

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 19 December 2024

Public Authority: London Borough of Tower Hamlets
Address: Town Hall
160 Whitechapel Road
London
E1 1BJ

Decision (including any steps ordered)

1. The complainant submitted a request to the London Borough of Tower Hamlets (the Council) seeking advice its Chief Executive had provided to the Mayor prior to the latter's decision to remove Palestinian flags from Council infrastructure. The complainant also sought copies of any information that the Chief Executive had himself considered in formulating his advice. The Council withheld the Chief Executive's advice on the basis of section 36(2)(b)(i) (effective conduct of public affairs) and information considered by him on the basis of section 42(1) (legal professional privilege) of FOIA.
2. The Commissioner's decision is that the requested information is exempt from disclosure on the basis of each of the exemptions cited by the Council and that for each exemption the public interest favours withholding the information.
3. The Commissioner does not require further steps.

Request and response

4. The complainant submitted the following request to the Council on 14 March 2024:

"In a recent Twitter post made by the Mayor of Tower Hamlets on 13 March 2024:

<https://twitter.com/LutfurRahmanTH/status/1767981298398687624>

there was a reference to "Following advice from the the [sic] Chief Executive" Please can I receive:

- a copy of this advice, and
- information considered by the Chief Executive on preparing the advice (e.g. any advice the Chief Executive received before advising the Mayor)"¹

5. The Council contacted the complainant on 14 April 2024 and explained that it held some information falling within the scope of the request but it considered this to be exempt from disclosure on the basis of section 36(2)(b)(i) (effective conduct of public affairs) of FOIA and that it needed additional time to complete its public interest considerations.
6. The Council provided the complainant with a substantive response to his request on 26 April 2024. It confirmed that the advice provided to the Mayor by the Chief Executive was exempt from disclosure on the basis of section 36(2)(b)(i) of FOIA and that the public interest favoured withholding this information.
7. The complainant contacted the Council on 2 May 2024 and asked it to conduct an internal review of this decision. He challenged the decision to withhold the advice on the basis of section 36(2)(b)(i) and also sought clarity regarding the Council's position in relation to the information sought by the second part of his request. He also asked the Council to provide him with a copy of the submission sent to the qualified person and details as to when the qualified person's opinion was sought and provided.
8. The Council informed him of the outcome of the internal review on 3 June 2024. The Council upheld the decision to withhold the Chief Executive's advice to the Mayor on the basis of section 36(2)(b)(i). With regard to the qualified person's opinion, the Council explained the process by which this had been obtained but explained that it would not provide a copy of the submission itself as this would invalidate the use

¹ The Twitter post in question announced the Mayor's decision that the Council would begin to remove Palestinian flags from Council owned infrastructure.

of the exemption. With regard to the information sought by part 2 of the request, the Council explained that:

"To clarify the information held was 1: a copy of the advice. The scope of "information considered by the chief executive on preparing the advice is too wide and generic in scope.

The "copy of the advice" is a single piece of communication in the form of an email and it has no further attachment/annexes and does not reference any other specific recorded document/information. The wider scope of part 2 would not be valid as we would not be able to determine all information considered by the Chief Executive in forming 1. For FOIA we are required to consider the release of a specific piece of recorded information which is 1, we are not required to consider all possible sources of thought or information that may have contributed to said recorded information."

Scope of the case

9. The complainant contacted the Commissioner on 5 July 2024 in order to complain about the Council's handling of his request. He raised the following two grounds of complaint:
 - Firstly, he disputed the Council's decision to withhold the advice provided to the Mayor by the Chief Executive on the basis of section 36(2)(b)(i) of FOIA.
 - Secondly, he was dissatisfied with the Council's response to the second part of the request. He argued that it is not clear whether the Council's position is that it does not hold any such information or whether it simply has not searched for such information.
10. During the scope of the Commissioner's investigation, the Council clarified its position regarding the second part of the request. It explained that it did hold information falling within the scope of this part of the request but it considered this to be exempt from disclosure on the basis of section 42(1) (legal professional privilege) of FOIA.
11. This decision notice therefore considers whether the information falling within the first part of the request is exempt on the basis of 36(2)(b)(i) and whether the information falling within the second part of the request is exempt from disclosure on the basis of section 42(1) of FOIA.

