

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 May 2021

Public Authority: London Councils
Address: 59½ Southwark Street
London
SE1 0AL

Decision (including any steps ordered)

1. The complainant has requested information on the income loss of London boroughs due to the Covid 19 pandemic.
2. The Commissioner's decision is that London Councils has appropriately applied the exemption at FOIA section 36(2)(c) to withhold the requested information.
3. The Commissioner does not require the public authority to take any steps to ensure compliance with the legislation.

Request and response

4. On 27 May 2020, the complainant wrote to London Councils and requested information in the following terms:

"Your weekly circular today contained the following

'Financial pressures on boroughs from Covid-19

London Councils has collated a summary of the London local government finance pressures based on the boroughs' recent finance returns:

- We are estimating £1.8 billion of extra pressure on London boroughs' finances this year due to Covid-19.
- Of this, £1.1 billion is caused by the boroughs' income loss and £700 million by increased expenditure.

Please can you send me a breakdown, as supplied by boroughs, of the £1.1bn of income loss by borough in as much detail as they gave you in their finance returns.

If the information is held electronically in a spreadsheet it should be forwarded in the same format as held as this address can accept an email up to 100mb. To save editing time I am perfectly happy to receive it along with other related information not requested about, say, increased expenditure."

5. London Councils responded on 19 June 2020. It stated that the information held was withheld in reliance of section 36(2)(c) – Prejudice to effective conduct of public affairs.
6. Following an internal review London Councils wrote to the complainant on 21 July 2020 upholding the initial response.

Scope of the case

7. The complainant contacted the Commissioner 27 August 2020 to complain about the way his request for information had been handled. He explained:

"I have asked for quite general information about budget shortages in London caused by the covid pandemic. Council tax payers have an absolute right to know of the effect that covid might have on their future council tax bills or reduced services. Central government is already collecting masses of data from local authorities and the denied data is probably already known to central government so its release can do no harm. The government has recently set out a formula to provide further financial support [sic] local authorities & releasing the data won't affect the support central government decides to give. Prejudice cannot possibly be caused by financial data being made public after the event. London Council provided no evidence that the data was provided to them in confidence and councils had no right to expect it would be confidential as council tax payers in each borough are entitled to inspect the audited annual accounts of their council which will make definite the budget shortfalls."

8. The Commissioner considers the scope of her investigation to be the application of FOIA section 36(2)(c) to the requested information.

Reasons for decision

Section 36 – otherwise prejudice the conduct of public affairs

9. Section 36(2)(c) FOIA states:

"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—

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

10. Section 36(4) FOIA states:

"In relation to statistical information, subsections (2) and (3) shall have effect with the omission of the words "in the reasonable opinion of a qualified person".

11. The term 'statistical information' has a wider meaning than 'statistics'. It includes the raw data that is used for statistical analysis, the mathematical model or methodology used to analyse the data and the product or outcome of that analysis. In this case, the requested information comprises statistical information created by London Councils from information provided by each of the London Boroughs at a granular level. London Councils explained that the statistics are intelligent estimates, combining the actual incidence of additional expenditure and lost income to a particular point and projections for the month ahead and to the financial year-end, based on modelling assumptions of the likely trajectory of the pandemic as it was then understood.
12. The Commissioner is satisfied that the qualified person's opinion is not required in this case by virtue of section 36(4)
13. In relying on subsection (c) London Councils has applied the exemption to all the information captured by the request. The inclusion of the words "otherwise prejudice" in this subsection means that it cannot be applied to a prejudice that would be covered by another exemption.
14. The Commissioner is satisfied that the exemption at section 36(2)(b)(ii); disclosure would, or would be likely, to inhibit the free and frank exchange of views for the purposes of deliberation, does not apply in this case. The Commissioner's guidance explains that an exchange of data or purely factual information does not constitute the provision of advice or the exchange of views. The exchange of views must be as part of a process of deliberation where deliberation refers to the public authority's evaluation of competing arguments or considerations in order to make a decision. In this case London Councils is not deliberating on or evaluating competing arguments, it is providing a public service to the London boroughs.
15. Section 36(2)(c) is concerned with the effects of making the requested information public. The prejudice to the effective conduct of public

affairs refers to an adverse effect on the public authority's ability to offer an effective public service or to meet its wider objectives or purpose.

16. London Councils explained that the prejudice in this case relates to its ability to be able to fulfil the function of lobbying government for support of the London boroughs and assisting the boroughs in improving their understanding of the financial impact of Covid-19 and the related estimates of that financial impact. Furthermore, London Councils' view is that these functions would likely be adversely affected if boroughs considered that the detailed financial information was publicly disclosed in detail.
17. In requesting an internal review the complainant stated:

"You are not undertaking a statutory function with your lobbying and the Government and [sic] going to make their own decisions on support for local government whether the public know the figures or not. The boroughs are under no obligation to give you this data and so you cannot be prejudiced by its release."
18. As noted above in paragraph 7 the complainant stated:

"...council tax payers in each borough are entitled to inspect the audited annual accounts of their council which will make definite the budget shortfalls."
19. In addressing the inspection of audited annual accounts, London Councils explained to the Commissioner that the London boroughs' accounts are prepared on a statutory basis and would not necessarily include specific reference to Covid spending and income loss. It added that is very likely that in the accounts' accompanying commentary, councils would identify the impact as a way of explaining overspends and reductions in reserves. While the accounts are public documents, they would not include the level of detail contained in the requested information.
20. The Commissioner considers that the provision of the data to London Councils, used to create the requested information, demonstrates the working relationship between London Councils and the London boroughs. Any harm to that relationship is therefore appropriately considered within the exemption for the prejudice to the effective conduct of public affairs.
21. London Councils confirmed that the information created, detailing all the London boroughs, was not shared with the boroughs. A benchmarking tool was created that enabled each borough to compare their own numbers with averages/quartiles. This was provided at a borough Finance Director level.

22. The Commissioner notes the complainant's comments at internal review, as set out in paragraph 18. The complainant acknowledges that the London boroughs are not obliged to engage with London Councils and therefore may not provide relevant data. Following from this, the Commissioner considers that such a lack of engagement would likely result from disclosure of information which the boroughs have not shared with each other and have provided to London Councils in its specific role, with no expectation that the figures would be shared publicly. The effect of this would likely result in the prejudice of the ability of London Councils to fulfil those functions described above in paragraph 16.
23. Furthermore, disclosure of the requested information in this case would likely result in a reluctance on the part of the boroughs to share other sensitive information which would harm London Councils' policy development and lobbying role.
24. In considering the likelihood of prejudice the Commissioner considers that to engage the lower threshold, 'would be likely to occur', the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, 'would occur', the Commissioner's view is that this places a stronger evidential burden on the public authority. The Commissioner notes that London Councils has relied on the lower threshold such that disclosure of the information would be likely to result in the prejudice being claimed.
25. The Commissioner questioned whether the boroughs would be likely to refuse to provide information to London Councils if it was lobbying on their behalf. London Councils explained that the boroughs may still provide data for this purpose but at a much less granular level. This could be sufficient for London Councils to provide assistance to the boroughs but would not be useful to London Councils in its work, for example, in creating trend analysis.
26. The Commissioner considers that such a circumstance would result in London Councils being less effective in their use of the information received, in terms of how the data could be used. The granular data enables a more accurate trend analysis for use in policy making. Consequently this function, part of the role of London Councils, would be compromised and prejudiced.
27. The Commissioner accepts that disclosure of the information would be likely to result in the prejudice being claimed. The Commissioner is satisfied that the adverse effect on London Councils' ability to fulfil its objectives and purpose in assisting and representing the London boroughs would be likely to be prejudiced if the relationship between it

and the Councils is harmed. Therefore, she is satisfied that the exemption at section 36(2)(c) is engaged.

28. Section 36 is a qualified exemption and therefore the Commissioner must consider the public interest test and determine whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest test

Public interest in favour of disclosing the information

29. London Councils explained that it:

"...recognises the strong general public interest in the transparency of the information, and the general public interest in the pandemic issue. There is also a public interest in understanding the use of financial resources."

30. The complainant argues (to London Councils):

"It is clearly in the interests of council tax payers, such as myself, that we are aware of the financial challenge we face and which we may have to make good in the form of increased council tax.

It is irrelevant if the 'issue' is live or historic. I have asked for information at a certain point in time and which you have published at high level, I merely wish to see the detailed breakdown."

Public interest in favour of maintaining the exemption

31. In explaining its consideration of those factors in favour of maintaining the exemption, London Councils pointed out that the information requested relates to the live issue of the financial impact of the pandemic on London boroughs, the assessment of which is ongoing. The boroughs continue to provide London Councils with monthly returns.

32. London Councils considers that the most significant argument against disclosure relates to the purposes for collecting the requested data. As explained at paragraph 16 above, London Councils provides support for the London boroughs; it argues that it would not serve the public interest if these functions did not operate effectively.

33. Furthermore, London Councils explained:

"...there is a likelihood that based on the release of this data, boroughs may in future be reluctant to share future potentially sensitive data, such as boroughs' anticipated future tax rises, the "stress testing" of their medium-term financial plans – which relies on sensitive risk ratings of their own budget proposals – or the contents of the peer challenges

London Councils manages for both Treasurers and Chief Executives. The lack of boroughs sharing such data would inevitably impair London Councils' policy development and lobbying role."

Balance of the public interest

34. In considering the balance of the public interest in this case the Commissioner notes that the summary figures collated from the monthly returns continue to be provided to London borough Leaders and subsequently published on London Councils' website. The most recent in a series of reports was made to the Leaders' Committee on 9 February 2021¹. The high level report covers the latest financial impact of the COVID-19 pandemic on London local government based on the latest funding announcements and contains detailed information with combined statistics for all London boroughs, albeit not broken down individually across all sectors.
35. The particular report referenced above post-dates the complainant's request, however, the intention to publish and update the website is clear as reports were published from June 2020. The Commissioner considers that the information available online provides a proportionate level of transparency. The Commissioner acknowledges the significant impact of the pandemic on local government finances and understands that addressing this is a matter of great public interest. She therefore attributes weight to the complainant's arguments in this regard. However, although the complainant's request would provide the public with greater specific detail she must weigh this greater level of transparency against any prejudice likely to result from the disclosure.
36. The Commissioner is persuaded that the London boroughs do not expect public disclosure of the information, particularly as London Councils has confirmed that the boroughs themselves do not receive the compiled, analysed data.
37. The complainant argues that prejudice cannot possibly be caused by financial data being made public "after the event". The Commissioner notes that at the time of the request, and currently, the impact of Covid-19 on local authorities' finances is ongoing. She acknowledges that the requested information had been used by London Councils at the time of the request. However, the prejudice to be considered is the harm to the functions of London Councils, as set out in paragraph 16, in

¹ <https://www.londoncouncils.gov.uk/node/38164>

its relationship with the London boroughs and its ability to effectively lobby on their behalf. The Commissioner acknowledges that, at a much later date, London Councils may be less concerned about the impact of the disclosure of the requested information. However, currently the timing of the request remains a significant factor in engaging and maintaining the exemption at section 36(2)(c).

38. The Commissioner has carefully considered the weight of the public interest in greater transparency of the detailed figures which demonstrate the impact of the pandemic on local government finances and the potential impact on council tax. Balanced against this is the public interest in the role of London Councils in representing and assisting the boroughs, and effectively operating, particularly in the prevailing circumstances. Ultimately, the impact of the prejudice to London Councils' functions created by disclosure holds significant weight, rather than the content of the information itself.
39. In the circumstances of this case the Commissioner is satisfied that, on balance, the public interest favours maintaining the exemption.

Right of appeal

40. 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@justice.gov.uk

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

41. 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.
42. 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

Susan Hughes
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF