemption to published minutes and reports, newspaper reports and a decision notice of the Commissioner.

⁴ The full text of the regulation 2(1) can be found here:
<http://www.legislation.gov.uk/uksi/2004/3391/regulation/2/made>

⁵ The full text of the exemption can be found here:
<http://www.legislation.gov.uk/ukpga/2000/36/section/36>

23. The exemptions at section 36(2)(b) can only be engaged on the basis of the reasonable opinion of a qualified person. The qualified person who issued the opinion in this case is the public authority's Deputy Monitoring Officer acting on behalf of the Monitoring Officer who had recused herself from considering the application of the exemptions on the grounds that she had submitted evidence to the Inquiry. The Commissioner is satisfied that the Deputy Monitoring Officer was the appropriate qualified person in the circumstances of this case. The Commissioner next considered whether the qualified person's opinion was reasonable.
24. The qualified person's opinion which was formed between 15 and 30 January 2018 is summarised below.
25. Since the exoneration of the public authority's officers by Lord Dyson's Inquiry, and the disruption caused by the local elections earlier this year, matters are stalled and incomplete. The New Bermondsey development remains a highly politically charged issue. Much decision making remains to be taken. A new resolution will be needed in respect of the CPO. Under relevant legislation, a CPO will further require a public inquiry into the matter and an affirmation decision in relation to any CPO by the Secretary of State. The decision making process will involve many more Cabinet and Council meetings. These will involve the assistance of officers, including those who gave evidence to the Inquiry. Furthermore, the process will involve cooperation with a number of external parties. These include Millwall Football Club, Millwall Community Scheme/Millwall Community Trust, SCSF, Incorporated Holdings Ltd. which are referred to in Lord Dyson's report or are the author of much of the evidence provided by the public authority to the Inquiry.
26. Therefore, disclosure of the withheld information would, or would be likely to, inhibit the free and frank exchange of views for the purposes of deliberation particularly in relation to the witness statements and any references to individuals' actions or views within the Core or Associated Bundle. The deliberations relate to: all future development of reports or meetings related to the New Bermondsey Development, all future development of reports or meetings at the public authority generally, and any future independent Inquiry that might be commissioned such as the Inquiry in relation to a new CPO. This view is held based on the factors below.
27. The circumstances surrounding the Inquiry are very controversial. The allegations, reported in the media, were very serious and potentially career-ending for officers.
28. The witnesses to the Inquiry provided their evidence in private and in the confidence that only such parts of it that were material would be

made public, and these parts of their evidence would only be made public within a report in which Lord Dyson would fully analyse that evidence in light of the entire body of evidence before the Inquiry and justify, with reasons, any view he took on it. This is supported by the following comments at paragraph 31 of Lord Dyson's report:

"I felt that the witnesses were most likely to speak freely and frankly in the informal atmosphere of a private Inquiry. The public interest in openness would be sufficiently served in the circumstances of this Inquiry if I were to (i) set out in my report the material evidence that I have read and heard and (ii) explain in detail the reasons for my conclusions on all the issues."

29. Were the whole evidence provided by the witnesses to be disclosed, this would be likely to open the witnesses up to further intense scrutiny. Such scrutiny would be unfair in circumstances where they had already been exonerated by the detailed findings of the Inquiry. Lord Dyson's report makes a finding in favour of officers of the public authority. Those seeking the whole body of evidence are most likely doing so for the purposes of objecting to that finding. Accordingly, it is likely that witnesses' evidence would be taken out of context for the purposes of critique as (1) the entire body of evidence will not have been released from the Inquiry (only that of the public authority's) in order for any evidence to be considered against and (2) the report itself contextualises the evidence and weighed it up; so, considering evidence outside of the report necessarily strips it of the benefit of that context.
30. As officers would be likely subject to a second wave of intense scrutiny (unmerited on the basis of the findings of the Inquiry) and had already been subject to great criticism, disclosure of the withheld information was likely to inhibit them freely providing information in the future for fear of further unmerited criticism. This chilling effect would be likely in relation to both contributing to any deliberation in relation to the New Bermondsey Development (of which there will be many such deliberations in the near future and which remains controversial), and to any future Inquiry (including the inquiry for any CPO).
31. The same chilling effect would be likely in relation to public deliberations such as reports and or Council meetings. Officers may fear that future contributions are likely to be read out of context and this would be likely to inhibit them from contributing freely and frankly more generally when conducting Council business.
32. In addition to the likelihood of inhibiting the free and frank exchange of views, disclosure of the withheld information would be likely otherwise to prejudice the effective conduct of public affairs. This applies in particular to the evidence in the Core and Associated Bundle and the

