

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 30 March 2020

**Public Authority:** Surrey Heath Borough Council  
**Address:** Surrey Heath House  
Knoll Road  
Camberley  
Surrey  
GU15 3HD

### Decision (including any steps ordered)

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1. The complainant has requested information about procedures that are applicable to the paying of any financial award or allowance to its Chief Executive, from Surrey Heath Borough Council (the "Council"). The Council provided some information, but refused to provide the remainder, citing sections 36(2)(b)(i) and (2)(b)(ii), and 36(2)(c) (prejudice to effective conduct of public affairs) of the FOIA. During the Commissioner's investigation, it revised its position, instead citing section 36(3) of the FOIA, the "neither confirm nor deny" provision of this exemption, by virtue of subsections 36(2)(b)(i) and (2)(b)(ii), and 36(2)(c) of the FOIA.
2. The Commissioner's decision is that section 36(3), by virtue of section 36(2)(c) only, is properly engaged and the public interest favours maintaining the exemption. No steps are required.

### Background

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3. On 4 September 2019<sup>1</sup>, at an extraordinary Council meeting, it was formally agreed that an independent investigation would be undertaken
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<sup>1</sup> <https://surreyheath.moderngov.co.uk/ieListDocuments.aspx?CIId=128&MIId=3318&Ver=4>

into an alleged decision by the former Leader of the Council to award and backdate an "Additional Duties Allowance" to the Council's Chief Executive.

4. The Council published the terms of reference in respect of the formal investigation into the matter. Within these it states:

*"The purpose of the investigation will be to gather information in a fair and impartial way in order to produce a written report into the alleged decision to award and backdate an "Additional Duties Allowance" to the Chief Executive.*

*We would like the investigator to investigate and make recommendations to enable the Council to make an informed decision as to the appropriate next steps".*

5. The terms of reference say that the investigation should also set out:

- *"the methodology that you adopted in carrying out the investigation;*
- *who instigated the proposed award and on what basis (e.g. the Exceptional Payments Policy);*
- *who approved the award, what forms were signed and who checked them;*
- *what failures, if any, were there that led to this award not being questioned at an earlier stage;*
- *the policies and procedures you have reviewed as part of your investigation;*
- *the key evidence that you gathered and the sources you gathered it from;*
- *any findings of fact that you have had to make as part of your investigation (e.g. if there is a conflict of evidence) and the reasons for these findings;*
- *your conclusions and recommendations including as to whether any further action is appropriate".*

6. The terms of reference include the following statement regarding confidentiality:

*"We request that you keep strictly confidential the documents and all information you obtain during your investigation and do not disclose any information to anyone else without prior written permission from interim Deputy Chief Executive ...*

*Our expectation is that your report will be made public by us in due course, in whole or in part, and you should assume it will be public".*

7. At the time of the completion of the internal review in this case, this investigation remained ongoing.

## **Request and response**

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8. On 14 August 2019, the complainant wrote to the Council and requested information in the following terms:

*"Please would you provide me with the full text of all borough council procedures that are applicable to: i) determining the size of ii) approving, and iii) implementing and paying any financial award or financial allowance granted to the Chief Executive. Please could you detail the posts involved in carrying out these procedures.*

*I already have copies of recent Draft Financial Statements and Pay Policy Statements – though I do not believe that the 2019-2020 Pay Policy Statement is readily available on the council's website".*

9. The Council responded on 12 September 2019. It provided two policies and did not cite any exemptions.
10. The complainant requested an internal review on 22 September 2019, explaining why the information provided did not satisfy his request. He advised:

*"My enquiry asked about procedures and posts relating to 'any financial award or financial allowance given to the Chief Executive'. You will see that the council's reply consists of two documents:*

*i) Pay Policy Statement. This document is about policy, not procedures. The nearest it comes to describing procedures is through statements such as "Pay for all employees including Chief Officers is agreed by Full Council in consultation with the Joint Staff Consultative Group." and "The Annual Pay Settlement procedure is to determine the value of the annual pay settlement that will be paid to all staff". These are not relevant to financial allowances given to the Chief Executive.*

*ii) Exceptional Payments Policy. This document says "All payments will be authorised by the appropriate Executive Head/Head of Service in consultation with the Human Resources Manager". Also, requests for additional payments should identify the "Line Manager Proposing The Payment:" Neither of these will be relevant when the Chief Executive is the recipient of the award; circumstances which are never mentioned in the document.*

*In view of the above, I believe that the council has substantially failed to address my request: "Please would you provide me with the full text of all borough council procedures that are applicable to: i) determining the size of ii) approving, and iii) implementing and paying any financial award or financial allowance granted to the Chief Executive. Please could you detail the posts involved in carrying out these procedures".*

11. The Council provided an internal review on 21 October 2019. It revised its position, saying that in respect of the specific grounds raised in the complainant's request for an internal review, any further information was exempt from disclosure under sections 36(2)(b)(i) and (2)(b)(ii), and 36(2)(c) of the FOIA.
12. During the Commissioner's investigation, the Council revised its response. It advised that it should have properly relied on section 36(3) of the FOIA to neither confirm nor deny ('NCND') that it held information falling within the scope of the request, and provided revised documentation to support this position. Having further liaised with the Council, the Commissioner was advised:

*"I would like to clarify the Council's position ... The Council does wish to rely on the exemption contained in s36(3) as to its duty to confirm or deny and it was in error that this exemption was not referred to in its original reply to you".*

13. This was five months after the original opinion was provided and, as such, is not ideal. However, a public authority can apply, or re-apply, an exemption at any time.

## **Scope of the case**

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14. The complainant contacted the Commissioner on 24 October 2019, to complain about the way his request for information had been handled. He said:

*"... I asked for details of the council's standard procedure for granting the chief executive a financial award. My enquiry did not ask for any personal data. It did not relate in any way to any specific individual, or to any point in time, but only to holders of the post in general. However, because an independent review of a recent controversial award to the current chief executive is currently underway, the council rejected my request. The council claimed that the review, conducted by a well-established legal firm (in private, I believe), could be prejudiced by revealing its standard procedure to me .... It is undoubtedly in the public interest to establish whether or not the council has rigorous processes in place*

*for good financial management. Good financial management includes having formal procedures for granting pay awards at all levels within the council. Whether any standard procedure was actually followed when the recent award was made is outside the scope of my enquiry. Accordingly, I believe that the council's reason for not revealing to me what may actually be a long-established procedure is unjustified".*

15. The Commissioner initially notes that, in this case, the issue at the heart of the request is clearly of significance, so much so that an independent investigation has been commissioned to ascertain whether or not the Council's own procedures have been properly followed. Whilst the complainant has made no specific reference to that investigation, because of these circumstances it is not possible to consider his request without taking this into account.
16. The complainant has not been updated regarding the Council's revised NCND position. However, the Commissioner does not consider that he will be disadvantaged by this as she considers he would still require a decision notice; proceeding directly to a decision notice presents the fastest outcome.
17. The Commissioner will consider the citing of section 36(3) below.
18. The Council has provided confidential submissions to the Commissioner which are not for inclusion in the notice. They have been taken into account when considering the case.

## **Reasons for decision**

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### **Neither confirm nor deny**

19. Section 1(1)(a) of the FOIA requires a public authority to inform a requester whether it holds the information specified in the request. However, there may be occasions when complying with the duty to confirm or deny under section 1(1)(a) would in itself disclose sensitive or potentially exempt information. In these circumstances, section 2(1) of the FOIA allows a public authority to respond by refusing to confirm or deny whether it holds the requested information.
20. The decision to use a NCND response will not be affected by whether a public authority does or does not in fact hold the requested information. The starting point, and main focus for NCND in most cases, will be theoretical considerations about the consequences of confirming or denying whether or not a particular type of information is held.