Reasons for decision

Section 36 – effective conduct of public affairs

12. Section 36(2)(b)(i) of FOIA states that:

“(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”

13. In determining whether this section is engaged in relation to the advice provided by the Chief Executive to the Mayor, the Commissioner must determine 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 and the timing of the request, for example, whether the request concerns an important ongoing issue on 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.

14. 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 not reasonable 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.

15. With regard to the process of seeking this opinion, the Council sought the opinion of its Monitoring Officer who is a qualified person under

section 36(5) of FOIA. The Monitoring Officer gave her opinion that section 36(2)(b)(i) was engaged on 24 April 2024.² The Commissioner is therefore satisfied that the process of seeking the opinion was appropriate.

16. Turning to the substance of the opinion, in summary the qualified person argued that since October 2023 the issue of Palestinian flags being displayed in the borough had been a source of community tensions and continued to be so. The qualified person argued that disclosure of the advice – which was given by an identifiable Council officer – risked having a chilling effect in scenarios where similar advice, including that provided by senior officers, was needed in the future. This was due to the sensitive nature of the subject matter and the need to consider a range of potentially difficult options. Furthermore, the qualified person argued that disclosure of this information risked having a chilling effect on the advice provided by other groups which provided the Council with advice on this topic, including the Tension Monitoring Group (TMG), if they thought that their advice could also be subject to release. The qualified person also argued that disclosure of the information risked encroaching on the safe space that Council officers – and others such as the TMG – needed to consider this issue. In support of their opinion that disclosure of the information would be likely to inhibit future advice on this subject the qualified person emphasised that the issue remained a live and ongoing one given the position in the Middle East and given continuing community tensions in respect of the displaying of Palestinian flags.
17. The Commissioner accepts that the qualified person's opinion was a reasonable one to come to. In respect of the issue of timing, the Commissioner notes that at the time of the request the decision to remove flags from Council owned infrastructure had been taken. However, he accepts that it is reasonable to argue that in view of the ongoing situation in the Middle East, and more specifically the impact on community tensions as result of this, that Council officers may need to provide further advice on related issues in the future. In view of this, and given the sensitive and complex nature of this issue, the Commissioner accepts that it was logical for the qualified person to argue that disclosure of the requested advice would be likely to have both a chilling effect on contributions of future officers, and an impact on the safe space needed to consider and provide such advice. Whilst

² The deputy monitoring officer had previously provided their opinion on 12 April 2024 that it was reasonable to engage the exemption, ie prior to the public interest test extension being issued. (The Commissioner understands that the monitoring officer was not available at that stage.)

the position that disclosure would also have an impact of other groups, eg TMG, is perhaps a more tenuous a line of argument position – which the Commissioner has considered and commented on in the public interest analysis below – taking into the sensitive nature of this subject he does not consider it to necessarily be an unreasonable one.

18. Section 36(2)(b)(i) is therefore engaged.

Public interest test

19. Section 36 is a qualified exemption and in line with the requirements of section 2 of FOIA the Commissioner must consider whether in all the circumstances of the case the public interest in maintaining the exemption cited outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosure

20. The complainant disputed the weight that the Council had attributed to the maintaining the exemption. He noted that the refusal notice had cited the Commissioner's guidance to support its position that disclosure would have a chilling effect but had not referred to the parts of the guidance which highlighted that previous First-tier Tribunal decisions had been sceptical of such arguments:

"Tribunals are generally sceptical of such arguments. In [Davies v Information Commissioner and the Cabinet Office \(GIA\) \[2019\] UKUT 185 \(AAC\)](#), 11 June 2019 the Upper Tribunal stated at paragraph 25 that,

There is a substantial body of case law which establishes that assertions of a "chilling effect" on provision of advice, exchange of views or effective conduct of affairs are to be treated with some caution.

There are two main reasons for such caution. Firstly, since FOIA was introduced in 2005, public officials now recognise that it is not possible to guarantee the confidentiality of their advice or deliberations. Secondly, civil servants and other public officials are expected to be impartial and robust when giving advice, and not be easily deterred from expressing their views by the possibility of future disclosure.

