

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 19 August 2024

**Public Authority:** Leicester City Council  
**Address:** City Hall  
115 Charles Street  
Leicester  
LE1 1FZ

#### **Decision (including any steps ordered)**

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1. The complainant has requested a copy of any documents held by the council in preparation of a question which would be asked in an open council meeting. Leicester City Council ("the council") refused the request on the basis that section 36(2)(b)(i) and section 36(2)(c) applied (prejudice to the effective conduct of public affairs).
2. The Commissioner's decision is that the council was correct to find that the exemptions were engaged, however the public interest in disclosure outweighs that in the exemption being maintained in this case.
3. The Commissioner requires the council to take the following steps to ensure compliance with the legislation.
  - To disclose a copy of the briefing note to the complainant.
  - To carry out further searches for information and to respond to the complainant's request again as required by section 1 of FOIA.
4. The public authority 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

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5. On 27 November 2023, the complainant wrote to the council and requested information in the following terms:

"Can the Labour council please send me copies of all documents emails memos notes aide memoire etc regarding all communication about or in response to the following three questions that [redacted] submitted to the council on 20 November 2023 (see email below)

-----Original message -----

Date: Mon, 20 Nov 2023 at 21:59

Subject: Questions

Cc: committees <[email address]>

In 2020 how much did the council pay to Leicester High School For Girls?

In 2021 how much did the council pay to Leicester High School For Girls?

In 2022 how much did the council pay to Leicester High School For Girls?"

6. The council responded on 21 December 2023. It refused the request on the basis that the exemptions in section 36(2)(b)(i), and section 36(2)(c) applied (prejudice to the effective conduct of public affairs).
7. Following an internal review, the council wrote to the complainant on 5 February 2024 upholding its decision.

## Scope of the case

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8. The complainant contacted the Commissioner on 19 March 2024 to complain about the way their request for information had been handled.
9. The Commissioner considers that the scope of his investigation is to determine whether the council was correct to withhold the information under the exemptions which it has applied.

## Reasons for decision

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### Section 36 – Prejudice to the effective conduct of public affairs

10. Section 36(2) of FOIA states:

“(2) 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,

(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.”

11. Unlike other exemptions in FOIA, an exemption in section 36(2) can only be applied where a public authority has consulted with a qualified person ('the QP'), as defined in the legislation, and it is the QP's opinion that the harm stated in the exemption would, or would be likely to, arise through disclosure of the requested information.
12. To find that any limb of section 36(2) is engaged, the Commissioner must be satisfied not only that a QP gave an opinion on the likelihood of the prejudice cited in the exemption occurring, but also that the opinion was reasonable in the circumstances. This means that the QP 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.
13. In this instance, the QP's opinion was that sections 36(2)(b)(i) and 36(2)(c) apply to the information.
14. The requested information is communications between council officers and councillors. It is briefing notes prepared by officers for councillors to answer questions in a public full cabinet meeting. The QP's opinion was that officers often include their own opinions and try to establish any follow up questions which might be asked.
15. The QP said that at disclosure of the requested information would make it less likely that such briefing notes would contain full and frank advice in the future (36(2)(b)(i)), and that disclosure would interfere with the general running of council business (36(2)(c)).

16. Section 36(5) sets out who may act as the QP in relation to a public authority. In the case of local government, the council's monitoring officer or the chief executive may be designated as the appropriate person.
17. In this case, the council clarified that the QP who provided the opinion was the monitoring officer. The Commissioner is therefore satisfied that opinion was provided by the designated QP at the council.
18. The next question for the Commissioner to consider is whether the QP's opinion is reasonable.
19. The Commissioner has published guidance on section 36 which explains that the QP's opinion does not have to be one with which the Commissioner would agree, nor the most reasonable opinion that could be held. The opinion must be in accordance with reason and not irrational or absurd.
20. The QP was asked to provide an opinion on 6 December 2023, and provided the opinion on 20 December 2023. The response was issued to the complainant the next day.
21. The council clarified that the QP was fully aware of the facts behind the request as they attend full council meetings, was privy to Directors discussing the request when it was received, and they were also consulted by the council in their role as monitoring officer. It also clarified that they were told verbally of the information falling within the scope of the request.
22. The council said that the QP was provided with the views of the Head of Information Governance, and some ICO guidance was provided which supported the application of the exemption. The Head of Information Governance also prompted public interest arguments for and against the disclosure of the information.
23. The Commissioner is therefore satisfied that the QP's opinion was based upon a full understanding of the facts and the nature of the information requested.
24. The QP's opinion, in brief, was that there is a need to protect the process by which senior officers and Executive Members prepare/brief/deliberate upon council questions. The QP's opinion was that this process would be likely to be inhibited if those exchanges were subject to FOI.

