

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 05 February 2018

Public Authority: London Borough of Lambeth
Address: 2nd Floor
Olive Morris House
18 Brixton Hill
London, SW2 1RL

Decision (including any steps ordered)

1. The complainant requested a copy of an audit report. The London Borough of Lambeth (the Council) refused the request under section 36(2)(b) and (c) – prejudice to the conduct of public affairs.
2. The Commissioner is satisfied that sections 36(2)(b) and (c) are engaged and the public interest favours maintaining the exemption. The Commissioner does not require the public authority to take any action.

Request and response

3. On 27 January 2017 the complainant requested the following information:

'On 25th September 2016 I made a FOI request to see a forensic audit report on one of Lambeth's maintenance contractors, Mears, which was carried out by Arcadis/EC Harris (FOI reference 193568).

After an internal review I was told that the information was in the course of being produced...

I am therefore making a further FOI request to see the forensic audit report into Mears that was carried out by Arcadis/EC Harris, as my original request of 25th September 2016. Can you please also tell me what actions Lambeth have taken as a result of this report.'

4. On 27 February 2017 the Council responded (reference 209241) that it did not hold the information.
5. The complainant requested an internal review on 1 March 2017. He stated that the report *'was commissioned over a year ago and invoiced for 10 months ago. It is inconceivable that this report is not available.'*
6. Rather than undertake an internal review, the correspondence was treated as a new request for information and a response provided (under reference 214540) on 7 March 2017: *'Please note that when you previously asked for this information, the report had not been provided: it has since been provided to us.'* The Council stated that it was unable to disclose it under sections 36(2)(b) and 36(2)(c).
7. After the intervention of the Commissioner on 28 July 2017, the Council undertook an internal review on 25 August 2017 and upheld the application of the exemption section 36 as *'audits rely on frank exchange of sensitive information and views on significant matters to the Council.'*

Scope of the case

8. On 26 May 2017 the complainant wrote to the Commissioner and the case was accepted on 9 October. The complainant argued that *'Releasing the audit report would therefore not diminish the council's ability to access confidential or commercially sensitive information as they already have that right enshrined within their contract. If the report contains information that the Information Commissioner considers to be commercially sensitive I would be happy for such information to be redacted.'*
9. The Commissioner considers the focus of the investigation to be whether the Council was entitled to rely upon the exemption at section 36 to withhold the information and, if so whether the public interest favours maintaining those exemptions.

Reasons for decision

Section 36 – prejudice to the conduct of public affairs

10. Section 36(2) of FOIA states that information is exempt if in the reasonable opinion of a qualified person, disclosure of the information –
 - (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 purpose of deliberation, or
 - (c) would otherwise prejudice, or would be likely to otherwise prejudice the effective conduct of public affairs.
11. Section 36 is unique in that its application depends on the opinion of the qualified person that the inhibition envisaged would, or would be likely to occur. To determine whether the exemption was correctly engaged by the Council, the Commissioner is required to consider the qualified person's opinion as well as the reasoning that informed the opinion. Therefore the Commissioner must:
- Ascertain who the qualified person is,
 - Establish that they gave an opinion,
 - Ascertain when the opinion was given, and
 - Consider whether the opinion was reasonable.
12. The Council confirmed that its qualified person is its Director of Legal Services and HR, Ms Alison McKane. The Council recorded that the qualified person's opinion was sought on 20 February and the Commissioner's form was signed on 28 December 2017. The Commissioner is therefore satisfied that the qualified person did provide her opinion that the information in question was exempt under section 36(2)(b)(i)&(ii) and 36(2)(c).
13. The exemption can be engaged on the basis that the prejudice to public affairs either 'would' or would be 'likely' to occur. In this case the Council has applied the exemption on the basis that disclosing the information in question would be 'likely' to prejudice the conduct of public affairs. This is taken to mean that the qualified person considers the likelihood of the inhibition occurring to be more than a hypothetical possibility; that there is a real and significant risk, even if that risk is less than 50%.
14. The Commissioner now needs to consider whether this opinion is a reasonable opinion to hold. It is important to highlight that it is not necessary for the Commissioner to agree with the opinion of the qualified person in a particular case. The opinion also does not have to be the only reasonable opinion that could be held or the 'most' reasonable opinion. The Commissioner only needs to satisfy herself that the opinion is reasonable or, in other words, it is an opinion that a reasonable person could hold. The qualified person's opinion can only be

considered unreasonable if it is one that no reasonable person could hold.

