

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 August 2024

Public Authority: London Borough of Camden

Address: 5 Pancras Square
London
N1C 4AG

Decision (including any steps ordered)

1. The complainant has requested information regarding LGBTQ+ equality and London Borough of Camden ("the Council's") procurement process. The Council refused the request, citing sections 36(2)(b)(ii) and 36(2)(c) (Prejudice to effective conduct of public affairs) of FOIA. The complainant in their submission to the Commissioner only focused on one part of the requested information, i.e. a copy of the Council's most recent submission to Stonewall's Workplace Equality Index.
2. The Commissioner's decision is that:-
 - The Council correctly applied section 36(2)(b)(ii) to the information which is the subject of this notice, but the public interest favours disclosure.
 - The information within the scope of this notice to which the Council applied section 36(2)(c) does not engage this exemption because the envisaged prejudice falls under that covered by section 36(2)(b)(ii).
3. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation:
 - Disclose the information within scope of this notice that engages section 36(2)(b)(ii) but in respect of which the public interest favours disclosure, i.e. the Council's most recent submission to Stonewall's Workplace Equality Index.
4. The Council must take these steps within 30 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 3 January 2024 the complainant requested the following information:-
 1. Please provide copies of any Council documents regarding your commitment to LGBTQ+ equality into your procurement processes.
 2. Please also provide a copy of your consultation on plans to increase "diversity in the public realm" to cover "all protected characteristics and intersectionality" and any information about the responses to this consultation.
 3. Please also provide copies of all email correspondence during 2022 between your organisation and Stonewall.
 4. Your payments to Stonewall and Proud Employers for the financial year 2022/23.
 5. Which dates you celebrated on an inclusion calendar for 2022, what these celebrations consisted of and the costings involved for each celebration.
 6. What firms, if any, you have ceased to use as suppliers due to their lack of commitment to LGBTQ+ equality.
 7. What estimate, if any. you have for any increase in cost of procurement due to your new policy.
 8. What assessment, if any, you have made on the impact of your LGBTQ+ equality policy on smaller firms wishing to tender but not finding it viable to do so.
 9. Are you a member of the Stonewall Workplace Equality Index? If so please provide a copy of your most recent submission.
5. The Council responded to the request on 29 January 2024. It stated that it did hold the requested information, disclosed some but refused to disclose the remainder, citing sections 12, 21 and 36 of FOIA. In respect of section 21 it did provide links to information.

6. The complainant sought an internal review of the Council's handling of the request on 8 March 2024, specifically in relation to questions 3 and 9. A response to this was provided on 22 March 2024. The reviewer upheld the application of the section 36 exemption, specifically sections 36(2)(b)(ii) and 36(2)(c).

Scope of the case

7. The complainant submitted a complaint to the Commissioner on 22 March 2024, specifically referring to the Council's handling of question 9 of their request.
8. The Commissioner's investigation has focused on question 9 and the Council's application of the section 36 exemption in respect of the information in that part of the request only.

Reasons for decision

Section 36 – Prejudice to the effect conduct of public affairs

9. Section 36 of FOIA states that information is exempt where, in the reasonable opinion of a qualified person, disclosure would, or would be likely to, prejudice the effective conduct of public affairs.
10. The Council has applied sections 36(2)(b)(ii) and 36(2)(c) to withhold the relevant requested information. Arguments under these sections are usually based on the concept of safe space and a 'chilling effect'. The chilling effect argument is that disclosure of discussions would inhibit free and frank discussions in the future, and that the loss of frankness and candour would damage the quality of advice and deliberation and lead to poorer decision making.
11. The Commissioner's guidance on section 36¹ states that information may be exempt under sections 36(2)(b)(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 part of the process of deliberation. In this case, the Council believes that disclosure would be likely to inhibit this ability.