witness statements insofar as they relate to the strategy taken by the public authority towards the New Bermondsey Development.

33. Specifically, disclosure would be likely to prejudice the ability of the public authority to effectively develop, decide upon and enact an effective strategy for the New Bermondsey Development. As mentioned, the public authority took a wide view of what may be relevant to the Inquiry when submitting evidence. This included commercial reports submitted to it by external parties, and both internal and external email exchanges in relation to the New Bermondsey Development. Were this information to be disclosed, it would reveal the totality, or at the very least the great majority, of the public authority's approach to and strategy within the New Bermondsey Development.
34. The New Bermondsey Development has many moving parts to it. The public authority must manage different parties in order to secure the best deal for those it represents. It cannot do this effectively if those who are in opposition to the development, or those who are in favour of the development but would prefer different commercial terms to the ones taken publically by the public authority are able to access and analyse the entire approach of the public authority. Such parties would be granted a windfall of knowledge, which would be used to the public authority's disadvantage in future negotiations
35. Furthermore, disclosure would enable an external party who opposed the development to wade through years of confidential internal Council operations on this matter. This would provide fodder for such parties to seize upon otherwise unknown matters and utilise them to create satellite issues for the public authority to address. This would likely stall further progress on the New Bermondsey Development.
36. The public authority is rightly subject to public scrutiny. It publishes all public reports and Cabinet and Council minutes on its website. However, it must have space within which it can effectively act to pursue public affairs without it being undermined by having its cards revealed to external parties with whom it is striking deals for the benefit of the public.
37. The complainant's substantive submissions are reproduced below.
38. "This is an internal inquiry and not a judicial nor public inquiry. It is common for evidence or background papers and supporting documents to be published."
39. "In light of the fact I am named personally I would like to see the evidence especially evidence relating to me personally."

40. "I have a wider interest in the issue and I cannot agree that it is defensible to withhold all the information in perpetuity."
41. The Commissioner has addressed these submissions further below in the section on the public interest test.

Was the qualified person's opinion reasonable?

42. As mentioned, in determining whether the exemptions are engaged, the Commissioner has considered whether the qualified person's opinion was a reasonable one. In doing so the Commissioner has considered all of the relevant factors including:
 - Whether the prejudice relates to the specific subsection of section 36(2) that is being claimed. If the prejudice or inhibition envisaged is not related to the specific subsection, the opinion is unlikely to be reasonable.
 - The nature of the information. Whether it concerns an important issue which there needs to be a free and frank exchange of views or provision of advice.
 - The qualified person's knowledge of, or involvement in, the issue.
43. Further, in determining whether the opinion is a reasonable one, the Commissioner takes the approach that if the opinion is in accordance with reason and not irrational or absurd – in short, 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 have to be the most reasonable opinion that could be held; it only has to be a reasonable opinion.
44. The Commissioner has been guided on the interpretation of the phrase 'would prejudice' or 'would be likely to prejudice' by a number of Information Tribunal decisions. The Tribunal has been clear that this phrase means that there are two possible limbs upon which a prejudice based exemption can be engaged; ie either prejudice 'would' occur or prejudice 'would be likely to' occur.
45. With regard to likely to prejudice, the Information Tribunal in *John Connor Press Associates Limited v The Information Commissioner (EA/2005/0005)* confirmed that "the chance of prejudice being suffered

should be more than a hypothetical possibility; there must have been a real and significant risk”.