15. The Council stated that it is the qualified person's opinion that disclosure of the requested information in this case would be likely to inhibit the free and frank provision of advice and the free and frank exchange of views for the purpose of deliberation (section 36(2)(b)(i) & (ii)) for a number of reasons:

'...to protect the contractual relationships necessary for auditing a contractor's performance whereby the quality of confidential conversations and disclosures of recorded issues are able to be made in a 'safe space' free from external scrutiny.

To effectively manage its commercial interests, it is critical that the Council is able to exchange information and views on a free and frank basis; disclosure of the requested information may undermine the relationship of trust and confidence between the Council and its contractors, and affect the quality of the information provided on a free and frank basis; the Council's commercial interests and decision-making abilities may be compromised if participants in the audit process thought commercially sensitive information and views would become public; disclosure of the requested information may have a "chilling effect" on future discussions between the Council and its contractors.'

16. As section 36(2)(c) is worded specifically as "would otherwise prejudice", it is the Commissioner's opinion that if a public authority is claiming reliance on section 36(2)(c) of the FOIA the prejudice claimed must be different to that which would fall in section 36(2)(b)(i) and (ii).
17. The Commissioner considers section 36(2)(c) of the FOIA is concerned with the effects of making the information public. It can refer to an adverse effect on the public authority's ability to offer an effective public service or to meet its wider objectives or purpose. She considers the effect does not have to be on the authority in question; it could be an effect on other bodies or the wider public sector. It may also refer to the disruptive effects of disclosure, for example, the diversion of resources managing the effect of disclosure.
18. The Council stated that it is the qualified person's opinion that disclosure of the requested information in this case would be likely to prejudice the effective conduct of public affairs (section 36(2)(c)) for a number of reasons:

'Disclosure would prejudice the authority's ability to manage the contractual relationship in the best interests of the Council. The contract in question is current at the time of the request and matters addressed

in the audit report, which has only been recently produced, are yet to be fully discussed.'

19. The Commissioner is satisfied that it is reasonable for the qualified person to have concerns over the release of this information. The Council has demonstrated that it has considered the different prejudices under both section 36(2)(b) and (c). Therefore, the Council has correctly applied the exemption at section 36(2)(b)(i) and (ii) and section 36(2)(c) to the requested information. The Commissioner has gone on to consider the public interest arguments for disclosing the information and for maintaining the exemption.

Public interest test

20. Section 36 is subject to the public interest test as set out in section 2 of the Act. This means that although the exemption is engaged, the information can only be withheld if in all the circumstances of the case the harm that disclosing the information would cause is greater than the public interest in its disclosure.
21. The Commissioner's approach to the competing public interest arguments in this case draws heavily upon the Information Tribunal's Decision in the case of Guardian Newspapers Limited and Heather Brooke v Information Commissioner and BBC (the Brooke case)¹. The Commissioner notes, and adopts in particular, the Tribunal's conclusions that, having accepted the reasonableness of the qualified person's opinion the Commissioner must give weight to that opinion as an important piece of evidence in his assessment of the balance of the public interest.
22. Although the Commissioner has accepted the qualified person's opinion to be a reasonable one in respect of the information now under consideration, and therefore will give some weight to that opinion, she will reach her own view on the severity, extent and frequency of that inhibition to the decision making process occurring in this case.