12. The exemptions at section 36 can only be engaged on the basis of the reasonable opinion of a qualified person ("QP"). The Commissioner is satisfied that the Council's Monitoring Officer, who is also the Borough Solicitor, is authorised as the qualified person under section 36(5) of FOIA and that they gave the opinion that the exemption was engaged.
13. The Commissioner has considered whether the opinion about section 36(2)(b)(ii) is reasonable. It's important to note that 'reasonableness' is not determined by whether the Commissioner agrees with the opinion provided but whether the opinion is in accordance with reason. In other words, is it an opinion that a reasonable person could hold? This only requires that it is a reasonable opinion, and not necessarily the most reasonable opinion.
14. The test of reasonableness is not meant to be a high hurdle and if the Commissioner accepts that the opinion is one that a reasonable person could hold, he must find that the exemption is engaged.
15. For the QP's opinion to be reasonable, it must be clear as to precisely how the inhibition may arise. In his published guidance on section 36 the Commissioner notes that it is in the interests of public authorities to provide him with all the evidence and arguments that led to the opinion, to show that it was reasonable. If this is not done, then there is a greater risk that the Commissioner may find that the opinion is not reasonable.
16. The Council has provided the Commissioner with a copy of the submission it provided to the QP. This shows that the QP was provided with a summary of the information being sought, detailed arguments for why the prejudice envisioned under section 36(2)(b)(ii) would or would be likely to occur, and counter arguments.
17. The QP made their decision on the basis that the envisioned prejudice would be likely to happen. This means that the QP considers that there is a real and significant possibility that the prejudice would occur.
18. The Commissioner accepts that it was reasonable for the qualified person to consider that there was a need to protect the confidentiality of discussions and deliberations.
19. He is also satisfied that the qualified person's opinion - that inhibition relevant to those subsections would be likely to occur through disclosure of the withheld information - is reasonable. He is therefore satisfied that the exemption was correctly applied.

Public interest test

20. Section 36 is subject to the public interest test, as set out in section 2 of FOIA. This means that although section 36(2)(b)(ii) is engaged, the withheld information must be disclosed unless the public interest in maintaining the exemption is stronger than the public interest in disclosure.

Public interest arguments in favour of disclosure

21. Disclosure would allow the public to understand the issues addressed in the Council's submission and the progress it is making in terms of equality. The Council has accorded significant weight to this argument.
22. There is a public interest in increasing the transparency of public authorities as this increases public trust in decision-making.
23. Disclosure could further demonstrate that the Council is an attractive employer for diverse individuals.

Public interest arguments in favour of maintaining the exemption

24. The submission may address sensitive controversial matters and areas of potential weaknesses in the Council's equalities progress. The Council argues that it must be able to send a submission to what is effectively an informal regulator, honestly exposing weaknesses and admitting areas where it might be concerned about equality compliance, as well as its areas of achievement and strengths, without self-censoring for fear it will be made public.
25. The Council considers that drafting a submission in the knowledge that it is likely to be disclosed would prevent the Council from seeking and receiving fully honest advice, which is not in the public interest especially around sensitive issues.
26. The Council considers that the disclosure of equality issues that need to be addressed may be used by potential candidates in assessing whether to apply for work when other comparable employers have not been obliged to release such information.

Balance of the public interest

27. When he considers the balance of the public interest, the Commissioner takes account of the weight of the QP's opinion, the timing of the request, and the severity, extent and frequency of the envisioned prejudice or inhibition.
28. The QP in this case was the Council's Monitoring Officer and Borough Solicitor, and, as such, had the requisite knowledge of how their

organisation works and the consequences of any disclosure. The Commissioner recognises that the QP's opinion was that the envisioned prejudice would be likely to occur.

29. The Commissioner has next considered the timing of the request. The public interest in being able to exchange views about an issue freely and frankly, for example, will be greater if the issue is ongoing and live at the time of a request.
30. The request was submitted in January 2024 and the Council's most recent submission to the Stonewall Workplace Equality Index (WEI) would have been made in 2023. The Commissioner understands that the results of the 2023 WEI had been published before the complainant submitted their request. The 2023 WEI was therefore no longer live. However, the Council continues to promote equality, diversity and inclusion and to publish corporate information about LGBTQ+ subjects. To that degree, therefore, the Council's approach to equality, inclusivity and diversity was live at the time of the request and remains live and ongoing.
31. The Commissioner has gone on to consider the severity, extent and frequency of the envisioned prejudice or inhibition. He found that the QP's opinion about the relevant information was reasonable.
32. Regarding section 36(2)(b)(ii) and staff being reluctant to fully engage in Council initiatives and share their views, the Commissioner understands that the Council employs a large number of staff. Not all its staff will feel inhibited if the information were to be disclosed, but a proportion may. The Commissioner is not convinced that the prejudice envisaged by the Council would be severe and he considers that the extent of it would be limited.
33. This is because the Council continues to publish information about its LGBTQ+ activities. The Council has not explained why disclosing the information caught by the request which is the subject of this notice would inhibit its staff from sharing their views (because the information might attract criticism and negative feedback), but the information it regularly proactively publishes would not have that effect. In addition, the Commissioner is not convinced that disclosing the information would increase or worsen the tone of any negative commentary which may or may not be already received by the Council.
34. Stonewall works for equality for all LGBTQ+ people. However, its position on transgender issues has been criticised for undermining compliance with the Equality Act 2010. Some groups and individuals are concerned that Stonewall promotes the primacy of gender identity – the personal sense of one's own gender (that is, the socially constructed characteristics of being a woman, man, girl, or boy) – over sex – the