The possibility of future disclosure could actually lead to better quality advice. Where lobbyists have been involved in the discussions, then they are even less likely to be inhibited in their contributions by the possibility of disclosure as they are trying to further their own agenda by influencing your public authority.

Although there are a number of restraints on the chilling effect, such arguments cannot be dismissed out of hand. The real issue is the weight they attract."³

21. The complainant also argued that the Council appeared to be relying heavily on the fact that matters were still live in relation to the conflict in the Middle East, whereas he emphasised that by the time of his request the Council had already taken - and announced - its decision to remove Palestinian flags from Council property. As a result he argued that, again in line with comments in the Commissioner's guidance, this reduced the weight that should be given to the chilling effect arguments, ie because the issue in question was no longer live.
22. The complainant also explained that he did not accept the argument that disclosure of this information would have a chilling effect on the TMG. He argued that the Chief Executive and the TMG were distinct individuals/bodies and the Council was not assessing each FOI request on an individual basis.
23. Similarly, the complainant argued that as a decision had now been taken on this issue, there was no need for the Council to argue that it needed a safe space to take future decisions on this subject.
24. Furthermore, the complainant argued that there was a strong public interest in the disclosure of the requested information. He argued that not only did the decision affect all residents of the borough, but also visitors to the area. He noted that the London Marathon took place on 21 April 2024 and part of the route went through the borough and the televised nature of this event drew wider attention to this issue.
25. The complainant also argued that the public have a right to know the thinking and rationale that had gone into this decision. In his view the Council had not given sufficient weight to this argument when considering the balance of the public interest. Furthermore, he highlighted that this decision appeared to have been made simply in respect of Palestinian flags, but there were other flags which had been used to show solidarity/support for particular causes, eg Ukrainian flags, but no statement had been made about those. He emphasised that the issue of Palestinian flags was receiving a lot of interest and it was important that decisions in respect of how different flags are handled are explained to the public without undue secrecy, and this included the

³ <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/section-36-prejudice-to-the-effective-conduct-of-public-affairs/#chilling>

disclosure of the advice provided by the most senior official in the Council on this.

Public interest arguments in favour of maintaining the exemption

26. The Council's position that the public interest favoured maintaining the exemption built upon the rationale set out by the qualified person. The Council emphasised that the crisis in the Middle East is having, and will continue to have, an impact on community tensions and cohesion within its diverse borough. The Council argued that it was in the public interest that officers – including senior officers – are able to give advice on difficult and complex matters which impact on cohesion and community safety. It argued that disclosure of this advice would be likely to result in a chilling effect on the similar advice given in the future, ie a loss of frankness and candour, which would damage the quality of the advice and lead to poorer decision making. The Council argued that in its view such an outcome was firmly against the public interest.
27. In support of this point the Council took the view that the tensions and divisions around the situation in the Middle East were unlikely to diminish or decrease anytime soon. The issue therefore remained live.
28. The Council also reiterated that this chilling effect operated on a number of levels and disclosure risked not only impacting on the nature of future advice provided by officers, including senior officers, but also on the TMG. It argued that this it was also clearly against the public interest that groups such as TMG, which support the Council, would be constrained in their decision making processes.
29. Furthermore, the Council argued that disclosure of the withheld information at the time of the request would encroach on the safe space needed by the Council to discuss current sensitive and high tension issues away from external scrutiny.
30. The Council acknowledged the complainant's points that the public have a right to know the thinking and rationale behind decisions it takes which can impact the community. However, it argued that the withheld information is not the only source of information which records the Council's thinking on this issue. It highlighted that the Mayor specifically released a statement which provided the thinking and rationale as to the decision to remove Palestinian flags from Council infrastructure (ie the statement cited by the complainant's request).

Balance of the public interest

31. In considering complaints regarding section 36, where the Commissioner finds that the qualified person's opinion was reasonable, he will consider the weight of that opinion in applying 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 he will go on to consider the severity, extent and frequency of that prejudice or inhibition in forming his own assessment of whether the public interest test dictates disclosure.