46. With regard to the alternative limb of ‘would prejudice’, the Tribunal in *Hogan v Oxford City Council & The Information Commissioner* (EA/2005/0026 & 0030) commented that “clearly this second limb of the test places a stronger evidential burden on the public authority to discharge”, and the occurrence of the prejudice claimed “is more probable than not”.
47. Having considered the withheld information against the background to the matters leading up to the Inquiry, the Commissioner had no hesitation accepting as reasonable the opinion that disclosure of the information would pose a real and significant risk of inhibiting the free and frank exchange of views by officers and members in deliberations relating to the New Bermondsey Development in particular, and similar/related deliberations more generally within the public authority. Although not a pre-condition for engaging the exemption, the Commissioner found this opinion to be wholly persuasive in view of the matters set out by the qualified person.
48. The Commissioner considers that prejudice to the effective conduct of public affairs could refer to an adverse effect on a public authority’s ability to offer an effective public service or to meet its wider objectives. In *McIntyre v Information Commissioner and the Ministry of Defence* (EA/2007/0068), the Tribunal commented that: “this...exemption is intended to apply to those cases where it would be necessary in the interests of good government to withhold information, but which are not covered by another specific exemption, and where the disclosure would prejudice the public authority’s ability to offer an effective public service or to meet its wider objectives or purposes due to the disruption caused by the disclosure or the diversion of resources in managing the impact of disclosure.”
49. The Commissioner therefore also had no hesitation accepting as reasonable the opinion that disclosure of the withheld information would pose a real and significant risk of prejudice to the ability of the public authority to effectively develop, decide upon and enact an effective strategy for the New Bermondsey Development. The Commissioner accepts that this specific prejudice falls within the scope of “the effective conduct of public affairs.”
50. The Commissioner finds that the public authority was entitled to engage the exemptions at sections 36(2)(b)(ii) and 36(2)(c).

Public interest test

51. Both exemptions at sections 36(2)(b)(ii) and 36(2)(c) are subject to the public interest test set out in section 2(2)(b) FOIA. Therefore, the Commissioner must also consider whether in all the circumstances of the case, the public interest in maintaining the exemptions outweigh the public interest in disclosing the withheld information.
52. The public authority's submissions on the balance of the public interest are summarised below.
53. The public authority recognised that there is a public interest in local authorities having their operations subjected to effective scrutiny. Were the withheld information to be disclosed, this may better enable the complainant to assess whether the conclusions in Lord Dyson's report are, in his view, sound. This would better enable him to assess whether officers had acted with propriety.
54. However, the Inquiry itself is an independent process for oversight of the public authority's activity. The extent to which transparency is served through accessing the withheld information is therefore lessened significantly. The process for scrutinising officers' actions has already been enacted, in a thorough process performed by a former Supreme Court judge.
55. The following factors in particular carry significant weight in favour of maintaining the exemptions.
56. Disclosure would take place within the context of already highly contentious decision making. The history demonstrates that the New Bermondsey Development is controversial to some parties. However, the public authority considers it an important large scale project running into millions of pounds. It is in the public interest that the public authority can efficiently redevelop a run-down area and that it is able to do so at as low a cost and on the most favourable terms possible to the tax payer. Significantly hampering the public authority's ability to do so is not in the public interest.
57. There is a strong public interest in preventing a severe chilling effect on officers and members' willingness to provide their views freely and frankly in the future. Although this will most obviously apply in confidential contexts, it is likely to apply to their contributions in public deliberations also, where an officer is more likely to be restrained due to fear that they personally will come under attack again if they say anything perceived to be controversial. The harm to the public authority's decision making process would be significant if it is not able to benefit from the free and frank views of its officers whether in

relation to the New Bermondsey Development or matters more generally.