different biological and physiological characteristics of males and females. They consider that this marginalises and damages the rights and freedoms of women who were born female and who identify as female. There are others who are critical of the focus on LGBTQ+ and diversity and inclusion matters more generally. Some private, public, and voluntary organisations are said to be reconsidering their participation in Stonewall's UK Workplace Equality Index and their membership of Stonewall's Diversity Champions programme.

35. Finally, in the context of the LGBTQ+ space, he does not consider the nature of the relevant information to be especially sensitive or unusual, or likely to attract more criticism than might be attracted by the information the Council has published and continues to publish.
36. For the above reasons, the Commissioner is not persuaded that the public interest arguments in favour of maintaining the exemption carry significant weight in respect of the information being considered here. In his view, the public interest associated with section 36(2)(b)(ii) favours disclosing that information.
37. The Commissioner has carefully considered the public interest arguments for and against disclosing the information to which the Council has applied the section 36(2)(b)(ii) exemption. He has noted the QP's opinion and the Council's concerns but he nonetheless considers that the general public interest in transparency, the concerns that exist about Stonewall now and at the time of the request and the Council's size and reach tip the balance in favour of disclosing the information he has considered in this notice.
38. To summarise, the Commissioner finds that the Council has correctly applied section 36(2)(b)(ii) of FOIA to the information to which it applied that exemption which is the subject of this notice. However, he has found that the public interest associated with section 36(2)(b)(ii) favours disclosing the information.
39. Because he has found that section 36(2)(b)(ii) is engaged but that the public interest favours disclosure, the Commissioner has gone on to consider the Council's application of section 36(2)(c) to the same information.

Section 36(2)(c) – otherwise prejudice conduct of public affairs

- .40. Section 36(2)(c) of FOIA says that information is exempt information if, in the reasonable opinion of a QP, disclosing the requested information would otherwise prejudice, or would be likely to otherwise prejudice, the effective conduct of public affairs. As above, to determine whether the Council correctly applied this exemption, the

Commissioner must consider the QP's opinion as well as the reasoning that informed the opinion.

41. For the reasons given above, the Commissioner is satisfied that the QP was the appropriate QP and that their opinion was given at an appropriate time.
42. As with section 36(2)(b)(ii) and taking the same factors into account, the Commissioner has considered whether the opinion about section 36(2)(c) is reasonable.
43. As noted, the Council has provided the Commissioner with a copy of the submission it provided to the QP. This shows that the QP was provided with a summary of the information being sought, detailed arguments for why the prejudice envisioned under section 36(2)(c) would or could occur, and counter arguments.
44. The QP made their decision on the basis that the envisioned prejudice would be likely to happen and the submission to them sets out the rationale for this.
45. The Commissioner is satisfied that the QP had sufficient appropriate information about the request and the section 36(2)(c) exemption to form an opinion on the matter of whether relying on that exemption was appropriate regarding the information being withheld.
46. With respect to the information which is the subject of this notice, the Commissioner notes that the arguments set out in the QP's opinion all relate to inhibition of exchange of views and deliberations, which is covered by section 36(2)(b)(ii). As section 36(2)(c) covers prejudice which is not covered by the other subsections of section 36, it is not engaged in this instance and therefore the Commissioner finds that the QP's opinion about that information isn't reasonable and that the Council has incorrectly applied section 36(2)(c) to that information.

Right of appeal

47. 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

48. 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.

49. 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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