32. As set out in the quote above at paragraph 20, chilling effect arguments need to be considered carefully. The Commissioner's approach in cases such as this, is as outlined in the above quote. In this case in terms of attributing weight to the chilling effect arguments a preliminary issue that needs to be considered is the disparity between the Council and the complainant as to whether the issue in question is a live one.
33. The Commissioner accepts, as the complainant argues, that by the time of this request the Council had already announced its decision that Palestinian flags were to be removed from Council infrastructure. To that extent, the Commissioner therefore accepts that this particular decision had been taken. However, the Commissioner considers it important to recognise the broader context within which this decision was made. In doing so he accepts the Council's point that there was no immediate end to the current crisis in the Middle East and as a result community tensions and divisions within the borough as result of this remain. The Commissioner therefore accepts that it is likely that the Council may well need to consider – and senior officers may need to provide advice on – further matters related to the Middle East crisis in respect of issues affecting community relations within the borough. This could, in theory, be a further consideration of its decision on the issue of Palestinian flags, or other closely related issues. The Commissioner therefore prefers the Council's position that in terms of attributing weight to the public interest arguments it is reasonable to accept that issues relating to the impact of the current Middle East crisis, and how this impacts on community relations within the borough, is a matter that was live and ongoing at the time of the request (and indeed remains so).
34. Turning to the chilling effect arguments themselves, the Commissioner acknowledges the points that the complainant makes. Nevertheless, in the circumstances of this case given the sensitive and complex nature of this issue the Commissioner is persuaded that if this advice was disclosed it is likely that there would be a chilling effect on how advice related to the Middle East crisis may be provided by senior officers in the future. In reaching this decision the Commissioner has also taken into account the content of the advice. As a result and in view of both the content of the advice, and the context within which it was given, the Commissioner is satisfied that this would have an impact on the candour of any similar advice. In turn the Commissioner accepts that this would impact on the efficiency of the Council's decision making, an outcome which would be firmly against the public interest. The chilling effect

therefore needs to be given considerable weight in this case in respect of the advice given by senior officers in the future.

35. The Commissioner is less persuaded that disclosure of such advice would in turn impact on the deliberations of the TMG and other similar groups. The Commissioner would draw a distinction between disclosure of advice provided by the Council's Chief Executive and the advice – even on similar topics – provided other bodies. In the Commissioner's opinion the likelihood / impact of the disclosure of the former having an impact on the latter is limited.
36. That said, the Commissioner does accept that significant weight should be given to the safe space arguments, ie the need to be able to consider and provide advice on issues away free from external comment and examination. The Commissioner accepts that there is a genuine risk of the safe space being impacted in terms of future advice and decision making about issues of community relations in respect of the current Middle East crisis if the content of this particular advice was disclosed at the point of the request. In reaching this decision the Commissioner has taken into account both the content of the advice and the strong opinions by various parties about this issue. As a result in the Commissioner's view disclosure of the advice would be likely to expose the Council to external comment and/or challenge when making decisions about similar issues related to the ongoing Middle East crisis and community relations in the borough. Again the Commissioner accepts that this would hamper the Council's decision making processes and would be against the public interest.
37. Turning to the public interest arguments in favour of disclosure, the Commissioner accepts that the displaying of Palestinian flags is a complex, sensitive and high profile one. As result he accepts that the public have a genuine and legitimate interest in understanding the basis upon which this decision was reached. The Commissioner appreciates the Council's point that the Mayor's statement did contain details of the rationale behind this, and as a result he accepts that to some extent there already is a level of transparency around this decision. However, in the Commissioner's opinion disclosure of the Chief Executive's advice would provide the public with a more detailed insight into the factors and considerations which led to this decision being taken. In the Commissioner's view the public interest in ensuring such additional transparency should not be underestimated or downplayed.
38. Nevertheless, taking into account the cumulative weight that he feels should be attributed to the safe space and chilling effect arguments, the Commissioner has concluded that the public interest ultimately favours maintaining the exemption contained at section 36(2)(b)(i) of FOIA.

Section 42 – legal professional privilege

39. Section 42(1) states:

“Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information”.

