

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 October 2017

Public Authority: London Borough of Haringey
Address: 6th Floor
River Park House
225 High Road
Wood Green
London N22 8HQ

Decision (including any steps ordered)

1. The complainant has requested a draft report regarding Adult Services Partnership Boards. The London Borough of Haringey ("LBH") refused to provide this information citing section 36(2)(c) (prejudice to effective conduct of public affairs) as its basis for doing so. It failed to conduct an internal review despite repeated requests for one from the complainant.
2. The Commissioner's decision is that LBH is entitled to rely on section 36(2)(c) as its basis for refusing to provide the requested information.
3. No steps are required.

Request and response

4. On 19 August 2016, the complainant requested information of the following description:

"Dr Roger Green (Centre for Community Engagement Research, Goldsmiths, London University) was commissioned by senior managers in Adult Services to undertake an independent review of its Partnership Boards.

1. On the w/b 23 May 2016, Dr Green emailed the first version of his completed research as an attachment to [named official 1] and/or [named official 2], who were either recipients or cc-ed.
2. This formed the basis of the Review of LBH's Adult Services Partnership Board Arrangements sent by [named official 3] on behalf of

[named official 2], as an attachment to an email sent on 5 Aug 2016, 3.19pm. I have received this email and attachment.

This is an foi request for the email and attachment(s) referred to in 1) above from Dr Roger Green. If the email includes confidential data, I'm content for this data to be redact [sic]."

5. On 23 September 2016, LBH responded. It said to the complainant: "Your request is in essence for the disclosure of the draft report by Dr Green titled "Review of the London Borough of Haringey's Adult Services Partnership Board Arrangement" and attached to the emails dated 27th May 2016 and 31st May 2016 from Dr Green to [named official 1] and then to [named official 2]. The draft Report was commissioned by the Council's Adult Services. You have acknowledged that the finalised Report by Dr Green was disclosed to you by email dated 5th August 2016."
6. It refused to provide this draft and cited the following exemptions as its basis for doing so:
 - Section 36(2)(c) (prejudice to effective conduct of public affairs)
 - Section 14(1) (vexatious request)
7. The complainant requested an internal review on 9 October 2016 and chased LBH at least twice throughout November.

Scope of the case

8. The complainant contacted the Commissioner 6 December 2016 to complain about the way his request for information had been handled. The Commissioner took the case forward without an internal review because the complainant had tried to follow this route more than once with the public authority over a considerable period of time but with no success. The Commissioner has made further comment about this in Other Matters.
9. On 27 June 2017, LBH wrote to the Commissioner to explain that it was no longer relying on section 14(1) as its basis for refusing the request. The Commissioner has considered whether LBH is entitled to withhold the requested information based on section 36(2)(c).

Reasons for decision

Section 36(2) – Prejudice to the effective conduct of public affairs

10. Section 36(2)(c) provides that "information is exempt if in the reasonable opinion of the qualified person, disclosure-

...

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

11. For the exemption to be engaged, the proper qualified person for the public authority must have given his or her opinion on the application of the exemption.

12. In this case, the Corporate Governance Assistant Director is LBH's qualified person and this person provided the opinion. The Commissioner is satisfied that he is the qualified person ("QP") for the purposes of section 36. The QP gave his opinion on 22 September 2016 and the Commissioner notes that, in doing so, he disagreed with colleagues' proposal to also rely on section 36(2)(b)(i) &(ii) – prejudice to the free and frank exchange of views and provision of advice.

13. In order to determine whether the exemption is engaged the Commissioner must then go on to consider whether the opinion was reasonable with regard to the following:

- whether the prejudice claimed relates to the specific subsection of section 36(2) that the Council is relying upon;
- the nature of the information and the timing of the request; and
- the qualified person's knowledge of or involvement in the issue.

14. The Commissioner has issued guidance on section 36 of the FOIA.¹ With regard to what can be considered a 'reasonable opinion' it states the following:

"The most relevant definition of 'reasonable' in the Shorter Oxford English Dictionary is 'In accordance with reason; not irrational or absurd'. 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."

¹ https://ico.org.uk/media/for-organisations/documents/1175/section_36_prejudice_to_effective_conduct_of_public_affairs.pdf

15. It is important to note that, when considering whether section 36 is engaged, the Commissioner is making a decision not on whether she agrees with the opinion of the QP, but whether it was reasonable for him or her to reach that opinion.
16. Having reviewed the information placed before the qualified person, the Commissioner is satisfied that the QP considered relevant arguments. The qualified person had access to the withheld information and deliberated on which, if any, subsection of section 36 was applicable. He also gave his opinion in respect of the specific request albeit out of time for a response that would have complied with the time requirements of the FOIA (24 working days after the request instead of up to 20 working days). The fact that it was out of time for a time-compliant response does not render the opinion unreasonable in the circumstances of this case.
17. In giving his opinion, the qualified person was satisfied that the disclosure of draft sections which were not ultimately included in the final published version of the report would have a prejudicial impact on the effective conduct of public affairs. The requested report was in draft form only and, according to the QP, had not been subject to the necessary quality and content checks which would be required to ensure that, for example, the terms of reference had been adhered to. In particular, he argued that the safe space in which the draft report was created would be undermined through disclosure and there would be a distracting focus on what was not included in the final report². In LBH's refusal notice, it described this as "giving unreasonable credence" to drafted parts of the report which were not included in the final version of the report. The qualified person argued that it would undermine the process of quality assurance for future reports to prejudicial effect.
18. In summary, the qualified person's opinion is that the disclosure of the information would be likely to prejudice the effective conduct of public affairs. He discounted colleagues' suggestions that other provisions of section 36 might also apply.
19. The Commissioner has reviewed the withheld information and is satisfied that it was reasonable for the qualified person to reach this opinion. It could reasonably be argued that disclosure would be likely to have a prejudicial effect on LBH's ability to maintain a safe space in which serious matters could be properly analysed and considered. The

² <https://www.gold.ac.uk/media/images-by-section/departments/social-therapeutic-and-community-studies/Review-of-LBH-Adult-Services-Partnership-Board-Arrangements-FINAL.pdf>

Commissioner also accepts it can be reasonably argued that the publication of unused draft material can create an unhelpful distraction of focus from the main report. The Commissioner notes that shortly after the request was made, a stakeholder meeting to discuss the report was due to take place (October 2016). The Commissioner accepts it is reasonably arguable that the likelihood of an unhelpful distraction of focus was particularly strong at the time of the request.

20. The Commissioner is satisfied that section 36(2)(c) of the FOIA is engaged, and has now gone on to consider the public interest test, balancing the public interest in disclosure against the public interest in maintaining the exemption.

Public interest test

21. Section 36(2)(c) is qualified by the public interest test as set out in section 2(2) of the FOIA. This means that even though the exemption is engaged, it is necessary to consider whether the public interest in favour of maintaining the exemption outweighs the public interest in disclosure. The exemption can only be relied on if it does.
22. When considering complaints about the application of any limb of section 36(2) in cases where the Commissioner finds that the qualified person's opinion is reasonable, she will also consider the weight of that opinion in applying the public interest test. She will consider the severity, extent and frequency of that inhibition in assessing whether the public interest test dictates disclosure.

Arguments in favour of disclosure

23. The complainant expressed detailed and carefully argued scepticism as to the likely prejudice envisaged by LBH. For example, he argued that 'quality assurance' is a politically neutral activity that does not require a safe space in which it can be conducted. He described it as a "largely editorial" task. He accepted that where such activity is a work in progress, such a safe space may well be required. However, where the activity is completed, as is the case here, the argument is much less powerful.
24. He also stressed the importance of transparency to advance deliberation on the matters in the report.
25. As regards the balance of public interest, he argued that insufficient consideration had been given to the wider public interest. He said:

"I contend that the test should apply to all parties interested in the Report. This involves not only the Council (officers and members) but representatives of voluntary groups, parents and carers who are Partnership Board members, and the two local MPs (Catherine West and

David Lammy) who attended a meeting on 20 March 2016 with [named official 1] and [named official 4] where concerns about the Partnership Boards were raised by the parents and MPs and minuted. This meeting played a key role in the genesis of the review of partnership boards. The discussion reflected a wider range of public interest in the workings of partnership boards in Haringey, and therefore in the eventually published Report and its precursor draft, than the interest of the council alone.”

26. LBH, for its part, recognised the public interest in transparency, particular on this matter.

Arguments in favour of maintaining the exemption

27. The complainant did not advance arguments in favour of maintaining the exemption nor did the Commissioner require him to do so.
28. LBH argued that the public interest in transparency had been met by the publication of the final report. The Commissioner notes the final report includes marked criticism of the Adult Services Partnership Board arrangements in Haringey. It also included a number of frankly made negative comments about the service available. These are not directly attributed to individuals but refer to their relationship to the matter e.g., as a service user.
29. It argued that there was a more compelling public interest in protecting the safe space in which reports are prepared.
30. Both the complainant and LBH referred to the prospect of legal proceedings. For LBH, this was a further compelling reason for withholding the information. According to the complainant:
“[p]resumably this refers to the two legal challenges that were settled by alternative dispute resolution and not by judicial review. The final report makes no reference to these challenges whatsoever. If the initial draft does refer to the legal challenges, I’m content to have these references alone redacted.”

The Commissioner’s decision

31. In the Commissioner’s view, this is a finely balanced matter. There is a compelling public interest in wide transparency about the provision of care services for adults by LBH. The published report shows a number of problems in the way in which carers and service-users have been consulted about the services available. Suggestions for improvements are made in the report. The complainant has referred to a particular meeting held on 20 March 2016 which, he infers, was a catalyst for further work on the effectiveness or otherwise of the service, including the preparation of the report. The Commissioner agrees that this

meeting is evidence that there is widespread interest locally in the provision of adult care services.

32. While “what the public is interested in” does not necessarily coincide with “what is in the public interest”, the Commissioner accepts that there is a strong public interest, in this case, in providing information about a matter that the public is interested in. The efforts and sacrifices made by carers to maintain and enhance the quality of life of those in their care cannot be underestimated. If the provision of support is falling short, there is a strong public interest in understanding as much about the reasons for this as possible. It is also clear from the published report that service-users have not had the opportunities needed to be truly engaged in developing and managing their own care. Transparency about content considered for the report that LBH commissioned on this subject is of clear public interest.
33. On the other hand, the Commissioner recognises there is also a compelling public interest in preserving the safe space in which reports are finalised through the drafting process. The complainant recognised this but argued that this position only carried weight during the drafting process which, in this case, was now completed.
34. In the Commissioner’s view, the public interest in protecting the safe space in which sensitive matters are considered for a public report can continue even after that report is published. The request was made shortly before a stakeholder meeting where distraction from the findings of the final published report would, arguably, have been counterproductive contrary to the public interest.
35. Given the timing of the request, the Commissioner considers that, on balance, the public interest favours maintaining the exemption. In her view, the matter is finally balanced and the timing of the request is a key factor in her decision. There is a public interest in protecting the safe space in which the report was drafted and a short-term public interest in avoiding distraction from discussion of the findings at a stakeholder event due to take place shortly after the request was made. By a narrow margin and in the circumstances of the case, these factors add greater weight to maintaining the exemption.
36. In light of the above, the Commissioner is satisfied that the Council has correctly withheld the information under section 36(2)(c) of the FOIA.

Other matters

37. As noted above, LBH failed to conduct an internal review despite receiving a request for one on at least two occasions.

38. Part VI of the section 45 Code of Practice makes it desirable practice for a public authority to have a procedure in place for dealing with complaints about its handling of requests for information and that the procedure should encourage a prompt determination of the complaint.
39. As the Commissioner has made clear in her '*Good Practice Guidance No 5*', she considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the FOIA, the Commissioner considers that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days.
40. In this case, the request for an internal review was made on 9 October 2016 and this request was repeated in November 2016 to no avail. LBH did not undertake an internal review.
41. LBH argued in mitigation that this was due to an administrative oversight. In any event, the Commissioner finds that this failure to be unacceptable and asks LBH to ensure that future requests for internal reviews are handled appropriately and in accordance with her guidance.

Right of appeal

42. 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

43. 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.
44. 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

Elizabeth Hogan
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