

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 19 June 2024

Public Authority: London Borough of Hounslow
Address: 7 Bath Road Hounslow
Middlesex
TW3 3EB

Decision (including any steps ordered)

1. The complainant has requested information about an internal investigation he believes has been undertaken by London Borough of Hounslow ("the public authority"). The public authority relied on section 36(3), read together with section 36(2)(c), to neither confirm nor deny that it held the requested information
2. The Commissioner's decision is that the public authority was not entitled to rely on section 36(3), read together with section 36(2)(c), to neither confirm nor deny that it held the requested information as the public interest did not favour maintaining the exemption.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - The public authority must confirm or deny that it holds the requested information;
 - and
 - if it does hold the information, disclose it, or provide a refusal notice in accordance with its obligations under section 17 of 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 22 July 2023, the complainant wrote to the public authority and requested information in the following terms:

"As I'm sure you know, the conduct of some members of the Planning Committee, and another councillor, at this meeting caused considerable local concern.

I am led to believe that an internal investigation followed this meeting to establish the motives of some committee members in voting the way that they did.

I would be most grateful if you would let me know of the results of this investigation".

6. The public authority responded on 2 August 2023 and said as follows.
 - "We can confirm that we can neither confirm nor deny that we hold the information requested pursuant to s.36 (Prejudice to the effective conduct of public affairs) exemptions of the Freedom of Information Act 2000".
7. Following an internal review the public authority wrote to the complainant on 27 September 2023 and said as follows.
 - "I am satisfied that the correct exemption under Section 36(2)(c) and Section 36(3) have been applied to the response provided to you. We are unable to confirm nor deny that the information requested is held by the Council".

Scope of the case

8. The complainant contacted the Commissioner on 27 October 2023 to complain about the way his request for information had been handled.

9. The Commissioner considers that the scope of his investigation is to determine whether the public authority was correct to neither confirm nor deny it held the requested information.

Reasons for decision

10. Section 1(1) of FOIA places a duty on a public authority to confirm whether it holds the information an applicant has requested; this is known as 'the duty to confirm or deny'.
11. Section 36(3) of FOIA removes the duty to confirm or deny information is held if, in the reasonable opinion of a Qualified Person (QP), to do so would or would be likely to have any of the effects under section 36(2).
12. Section 36(2)(b)(ii) says that information is exempt information if, in the reasonable opinion of a QP, disclosure would inhibit, or would be likely to inhibit, the free and frank exchange of views.
13. Section 36(2)(c) says that information is exempt information if, in the reasonable opinion of a QP, disclosure would otherwise prejudice, or would be likely to otherwise prejudice, the effective conduct of public affairs.

Public Authority's Submissions

14. The public authority explains that the QP was Rachel McKoy, Director of Law and Governance and its Monitoring Officer. Her opinion was sought on 31 July 2023 and her opinion was given on 2 August 2023 . The Commissioner is satisfied that the Monitoring Officer is authorised as the QP under section 36(5) of FOIA.
15. The public authority provided the Commissioner with a copy of the submission put to its QP.

Commissioner's Reasonings

16. In determining whether the exemption is correctly engaged, the Commissioner must determine whether the QP's opinion was a reasonable one. 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. The QP's opinion does not have to be the most or only reasonable opinion that could be held, it only has to be a reasonable opinion

17. The QP's opinion in this case – given in the QP submission - is that the prejudice envisioned under section 36(2)(c) would be likely to occur if the public authority confirmed or denied holding the requested information.
18. Having seen the explanation of the QP's opinion and considered the circumstances, the Commissioner is satisfied that the QP's opinion that section 36(2)(c) was engaged was (but not by a large margin) reasonable. This is more fully explained in the confidential annex (only to be provided to the public authority) attached to this decision notice.
19. The Commissioner has gone on to consider the public interest arguments associated with the section 36(2)(c) exemption.

Public interest test

20. The Commissioner has to determine whether the public interest in neither confirming nor denying outweighs the public interest in confirming whether the requested information is held.
21. The Commissioner for reasons that follow, is not persuaded that the public interest in maintaining the exemption from the duty to confirm whether the requested information is held, outweighs the public interest in confirming whether the requested information is held.
22. There is a general public interest in promoting transparency, accountability, public understanding and involvement in the democratic process. FOIA is a means of helping to meet that public interest, so this must always be given it some weight in the public interest test.
23. Additionally, the Commissioner considers that confirming whether or not the requested information is held will greatly help and facilitate the public understanding and scrutiny of the public authority and its elected members.
24. The public interest factors for maintaining the exemption are more fully discussed in the confidential annex. However the Commissioner notes here they are not particularly weighty or persuasive.
25. The Commissioner is satisfied that the general and matter specific factors in the public interest test favour the public authority to confirm or deny it holds the requested information.
26. Whilst the Commissioner is not persuaded that the public authority was entitled to rely on section 36(3) to neither confirm nor deny the requested information is held, it does not necessarily mean it should be

(if held) released to the complainant. The public authority may come to correctly rely on an exemption not to release any (if) held information to the complainant.

Right of appeal

27. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

28. 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.
29. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Richard Lawanson
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Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF