

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 4 January 2018

Public Authority: London Borough of Hammersmith and Fulham
Address: Hammersmith Town Hall
King Street
London
W6 9JU

Decision (including any steps ordered)

1. The complainant has requested polling and similar information regarding a proposed housing stock transfer. The London Borough of Hammersmith and Fulham ("LBHF") refused to provide it citing section 36(2)(c) (prejudice to effective conduct of public affairs) as its basis for doing so. It upheld this at internal review. Since the request, LBHF has changed its position regarding the proposed housing stock transfer. In correspondence with the Commissioner, it maintained its position with regard to section 36(2)(c) and also introduced reliance on section 40(2) (unfair disclosure of personal data) for some of the requested information.
2. The Commissioner's decision is that by the time of the internal review, LBHF was entitled to rely on section 40(2) in respect of the personal data contained in the information it held within the scope of the request. However, it was no longer entitled to reply on section 36(2)(c) as its basis for refusing to provide the remainder.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the information within the scope of the request which is not personal data and which is not exempt from disclosure by virtue of section 40(2).
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 3 November 2016, the complainant requested information of the following description:

“Please provide any information that has been collated from polling, focus groups, consultations regarding the views of tenants and leaseholders on the proposed council housing stock transfer.”

6. On 3 January 2017, LBHF responded. It refused to provide the requested information. It cited the following exemption as its basis for doing so:

- section 36(2)(c) (prejudice to effective conduct of public affairs)

7. The complainant requested an internal review which was received by LBHF on 24 January 2017. LBHF sent him the outcome of its internal review on 22 March 2017. It upheld its original position as regards this request but explained the following: “since this RFI response was issued, it has been decided that the housing stock transfer project will not go ahead. You may therefore wish to consider filing a new request for the withheld information, which can be considered in light of current circumstances.”

Scope of the case

8. The complainant initially contacted the Commissioner on 16 January 2017 to complain about LBHF’s refusal to provide him with the requested information. On 10 February 2017, the Commissioner asked the complainant to provide details of any internal review. He did so in an email dated 23 March 2017. After an exchange of correspondence with the Commissioner, the complainant confirmed that he still wished to pursue this complaint about his 3 November 2016 request even though the project was not now going ahead.
9. LBHF introduced reliance on section 40(2) (unfair disclosure of personal data) in a letter to the Commissioner of 21 July 2017. It undertook to write to the complainant about this.
10. The Commissioner has therefore considered the application of both section 36(2)(c) and section 40(2).

Reasons for decision

Background

11. At the time of the request, there was a proposal to transfer council housing stock to a housing association. LBHF had commissioned a report on this topic.¹ By the time of the complaint, LBHF had decided not to go through with the transfer of council housing stock. This was announced in an update report to the meeting of LBHF's Economic Regeneration, Housing & The Arts Policy & Accountability Committee of 7 March 2017.²

Section 40(2) – unfair disclosure of personal data

12. Section 40(2) applies where disclosure of the information in question under FOIA would constitute a breach of the Data Protection Act 1998 ("DPA"). It would breach DPA if personal data were to be disclosed and that disclosure was not in accordance with one of the data protection principles. LBHF has applied this to the name and address data, more information about which is set out below.
13. The DPA principle that is most applicable here is the first principle which requires personal data to be processed fairly and lawfully and in accordance with certain principles in Schedule 2 of DPA (and also in Schedule 3 in the case of sensitive personal data).
14. Personal data is information which relates to a living information which is also biographically significant about them. The withheld information includes detailed personal information about individuals who responded to LBHF's survey and includes sensitive personal data such as their ethnic background and information about their health. It includes other information such as their name, address, age, contact details, employment status and length of residency at the property as well as information about other people living at their address. The Commissioner is wholly satisfied that this is personal data and, in respect of health information and ethnic background information, sensitive personal data.
15. The Commissioner is satisfied that it would be wholly outside the reasonable expectations of those identified in the information to have

¹ <https://www.theguardian.com/uk-news/davehillblog/2015/nov/13/report-backs-community-control-of-hammersmith-and-fulham-council-homes>

² <http://democracy.lbhf.gov.uk/ieListDocuments.aspx?CIId=487&MIId=4921&Ver=4>

this information disclosed. Even if it is outside their reasonable expectations, it may still be fair to make the disclosure, for example, if such disclosure is necessary to serve a legitimate interest that is more compelling than their own legitimate interest in non-disclosure.

16. The Commissioner recognises that there is a legitimate interest in ensuring that only local tenants and leaseholders gave their opinion to LBHF when it was considering this matter. There is also a legitimate interest in learning as much as possible about the proposal. The proposal was controversial at the time of the request and remained so at the time of the complaint (after the decision not to go ahead with the proposed stock transfer). Disclosure of the personal data in question would serve that legitimate interest although, in the Commissioner's view, disclosure is not necessary to serve that interest. There is a more compelling legitimate interest in respecting the wholly reasonable expectations of the individuals that their personal data would be kept confidential.

Section 40(2) - conclusion

17. The Commissioner is satisfied that LBHF is entitled to rely on section 40(2) as its basis for withholding the personal data included in the withheld information. LBHF identified this information when it submitted its arguments to the Commissioner. The Commissioner agrees with it on this point.
18. It would be wholly unfair and contrary to the reasonable expectations of the individuals in question to disclose their personal data in this case. Disclosure may serve a legitimate interest in ensuring that only local residents were consulted but disclosure is not necessary in order to serve this interest given the consequences for individuals who contributed to the survey if their details were disclosed.
19. Having concluded that LBHF is entitled to rely on section 40(2) in respect of the personal data within the scope of the request, the Commissioner has gone on to consider whether the remainder of the withheld information is exempt under section 36(2)(c) as claimed by LBHF.

Section 36 – prejudice to the effective conduct of public affairs

20. Section 36(2) 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."

21. The important point to note is that LBHF is also relying on a rarely used provision of section 36, namely, section 36(4). This 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’”.

22. The Commissioner is satisfied that the information in question is statistical information. Her guidance on this provision in section 36 states:

“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.”³

23. In this case, the information is raw data in spreadsheet form which can readily be used to analyse local resident opinion on a number of points related to the subject of the proposed council housing stock transfer referred to in the request.
24. The Commissioner has therefore considered LBHF’s submissions as to the likelihood of prejudice without seeking the opinion of the qualified person which would normally be required for the application of section 36.
25. LBHF’s arguments as to the likelihood of prejudice focussed on the fact the proposed transfer was still live at the time of the request. It said “the Council was still working on shaping the offer”. It explained that information it had previously released on the subject had led to the generation of misleading leaflets on the topic. Officers tasked with shaping the transfer offer were diverted from their work in order to produce what LBHF described as “accurate, neutral information” to address residents’ concerns.
26. Section 36 is a prejudice-based exemption. In order to be engaged, the following criteria must be met:

³ https://ico.org.uk/media/for-organisations/documents/1175/section_36_prejudice_to_effective_conduct_of_public_affairs.pdf (paragraph 32)

- the actual harm which the public authority alleges would, or would be likely to, occur if the withheld information was disclosed has to relate to the applicable interest within the relevant exemption;
 - the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and
 - it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice.
27. The harm described by LBHF does relate to disrupting the effective conduct of public affairs as described in section 36(2)(c). That is not to say that the Commissioner agrees with LBHF on this point. However, the Commissioner accepts that the first criterion is satisfied.
28. As regards the second criterion, LBHF gave an example to demonstrate what it saw as the causal link between disclosure of information on a live matter and prejudice to its officers' work through diversion of resource. The Commissioner is satisfied that LBHF has demonstrated a causal link. Furthermore, the Commissioner is satisfied that this prejudice is real, actual and of substance.
29. Thirdly, the Commissioner has considered the likelihood of such prejudice occurring - it should be noted that LBHF argued that prejudice was "likely to happen", not that it "would" happen. In considering the likelihood of prejudice, the Commissioner has had regard for her own published guidance.⁴
30. It is inevitable that a controversial proposal such as the transfer of housing stock would give rise to considerable debate and disagreement. LBHF should reasonably expect to spend a considerable amount of time answering local residents' questions and allaying local residents' concerns where they arise. It should also reasonably expect that it cannot always dictate the topics that raise the most concern. However, the Commissioner does accept that the prejudice envisaged would be likely to arise given, particularly, that it had happened previously in respect of information disclosed on a live matter. LBHF gave the Commissioner details of an example of this with specific reference to

⁴ https://ico.org.uk/media/for-organisations/documents/1214/the_prejudice_test.pdf

what it considered was the circulation of incorrect information following another partial disclosure on this topic.

31. In the Commissioner's view, the prejudice described in section 36(2)(c) of the FOIA would be likely to occur following disclosure. The exemption is therefore engaged. The Commissioner 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

32. 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.

Arguments in favour of maintaining the exemption

33. LBHF emphasised that its arguments as to the public interest in maintaining the exemption were those that applied at the time of the request. These were as follows:
- It would be contrary to the public interest to circulate incomplete information about a live matter. This would place an unnecessary burden on officers who were involved with "progressing the programme in a timely and effective manner".
 - There is a risk that the information would be misused to generate misleading information which would distract from useful and informed debate. It had been done previously when leaflets were circulated saying that the housing stock was about to be "sold" or "privatised". This "distracted attention from useful and informed public debate on the issues regarding the transfer".
 - "Emotive false information" circulated to residents caused some panic as it was alleged that people would lose their homes. It explained that 25% of its council housing residents were over 65 and that it also had a number of vulnerable residents. It said that it had evidence of this from records of calls received from people fearful that their homes would be sold off after having read the leaflets.
 - It had gone to considerable effort to circulate "full, complete and accurate" information to ensure that its communication with residents was neutral and to support residents in making their own decisions. It said that there had been good dialogue with local

residents using a number of different methods such as roadshows, advertisements and newsletters.

- Tenants and leaseholders who participated in the survey and whose responses comprise the withheld information were told it would be used for the purpose of “shaping the offer” and not for any other purpose. Even if their views are used anonymously by opponents of the proposal, they may be reluctant to participate in future surveys of this type.

Arguments in favour of disclosure

34. The complainant did not advance any arguments about this with his initial request, his request for internal review nor with his complaint to the Commissioner. It would have been helpful had he done so.
35. LBHF acknowledged that there was an inherent public interest in an open and transparent public debate about housing issues. However, it argued that this was not sufficiently compelling to counter the public interest in maintaining the exemption.

The Commissioner's decision

36. In the Commissioner's view, there is a clear public interest in avoiding disruption to the process by which an offer is prepared to carry through the proposed transfer of housing stock. The Commissioner is satisfied that this would be likely to occur if disclosure is made while the matter is still “live”.
37. However, while LBHF was considering the matter at internal review, the situation changed. On 7 March 2017, LBHF reported that it was no longer going ahead with the proposed stock transfer. The Commissioner is mindful of the position taken by the Upper Tribunal in *APPGER v ICO and Foreign and Commonwealth Office (UKUT 0377 (ACC), 2 July 2015)* (“*APPGER vs ICO and FCO*”). This judgment concluded that ‘the public interest should be assessed by reference to the circumstances at or around the time when the request was considered by the public authority (including the time of any internal review)’.
38. While the Commissioner accepts that the circumstances prevailing at the time of the request strongly favoured withholding the requested information, these circumstances changed by the time LBHF was considering its internal review.
39. The Commissioner is of the view that LBHF was entitled to rely on section 36(2)(c) at the time of the request to that information which is not personal data. However, this was not the case by the time LBHF sent the complainant the outcome of its internal review.

40. In the Commissioner's view, the public interest in disclosure had become much stronger at this point. There is a compelling public interest in learning as much as possible about the proposal including publishing the fully anonymised views of local residents. Where such disclosure could no longer affect a live matter, this carries even greater weight. Again, the Commissioner believes it would have been helpful had the complainant submitted his own arguments on this point and she is disappointed that he did not.
41. In conclusion, the Commissioner has decided that LBHF were correct to rely on section 36(2)(c) to withhold the requested information at the time of the request but the balance of public interest in respect of that information which is not personal data (information from which individual residents cannot be identified) changed by the time of the internal review. The Commissioner has followed *APPGER vs ICO and FCO* in reaching this view.
42. In light of the above, the Commissioner has concluded that LBHF remain correct to rely on section 40(2) in respect of the personal data within the scope of the request but it is no longer entitled to rely on section 36(2)(c) in respect of the remainder. The public interest in disclosing anonymised responses to polling exercises conducted by LBHF (as described in the request) outweighs the public interest in maintaining the exemption at section 36(2)(c).

Right of appeal

43. 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

44. 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.
45. 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

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