40. Section 42 is a class based exemption, that is, the requested information only has to fall within the class of information described by the exemption for it to be exempt. This means that the information simply has to be capable of attracting legal professional privilege (“LPP”) for it to be exempt. There is no need to consider the harm that would arise by disclosing the information

41. There are two types of legal professional privilege; advice privilege and litigation privilege. The Commissioner’s view is that for legal professional privilege to apply, the information must have been created or brought together for the dominant purpose of litigation or for the provision of legal advice. With regard to legal advice privilege, the information must have been passed to or emanate from a professional legal adviser for the sole or dominant purpose of seeking or providing legal advice. With regard to litigation privilege, the information must have been created for the dominant purpose of giving or obtaining legal advice, or for lawyers to use in preparing a case for litigation.

42. The Council explained to the Commissioner that it considered section 42(1) to apply as the advice in question consisted of advice from a lawyer to their client (in this case the Council) the dominant purpose of which was the provision of legal advice. The Commissioner has considered the withheld information and accepts this description. He is satisfied that information is therefore exempt from disclosure on the basis of section 42(1) of FOIA.

Public interest test

43. Section 42 is a qualified exemption and therefore the Commissioner must consider the public interest test and whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

44. Although the Commissioner accepts that there is a strong element of public interest inbuilt into legal professional privilege, he does not accept, as previously argued by some public authorities, that the factors in favour of disclosure need to be exceptional for the public interest to favour disclosure. The Information Tribunal in *Pugh v Information Commissioner* (EA/2007/0055) were clear:

"The fact there is already an inbuilt weight in the LPP exemption will make it more difficult to show the balance lies in favour of disclosure but that does not mean that the factors in favour of disclosure need to be exceptional, just as or more weighty than those in favour of maintaining the exemption". (Para 41).

45. Consequently, although there will always be an initial weighting in terms of maintaining this exemption, the Commissioner recognises that there are circumstances where the public interest will favour disclosing the information. In order to determine whether this is indeed the case, the Commissioner has considered the likelihood and severity of the harm that would be suffered if the advice were disclosed by reference to the following criteria:

- how recent the advice is; and
- whether it is still live.

46. With regard to the age of the advice, the Commissioner accepts the argument advanced on a number of occasions by the Tribunal that as time passes the principle of legal professional privilege diminishes. This is based on the concept that if advice is recently obtained it is likely to be used in a variety of decision making processes and that these processes are likely to be harmed by disclosure. However, the older the advice the more likely it is to have served its purpose and the less likely it is to be used as part of any future decision making process.

47. In many cases the age of the advice is closely linked to whether the advice is still live. Advice is said to be live if it is still being implemented or relied upon and therefore may continue to give rise to legal challenges by those unhappy with the course of action adopted on that basis.

48. In order to determine the weight that should be attributed to the factors in favour of disclosure the Commissioner will consider the following criteria:

- the number of people affected by the decision to which the advice relates;
- the amount of money involved; and
- the transparency of the public authority's actions.

49. With regard to whether the advice is live, for the reasons discussed above, the Commissioner accepts that this is an issue that remained live at the time of the request. Furthermore, the Commissioner understands that the advice is still being relied on by the Council, and in addition, was clearly given very recently prior to the FOI request being received. For these reasons, the Commissioner accepts that the public interest in

favour of maintaining the exemption, and preserving LLP in this case, attracts very significant weight.

50. As discussed above, the Commissioner recognises that there is a genuine and legitimate public interest in the public being able to understand the reasoning and basis of the Council's decision in respect of Palestinian flags. In doing so, he appreciates that the complainant's point this is an issue that affects all those who both live and travel within the borough. Disclosure of the advice in question would provide a direct insight into the legal issues and considerations that the Chief Executive took into account when formulating his own advice for the Mayor and would therefore contribute directly to this public interest. However, and again as discussed above, the Commissioner accepts that the Mayor's statement does provide some rationale for the decision taken about Palestinian flags in the borough. Therefore, he accepts that there has already been some transparency about the Council's action in this regard.
51. As a result, taking into account the fact the advice is recent and live, and the inbuilt weight in protecting LLP, the Commissioner has decided that the public interest favours maintaining the exemption.

Right of appeal

52. 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

53. 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.
54. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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