25. The QP noted that the information in question as regards this case was factual information, and noted that its disclosure would not be significant in itself. However, the QP was concerned that a disclosure would inhibit the process of officers providing free and frank advice and opinion in order to aid councillors to respond to questions and formulate their opinions surrounding the questions asked. Members may not ask officers for assistance with answering questions, which could lead to poorer scrutiny/accountability in the event that Executive Members are not fully equipped with factual and contextual information. Additionally, or alternatively, it could lead to officers being more circumspect when assisting Executive Members as their opinions would subsequently be published to the world at large. For this reason, the QP argued that the council's written policy is that such communications are made in confidence.
26. Having considered the QP's opinion, the Commissioner is satisfied that it addresses the issues falling within the scope of the exemptions cited, that it was made with all of the necessary background information, and that the opinion expressed was reasonable.
27. The Commissioner has therefore decided that section 36(2)(b)(i) and section 36(2)(c) are engaged by the withheld information. The Commissioner must therefore carry out a public interest test as required by section 2(2)(b) of FOI.
28. The test is whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

#### The Public Interest

#### The public interest in the exemption being maintained

29. The QP said that the council was primarily concerned that its process of informing councillors of questions and researching and providing answers would be impacted by a disclosure of the requested information. They added that:

"Officer advice is essential to ensuring that Executive Members are equipped to answer "Questions" at Full Council. This officer input spans (i) providing factual information; (ii) adding contextual information relevant to the topic; (iii) speculating upon possible supplementary questions and furnishing speculative answers thereto."

30. The QP noted that although council officers are ostensibly politically neutral, the process of answering questions at full council is primarily a political affair. Senior officer assisting with the preparation of answering formal questions are generally politically led, and have a relationship of trust and confidence with the executive.
31. The QP considered that senior officers involved in this process must occupy a safe space from which to provide members with the information necessary to publicly account for the issues which the questions address. As such, their task extends beyond providing factual information to providing contextual information and opinion, which will often require the provision of frank views or speculation.
32. The QP argued that this process is legitimate in a politically led organisation, and the process would be significantly damaged by a disclosure of such briefings. They argued that the council's constitution recognises and protects this relationship in certain circumstances.
33. The QP said that they were cautious in arguing that a chilling effect on the free and frank provision of advice would occur. They noted that council officers would still have to provide executive members with information required to answer council questions, but considered that views and sensitive opinion may not be included if there is a possibility that it might subsequently be disclosed into the public domain.
34. The council was also concerned that a disclosure of the information would set a precedent that all council questions could have meta data requests submitted under the FOIA, with little apparent added value for the public, but creating a significant burden on the authority.

The public interest in the information being disclosed

35. There is always a general public interest public authorities being transparent and accountable for their decisions, actions and decision making.
36. A disclosure of the information in this case would highlight the information which the councillor responding to the questions asked was provided with prior to responding to them.
37. A disclosure would also provide insight into the process of councillors' responding to questions in full council meetings. It would shed light on the sorts of factual information, opinion and/or suggestions which are provided to councillors in preparation for both the initial, and the supplementary questions which may be asked of them.

38. The Commissioner agrees with the QP that the withheld information in this case is factual information which the council has already disclosed via its response to the question asked in the council meeting.
39. The complainant argues that the requested information is financial data, not subjective matters. They argue that it is crucial that the public and other councillors receive accurate information about council expenditure. The Commissioner notes, however, that the full extent of the request goes further than the data alone.
40. The complainant said that they had noted a disparity between the figures provided at the meeting and those provided previously. They therefore argue that their request seeks clarification on why there was a disparity between the figures provided, and what led to this.
41. The complainant argued that the council refers to its own policies as grounds for withholding the information, but UK law emphasises transparency, especially in matters concerning the public interest and finances. They argued that statutory regulations carry much greater weight than a local council's policy documents.
42. The complainant further argues that in times of financial strain, it is essential for the public to have access to information about where their money is being spent. They argued that without proper disclosure, it becomes impossible for the council to make informed decisions and make necessary savings in the interest of local taxpayers.

#### The Commissioner's analysis

43. The withheld information in this case consists solely of the briefing note to the member. The council has not provided the Commissioner with any communications or other information which falls within the scope of the complainant's request for information.
44. The Commissioner notes the complainant's argument that it is essential for the public to have access to information about where their money is being spent. The factual information requested by the complainant was publicly announced in this case<sup>1</sup>, albeit that the complainant notes that this information contradicted other information disclosed previously. The complainant is therefore seeking the member's briefing note and other communications which sit behind that information.

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<sup>1</sup> <https://www.youtube.com/watch?v=kK5mEAmQY3E> (at 35.30 minutes)

45. The council accepts that the factual content is already publicly available. It argued, however, that disclosing the briefing note would set a precedent, and that the intrusion into what it currently considers to be a confidential process would lead to a chilling effect occurring in the future.
46. The Commissioner notes that a chilling effect, as argued by the QP, would affect how well prepared and informed councillors were during council meetings. If councillors are not fully informed then their responses in the meetings will not be as full and useful to members and the public as they would otherwise.
47. However, in respect of the chilling effect, the Commissioner considers that civil servants should be robust, forthright, and not easily dissuaded from sharing their views – regardless of the possibility of disclosure.
48. The Commissioner notes the council's argument, however the public's rights under FOIA means that there can be no blanket refusal to disclose such information. There may be circumstances where the information provided to cabinet does not reflect the briefing note, or where there has been a significant failing of transparency which the briefing note can shed light on. Similarly, where a disclosure of the specific information falling within the scope of the request is not sensitive, then there is less likelihood that its disclosure would cause a chilling effect in the future. This is the case in this instance.
49. The Commissioner notes the council's argument that officers' briefing notes will often be written with opinions and views included, and that they may include some degree of political leaning. It is the provision of this sort of information which could be affected by the disclosure of this information in the future. If such comments are politically sensitive then the information may be provided verbally or not at all in the future. This would leave the relevant members less informed, and public debate may be affected as a result of this. However, the withheld information in this case does not contain views of this nature. It is factual information, without opinion or views being expressed within it.
50. The Commissioner accepts that there is a strong public interest in preserving the ability of councillors to seek both factual information, advice, and context to questions which they are likely to face in full council meetings in a 'safe space'. Should that process be inhibited the democratic oversight process would be undermined, and this may lead to less informed decision making by the council in the future.



51. Briefing notes which contain suggested secondary questions, or opinions voiced by officers may prove irrelevant to the meetings. The Commissioner recognises, however, that a disclosure of background information such as briefing notes and opinions would potentially open the possibility that such information might be used for political purposes.
52. In the context of the information requested in this instance, however, the Commissioner has not been provided with arguments that the information is sensitive. He notes, also, that there are no views expressed within it which would lead to the chilling effect which the QP suggests occurring in the future.
53. The Commissioner reiterates that the FOI Act and the EIR provide a right to request such information, and that a blanket ban on the disclosure of such information cannot be applied. The information falling within the scope of a request needs to be considered on a case-by-case basis, with an evaluation of the sensitivity of the information, and if necessary, a public interest test to determine whether the information should be disclosed.
54. In this case, the factual information has already been disclosed. There has been no arguments that the withheld information is sensitive in nature, and there are no views or opinions expressed in the note by the council officer who prepared the brief which might lead to a future chilling effect.
55. Given this, the Commissioner's decision is that the public interest in disclosure outweighs that in the exemption being maintained in this case.
56. The Commissioner has therefore decided that the council was not correct to withhold the information under section 36(2)(b)(i) or section 36(2)(c) and it should therefore have disclosed the information.

**Is further information held by the council**

57. Section 1(1) of FOIA requires that a public authority must inform a requestor, in writing, whether it holds information falling within the scope of the request. If it does hold relevant information, it also requires that it communicates the information to the requestor, subject to any exclusions or exemptions applying.
58. The complainant's request was for "*copies of all documents emails memos notes aide memoire etc regarding all communication about or in response to the following three questions...*"

59. The withheld information provided by the council to the Commissioner was solely a copy of the briefing note itself. The council did not provide any communications, notes, or memo's etc.
60. Whilst this may be all of the information which the council holds, the council has not clarified that to be the case, and in the absence of such a clarification, the Commissioner is concerned that further information falling within the scope of the request may be held by it.
61. The Commissioner therefore requires the council to carry out further searches to determine whether it holds any further information falling within the scope of the complainant's request for information, and to respond to the complainant's request again, as required by section 1 of FOIA.
62. This step does not rule out the possibility that no further information is held by the council.

## **Right of appeal**

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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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

63. 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.
64. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Ian Walley**  
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