58. The public authority also addressed the complainant's submissions. This is summarised below.
59. Some of the public authority's comments in response to the complainant's submission that he is named in Lord Dyson's report and has "a wider interest in the issue" arguably constitute the complainant's personal data and have not been repeated here. However, in the context of that specific argument by the complainant, it is sufficient to note that the public authority has argued; to the extent that his private interests form a subset of the public interest, his private interest is extremely minor in this case. Furthermore, the complainant's request was for the entire "wealth" of evidence submitted to the Inquiry, not for evidence relating to himself.
60. In response to the argument that the Inquiry was "an internal inquiry and.....[so] it is common for evidence or background papers and supporting documents to be published..", the public authority explained that the Inquiry was in fact independent of the public authority and considered the public authority's internal affairs. It was unprecedented in its constitution. Accordingly, there is no precedent at the public authority for Inquiries of the sort conducted by Lord Dyson or whether information submitted to it ought to be disclosed. Even if there was such a precedent, the sensitivity surrounding this matter and the prior representation to witnesses and parties that the Inquiry was private would provide sufficient reason to break with it and prevent disclosure of the withheld information.

Balance of the public interest

61. If the Commissioner finds that the qualified person's opinion was reasonable, she will then consider the weight of that opinion in the public interest test. This means that the Commissioner accepts that a reasonable opinion has been expressed that prejudice or inhibition would, or would be likely to occur, but she will go on to consider the severity, extent and frequency of that prejudice or inhibition in forming her own assessment of whether the public interest test dictates disclosure.
62. The Commissioner considers that there is a strong public interest in not disclosing the withheld information in view of the real and significant risk of inhibiting free and frank exchange of views in relation to the New Bermondsey Development. A chilling effect on free and frank exchanges in respect of the matter would significantly hamper the public authority's decision making process at potentially considerable cost to the tax

payer. Given the controversy surrounding the matter, there is a strong public interest in members and officers being able to deliberate in a free and frank manner without fear that their views would be revealed prematurely, leaving them open to criticism potentially including allegations of impropriety. It is right that the actions of members and officers in relation to the New Bermondsey Development are properly scrutinised which was what the Inquiry did. Clearly the public interest in additional scrutiny of their views and actions should not be dismissed in view of the fact that the New Bermondsey Development remains a live issue. Indeed the public authority has mentioned the possibility of a public inquiry into the matter and an affirmation decision in relation to any CPO by the Secretary of State. However, there is a strong public interest in ensuring that scrutiny is not conducted in a manner that would be detrimental to the interests of the residents of the borough. Publishing the withheld information while the decision making process in relation to the development is still very much ongoing would hinder, rather than facilitate the process. The risk of disclosing the withheld information outweighs the public interest in its value to additional scrutiny.

63. There is also a strong public interest in not significantly hampering the ability of the public authority to develop, decide upon and enact an effective strategy for the New Bermondsey Development. It is not in the public interest for tax payers to bear the enormous financial cost of a defective strategy in relation to the development. There is therefore a strong public interest in giving officers a safe space free from external interference to develop and implement a strategy for the development.
64. The Commissioner shares the view that the Inquiry was independent of the public authority. It was set up for precisely that reason; an independent third party consideration of some of the serious allegations against officers. She also shares the view that to the extent that the complainant's private interests form a subset of the public interest, his private interest is minor in the circumstances of this case.
65. The Commissioner has therefore concluded that on balance, in all the circumstances of the case, the public interest in maintaining the exemptions outweighs the public interest in disclosing the withheld information.
66. The Commissioner has not considered the applicability of the remaining exemptions in view of her conclusion above.

"Paragraph 9 of this notice suggests that an internal review was conducted by the public authority on 5 February 2018. In fact, the public authority advised the complainant that there were "no other section 36 statutory officers who are able to carry out the review who have had no prior involvement in this matter." The Commissioner considers that this was an acceptable approach to take in the circumstances."

Right of appeal

67. 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

68. 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.
69. 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

**Gerrard Tracey
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