Public interest arguments in favour of disclosure

23. The complainant has argued that

'I am of the opinion that there is an overwhelming public interest case that the report should be released. The public has a right to know that its money is being spent appropriately or otherwise. A forensic audit would only have been authorised by the council if there was a suspicion that there was potential fraud or mal-practice. The public interest case is

¹ EA/2006/0011; EA/2006/0013

only heightened by the fact that there has been a lot of cases of fraud and malpractice within Lambeth's housing department in recent years.'

24. The Council recognised that there is public interest in disclosing information which provided the public with the opportunity to consider how effective their contractors are performing.
25. The Commissioner accepts that there are public interest arguments in favour of disclosure. There is a public interest in openness and transparency and in understanding more clearly the expenditure and auditing of public funds.

Public interest arguments in favour of maintaining the exemption

26. The Council explained that the maintenance contract with Mears was current at the time of the request and considered the following arguments in favour of maintaining the exemption:

'We consider that disclosure would damage our relationship with Mears; making them less likely to co-operate as fully with other audits in future. It is not in the public interest if the Council would be unable to make a full or comprehensive audit of services in order to review whether the services are effective or not.'

27. The Council has stated that the qualified person recognised that there is a strong public interest in the Council having the ability to conduct free and frank discussions with external contractors and effectively manage its services:

'disclosure may result in future audits being less effectively carried out as contractors may be less inclined to co-operate with the audit. We consider audits are important to ensure that our services are effectively delivered by contractors and it is vital that we can use audits to assess the contractors' performance. Should the confidentiality of the audit process be undermined by disclosure under FOI; this would necessarily impact on the quality of information provided to future audits and therefore our ability to monitor contractors performance would be undermined which clearly would not be in the public interest.'

28. The Council also asked the qualified person to consider the Commissioner's previous decision notice FS50610689 (<https://ico.org.uk/media/action-weve-taken/decision-notices/2016/1624168/fs50610689.pdf>), where the Commissioner ruled that section 36 applied in relation to an internal audit report. The Council considered this previous decision to be relevant in this case as

this is a current contract and negotiations/discussions regarding the audit are ongoing:

'...disclosing the withheld information would have been likely to cause prejudice to the Council by inhibiting the free and frank provision of advice and exchange of views i.e. section 36(2)(b), and by having an adverse effect on its negotiations with the contractor and others i.e. section 36(2)(c). He considers that both limbs of section 36 are engaged

.....Compromising the negotiations risked poorer outcomes for the Council for example in its longer term strategic planning. Although 'would be likely to jeopardize' carries less weight than 'would jeopardize', the Commissioner agrees that this argument nonetheless carries a good deal of weight.

The requested information was current, negotiations with the contractor were ongoing or planned and, given that concerns had been raised about the contract in question, releasing the information may well have generated attention that would have been likely to disrupt that negotiation process, or made it more difficult.'

29. The Commissioner is satisfied that disclosure would be likely to compromise the decision making process concerning the audit of the external contractor.

Balancing the public interest arguments

30. The Commissioner has considered both the complainant's and the Council's public interest arguments.
31. The Commissioner accepts that there are public interest arguments in openness and transparency. However, in this case the Commissioner considers the public interest arguments in favour of maintaining this exemption are stronger and she believes the effects of disclosure would be likely to compromise the integrity of the auditing process and therefore the effective conduct of public affairs.
32. The Commissioner also recognises the value in allowing the Council to have the 'safe space' to review full and comprehensive audits of its contractors and services. To disclose the information withheld under section 36 at the time of the request could have had a chilling effect on the Council's ability to do so.
33. Having considered all the circumstances of this case, the Commissioner finds that although there is a significant and important public interest in the public understanding how the Council audits its contractors, there is a greater public interest in allowing the Council the ability to seek

information through the auditing process and make decisions on the effectiveness of a contractor's performance with its contractor.

34. The Commissioner is therefore satisfied that, at the time of the request, the public interest favoured maintaining the exemption cited under section 36(2)(b)(i)&(ii) and 36(2)(c).

Right of appeal

35. 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

36. 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.
37. 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

Pamela Clements
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF