

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 March 2017

Public Authority: London Borough of Lewisham

Address: Second Floor
Lewisham Town Hall
Catford Road
London
SE6 4RU

Decision (including any steps ordered)

1. The complainant requested from the London Borough of Lewisham ("the Council") information concerning its No Recourse to Public Funds ("NRPF") training material, guidance and other related documents. The Council disclosed some information but withheld other information under section 36(2)(c).
2. The Commissioner's decision is that section 36(2)(c) is engaged but that the public interest in withholding the information does not outweigh the public interest in disclosure.
3. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation.
 - To disclose to the complainant the information that it has withheld under section 36(2)(c).
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 12 January 2016 the complainant wrote to the Council and requested the following information:

"1. NRPF team internal guidance on territorial responsibility under s.17 for NRPF families

2. Blank triage form to be completed by NRPF assessmors

3. NRPF team internal guidance note on concurrent duties and s.17 of the CA 1989

4. NRPF internal guidance on where domestic violence is raised as an issue assessment.

5. NRPF internal guidance on assessment of EU Nationals and Zambrano Carers

6. NRPF: Guidance for assessment and case management, v.1, July 2015 (if any new versions of this guidance have been produced, I request that also).

7. Training materials for NRPF team concerning 'Housing Options'

8. Blank initial assessment form.

9. NRPF Decision Making Guide v.3, 2014

...Finally, I understand that there are team meetings and dedicated review days during which the NRPF team discuss guidance documents. Please can I have a copy of any minutes produced at these meetings, and any material used in the dedicated review meetings."

6. Following an investigation by the Commissioner, she issued a decision notice on 23 June 2016 requiring the Council to provide the complainant with a response which was compliant with the Freedom of Information Act.
7. The Council wrote to the complainant on 6 July 2016 and provided some information within the scope of the request but withheld other information under section 36.

Scope of the case

8. The complainant wrote to the Commissioner on 6 July 2016 to complain about the way her request for information had been handled. The complainant argued as part of her complaint that the Council should have provided her with all of the information that she had requested.
9. The Commissioner considered whether the Council had complied with the Act in its handling of the request. Specifically, she considered in this notice whether it was entitled to rely on section 36 to withhold information.

Reasons for decision

Section 36 – Prejudice to the effective conduct of public affairs

10. The Council relied on section 36(2)(c) to withhold some of the information falling within the scope of the complainant's request.

The engagement of section 36

11. Section 36(2)(b) and (c) provides that:

'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.

12. In order to determine whether section 36 has been correctly applied the Commissioner has:

- (i) ascertained who the qualified person was for the Council;
- (ii) established that an opinion was given;
- (iii) ascertained when the opinion was given; and
- (iv) considered whether the opinion given was reasonable.

13. The Council informed the Commissioner that the opinion under section 36 was given by its Head of Law who was also its Monitoring Officer. The Commissioner is satisfied that the Council's Monitoring Officer is an appropriate qualified person for the purpose of section 36.
14. In support of the application of section 36, the Council provided the Commissioner with a copy of the submissions to the qualified person in respect of each part of the complainant's request in relation to which information had been withheld. Attached to the submissions were copies of the information that it was proposed should be withheld.
15. The qualified person's opinion was given on 1 June 2016 and was that disclosure of the withheld information would be likely to otherwise prejudice the effective conduct of public affairs under section 36(2)(c).
16. In the Commissioner's view "would be likely" means that there must be more than a hypothetical or remote possibility of prejudice occurring. There must be a real and significant risk of prejudice, even though the probability of prejudice occurring is less than 50%.
17. The Commissioner considered whether it was reasonable for the qualified person to conclude that disclosure of the withheld information would be likely to prejudice the effective conduct of public affairs under section 36(2)(c).
18. The submission to the qualified person explained that prior to revised processes, guidance and training being put in place, the Council had a disproportionate level of fraud as a result of the failure by NRPF applicants to disclose information or as a result of misrepresentations. It went on to explain that since the revision of its processes and guidance, the Council had saved £4.3 million between June 2015 – April 2016 and that this information had been provided to the Department for Local Communities and Government as part of a funding initiative to reduce fraud.
19. The submission stated that the documents requested formed part of the revised processes, guidance and training which were specifically produced to decrease fraud levels within NRPF representations. More specifically, the documents were decision making tools used by its NRPF team. It argued that if applicants (or third parties) were to obtain the withheld information it would provide the applicant (or their representative) with the opportunity to have sufficient foreknowledge of the application process and the criteria to allow them to prepare a response in advance to achieve a specific outcome, as opposed to answering truthfully. This undermined the purpose of the tools as it allowed applicants the opportunity to manipulate the outcome.

20. It was further stated in the submission that the NRPF team had already demonstrated that the guidance had been critical in reducing fraudulent applications and the risk of applicants receiving destitution support from more than one borough. It also assisted the Council and neighbouring boroughs (all of whom had signed up to this approach) to appropriately consider concurrent duties in relation to children in need. It noted that this was a complex area of casework and that it was important that the decision making tools continued to function in a way that enabled authorities to make decisions.
21. The submission argued that authorities needed to be confident that decision making was compliant with legislation and the requested documents allowed the Council to do that. Specifically, to ensure that the correct authority was taking financial responsibility for the people that they had a duty towards.
22. The submission went on to argue that the requested documents were decision making tools and the release of one of the documents, in conjunction with other guidance and training material (forming a mosaic effect) would be likely to lead to an increase in misrepresentations and failure to disclose. In doing so, this would be likely to inhibit the Council's ability to effectively manage applicants and result in an increase in the number of fraudulent claims paid.
23. The qualified person accepted that some parts of the requested documents should be withheld for the reasons set out in the submission, on the basis that disclosure of this information would enable applicants to manipulate their answers in the assessment process to gain access to benefits to which they would not otherwise be entitled.
24. In judging the reasonableness of the qualified person's opinion the Commissioner's guidance on section 36 states:

*"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 unreasonable if it is an opinion that **no** reasonable person in the qualified person's position could hold. The qualified person's opinion does not even have to be the **most** reasonable opinion that could be held; it only has to be a reasonable opinion."* (para 21)
25. In light of the above and after reviewing the content of the withheld information to which this section had been applied, the Commissioner accepts that the opinion of the qualified person in relation to that information was a reasonable one. The Commissioner has consequently concluded that section 36(2)(c) is engaged in relation to the withheld information. As the section is a qualified exemption, she has gone on to

consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure of the information.

Public interest test

26. In relation to the application of the public interest test under section 36, the Commissioner's guidance on that section states:

"In considering a complaint regarding section 36, if the ICO finds that the opinion was reasonable, we will consider the weight of that opinion in the public interest test. This means that we accept that a reasonable opinion has been expressed that prejudice or inhibition would, or would be likely to occur, but we will go on to consider the severity, extent and frequency of that prejudice or inhibition in forming our own assessment of whether the public interest test dictates disclosure." (para 71)

Public interest arguments in favour of maintaining the exemption

27. The Commissioner initially notes that the reasonable opinion of the qualified person was that disclosure of this information would be likely to prejudice the effective conduct of public affairs under section 36(2)(c). This was on the basis that it would be likely to provide NRPF applicants with sufficient foreknowledge of the application process and the criteria to allow them to prepare a response in advance to achieve a specific outcome, as opposed to answering truthfully. It was believed that this would be likely to result in an increase in the number of fraudulent claims made and subsequently paid by the Council.
28. The consequences of this opinion is that the Commissioner accepts that there is a plausible causal link between the disclosure of the withheld information and the prejudice identified and that there is a real possibility that the circumstances giving rise to this prejudicial effect could occur. However, she must go on to consider the severity, extent and frequency of that prejudice in carrying out the public interest test.
29. The Commissioner notes that the information that has been withheld consists of details of criteria to be applied and the weight to be given to those criteria in assessing NRPF applications. It also consists of details of the sorts of evidence that may be required from applicants as part of the assessment process and procedural steps to be taken by those carrying out relevant assessments.
30. As noted above, the acceptance by the Commissioner that the qualified person's opinion was a reasonable one means that she accepts there is a real possibility that the disclosure of the withheld information could lead to it being used by people wishing to make fraudulent NRPF applications. However, the Commissioner is of the view that the information that has

been withheld is information that people making NRPf applications will become aware of during the course of the assessment of their applications. So for example, they will be informed of what documentary evidence they need to provide to assist their application and will be asked by those carrying out the assessments for other information considered relevant to their application. Consequently, if the same person makes a further NRPf application, they will be aware of the types of evidence that they may need to provide and the criteria that are likely to be applied to their application. In addition, anyone who was minded to make a fraudulent application would be likely to be able to obtain details of the types of evidence that may be required and the criteria that might be applied by simply asking for these details from other people who have already been through the assessment process.

31. In light of the above, the Commissioner is not convinced that the disclosure of this information would be likely to have a severe, extensive or frequent effect on the Council's efforts to prevent fraud in relation to NRPf applications.

Public interest arguments in favour of disclosing the requested information

32. The Council has acknowledged that there is a public interest in the disclosure of the withheld information to promote openness and transparency in its decision making, especially in the context of how public money is spent and how NRPf applicants become eligible for funds.
33. The Commissioner notes that NRPf funding is provided for migrant families to give them financial and housing support where they do not have other forms of support available to them. Consequently, the provision of NRPf funding to appropriate applicants may be vital if they are to avoid the risk of homelessness and destitution. The Commissioner therefore believes that there is a very strong public interest in transparency and accountability in relation to the NRPf process and decision making to try to ensure that as far as possible all of those people in need of support are identified and provided with the necessary assistance.
34. The Commissioner believes that the disclosure of the withheld information would assist the public in satisfying itself as to the appropriateness of the criteria being applied to the NRPf decision making process and as to the appropriateness of the evidence that applicants are required to provide. It would also allow applicants and other interested parties to satisfy themselves that the Council is complying with its own guidance in applying the criteria for assessing

NRPF applications and in terms of the evidence required to be produced by applicants.

35. The disclosure of the withheld information would also allow potential applicants to be aware of the sorts of information and documents they might need to provide as part of the assessment process and so put them in a better position to provide any relevant information as soon as required by the Council. This could potentially save time in processing applications, which would be of particular importance to applicants for whom, given their circumstances, time is likely to be of the essence.

Balance of the public interest arguments

36. In considering where the balance of the public interest lies, the Commissioner is mindful of the public interest arguments in favour of withholding the information presented by the Council. She acknowledges the Council's concerns over the impact that the disclosure of the withheld information might have on the level of fraudulent NRPF claims. However, the Commissioner believes that as a democratic body which acts on behalf of the public, the actions of the Council should, as far as possible, be open, transparent and subject to public scrutiny. She considers that, in this particular case, there is a very significant public interest in the disclosure of the withheld information to promote openness and transparency. In light of this, the Commissioner has determined that the public interest in withholding the information does not outweigh the public interest in disclosure. She has therefore concluded that the Council has incorrectly applied section 36(2)(c) to the withheld information and she requires it to disclose this information to the complainant.

Right of appeal

37. 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@hmcts.gsi.gov.uk

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

38. 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.
39. 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

Rachael Cragg
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