21. A public authority will need to use the NCND response consistently, over a series of separate requests, regardless of whether or not it holds the requested information. This is to prevent refusing to confirm or deny being taken by requesters as an indication of whether or not information is in fact held.
22. Having disclosed some information which it considered relevant to the request, the Council has taken the position of neither confirming nor denying whether it holds any further information in this case, citing section 36(3) of the FOIA.
23. Even though the Council has determined that section 36(3) is engaged, it must still carry out a public interest test to decide whether the public interest in not confirming or denying outweighs the public interest in complying with s1(1)(a). The refusal notice should indicate which subsection of section 36 is engaged, without disclosing whether the information is held or not.
24. The Council has said that any further information, if held, would be exempt from disclosure by virtue of sections 36(2)(b)(i) and (2)(b)(ii), and 36(2)(c) of the FOIA.
25. Put simply, in this case the Commissioner must consider whether or not the Council is entitled to NCND whether it holds any further information about the procedures referred to in the request.

**Section 36 – prejudice to effective conduct of public affairs.**

26. Section 36(3) provides that:

*"(3)The duty to confirm or deny does not arise in relation to information to which this section applies (or would apply if held by the public authority) if, or to the extent that, in the reasonable opinion of a qualified person, compliance with section 1(1)(a) would, or would be likely to, have any of the effects mentioned in subsection (2)".*

27. In respect of section 36(2) the Council has cited sections 36(2)(b)(i) and (2)(b)(ii), and 36(2)(c). These provide 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, or*

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

28. According to the Commissioner’s guidance on section 36<sup>2</sup>:

*“Information may be exempt under section 36(2)(b)(i) or (ii) if its disclosure would, or would be likely to inhibit the ability of public authority staff and others to express themselves openly, honestly and completely, or to explore extreme options, when providing advice or giving their views as part of the process of deliberation. The rationale for this is that inhibiting the provision of advice or the exchange of views may impair the quality of decision making by the public authority”.*

29. These exemptions are about the processes that may be inhibited, rather than what is in the information itself. The key issue in this case is whether confirmation or denial as to whether or not any further information is held would be likely to inhibit the process of providing free and frank advice, and / or the free and frank exchange of views for the purposes of deliberation.

30. In respect of section 36(2)(c), this can only apply in instances when the envisioned inhibition or prejudice to the effective conduct of public affairs does not concern the giving / receiving of advice or the exchange of views. A public authority may apply both section 36(2)(b) and section 36(2)(c) to information but the envisioned prejudice under section 36(2)(c) must concern something other than advice or the exchange of views, which are covered by 36(2)(b).

31. In this case, section 36(2)(c) is concerned with the effects of making a public confirmation or denial as to whether any further information is held. Prejudice to the effective conduct of public affairs could 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, but 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 refer to the disruptive effects of disclosure, for example the diversion of resources in managing the effect of disclosure.

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<sup>2</sup> <https://ico.org.uk/media/for-organisations/documents/2260075/prejudice-to-the-effective-conduct-of-public-affairs-section-36-v31.pdf>

32. In determining whether the exemptions are correctly engaged, the Commissioner is required to consider the qualified person's opinion as well as the reasoning which informed the opinion. Therefore, in order to establish that the exemption has been applied correctly, the Commissioner must:
- Establish that an opinion was given;
  - Ascertain who was the qualified person or persons;
  - Ascertain when the opinion was given; and
  - Consider whether the opinion was reasonable.
33. The Council explained that the qualified person was its Monitoring Officer. The qualified person's opinion was that sections 36(2)(b)(i) and (2)(b)(ii), and 36(2)(c) are all applicable in this case, as disclosure would be likely to prejudice the free and frank provision of advice, the free and frank exchange of views for the purposes of deliberation and would be likely to otherwise prejudice the conduct of public affairs. The Council explained that the qualified person had access to all relevant material. A copy of the submissions put to the qualified person were provided to the Commissioner as well as a copy of the qualified person's opinion dated 21 October 2019.
34. Based on the wordings of these submissions, and subsequent correspondence with the Council, the Commissioner did not consider that the opinion of the qualified person was reasonable as there was no specific reference to the NCND provisions within the opinion given, although the supporting correspondence, and dialogue with Council, indicated that this was the position which was intended. Furthermore, the Council did not actually cite section 36(3) at any point. The Commissioner put this to the Council during her investigation. Subsequently, on 17 March 2020, the Council provided a revised qualified person's opinion to reflect its reliance on section 36(3) and confirmed this in writing.
35. The qualified person agreed that, in his opinion, confirming or denying whether any further information is held, would be likely to have the effects set out in section 36(2), as cited above. The Commissioner is therefore satisfied that an opinion was given by the qualified person as regards the Council's final position in respect of the request.
36. The Commissioner has gone on to consider whether that opinion is reasonable. It is important to note that this is not determined by whether the Commissioner agrees with the opinion provided but whether the opinion is in accordance with reason. In other words, is it an opinion that a reasonable person could hold? This only requires that it is a reasonable opinion, and not necessarily the *most* reasonable opinion. The test of reasonableness is not meant to be a high hurdle and if the



Commissioner accepts that the opinion is one that a reasonable person could hold, she must find that the exemption is engaged.

37. The qualified person's opinion in this case – given in the qualified person submission - is that the prejudice envisioned under section 36(2) *would be likely to occur* if the Council confirmed or denied whether it holds any further information in this case; 'would be likely' imposes a less strong evidential burden than the higher threshold of 'would occur'.
38. In order for the qualified person's opinion to be reasonable, it must be clear as to precisely how the prejudice or inhibition may arise. In her published guidance on section 36 the Commissioner notes that it is in the public authority's interests to provide her with all the evidence and argument that led to the opinion, in order to show that it was reasonable. If this is not done, then there is a greater risk that the Commissioner may find that the opinion is not reasonable.
39. In respect of 36(2)(b)(i), the opinion is that there is a need to freely provide advice in a frank and open environment. Whilst the Commissioner accepts that this would be the case in respect of disclosure of documentation about the on-going investigation itself, the request only seeks to ascertain what policies / procedures exist to allow the Council's Chief Executive to be given a financial award / allowance. There is no further rationale in the submission to explain how the provision of advice would in itself relate to this confirmation or denial. The Commissioner therefore does not consider the opinion to be reasonable in this regard and she finds that section 36(2)(b)(i) is not engaged.
40. In respect of section 36(2)(b)(ii), the opinion refers to the investigation and the deliberation and exchange of views in respect of this. Again, there is no further rationale in the submission which evidences how this relates to confirmation or denial in respect of what has actually been requested. The complainant has not sought details about the investigation and has not asked for any details about it, he has only asked for copies of any relevant policies and procedures. The Commissioner therefore does not consider the opinion to be reasonable in this regard and finds section 36(2)(b)(ii) is not engaged.
41. In respect of section 36(2)(c), the most recent submission with which the qualified person agreed included the following rationale:

*"There is an investigation in response to the processes, procedures, accountabilities and decisions leading up to and following the award of an additional duties allowance and back payment to the Chief Executive. The investigation includes matters of Governance arrangements around how the payments were justified and whether the processes followed were in line with the Council's Constitution.*

*To confirm or deny that the Council holds or does not hold any documentation that sets out a procedure for payments to the Chief Executive, would prejudice the investigation by pre-empting its findings in respect of whether or not the proper governance was in place to make this award ..."*

42. The Commissioner is satisfied that the opinion here clearly relates to a potential adverse effect on the public authority's ability to offer an effective public service or to meet its wider objectives or purpose and she therefore considers it was provided on reasonable grounds. She finds section 36(3), by virtue of 36(2)(c), to be engaged.

*Public interest test*

43. Section 36 is a qualified exemption and in line with the requirements of section 2 of the FOIA, the Commissioner must consider whether, in all the circumstances of this case, the public interest in maintaining the exemption cited outweighs the public interest in providing a confirmation or denial. If the public interest is equal on both sides, then the confirmation or denial in this case must be given.
44. In considering complaints regarding section 36, where the Commissioner finds that the qualified person's opinion was reasonable, she will consider the weight of that opinion in applying the public interest test. This means that the Commissioner accepts that a reasonable opinion has been expressed that prejudice or inhibition would, or would be likely to, occur but she will go on to consider the severity, extent and frequency of that prejudice or inhibition in forming her own assessment of whether the public interest test dictates disclosure, or, as in this case, confirmation or denial as to the existence of further information.

*Public interest arguments in favour of confirmation*

45. The Council has argued:

*"Disclosure would be upholding the need for transparency, accountability and public understanding of the processes leading to the increase in the Chief Executive's salary. It may avoid a sense of suspicion and mistrust by the general public".*

46. The complainant has argued that it is in the public interest to ensure that there are good financial procedures in place including rigorous processes for pay awards at all levels. In his complaint to the Commissioner he stated:

*"It is undoubtedly in the public interest to establish whether or not the council has rigorous processes in place for good financial management. Good financial management includes having formal procedures for granting pay awards at all levels within the council.*

*Whether any standard procedure was actually followed when the recent award was made is outside the scope of my enquiry. ... I believe that the council's reason for not revealing to me what may actually be a long-established procedure is unjustified".*

*Public interest arguments in favour of maintaining the exemption*

47. At internal review, ie prior to citing the NCND provision, the Council argued:

*"Maintaining the exemption and thereby withholding information, would allow the investigation to be undertaken in a frank and objective environment. To disclose information which is the subject of that investigation at this time would defeat the very purpose for which it is being undertaken".*

48. As cited in paragraph 41 above, the Council also considers that confirmation or denial would prejudice the on-going investigation by pre-empting its findings in respect of whether or not the appropriate governance was in place.

*Balance of the public interest*

49. Having found that the qualified person's opinion was reasonable, appropriate weight must be given to that here. It is very much in the public interest to ensure that the Council is able to achieve an accurate and unhampered conclusion to the ongoing investigation. As to how much weight this should carry in the balance of the public interests, the question is what the severity, extent and frequency would be of the prejudice identified by the qualified person.
50. Maintaining the integrity of a live, confidential investigation is very important. It is of some considerable public interest that the Council is able to ensure that the investigation is conducted effectively and impartially without interference. The prejudice identified by the qualified person is that providing confirmation or denial about matters which are, essentially, currently under investigation, would defeat the very purpose for which the investigation is being undertaken.
51. Whilst there has been no reference to frequency by the qualified person in this case, the Commissioner does not believe that the frequency of the prejudice would be great as the withheld information concerns a specific issue that is unlikely to be repeated, but she does accept that the impact of the prejudice would be likely to be severe. The Commissioner's view is that there is a weighty public interest in favour of maintenance of the exemption in order to avoid that outcome.
52. The Commissioner considers that some weight must always be given to the general principle of achieving accountability and transparency

through the disclosure of information, or in this case the confirmation or denial as to whether or not information is held, by public authorities. Such confirmation or denial would assist the public in understanding how public authorities carry out their functions and make their decisions. This in turn fosters trust in public authorities.

53. The Commissioner also recognises that, in this case, confirmation or denial may also allow greater participation by the public in the Council's decision-making process and allow it to make appropriate challenges to those decisions.
54. The Commissioner also acknowledges the comments made by the complainant, as cited in paragraphs 10 and 14 above. She particularly notes his concerns that financial procedures may not have been properly followed and this is what he is seeking to establish. In this regard, she agrees that there is a substantial public interest in establishing whether practices have been followed, or whether there has been any failure to adhere to proper procedures. However, she also notes that these points are precisely what the independent investigation is considering with a view to uncovering any wrong-doing. This very much minimises any public interest in confirming or denying, at the present time, whether any further information is available as it would undermine that investigation at a crucial stage, ie before any findings have been ascertained. She also notes that the Council has published the terms of reference of the investigation so the public is aware of what is being considered. She has also been advised that it is likely that the findings of the investigation will be published in due course.
55. Whilst the Commissioner agrees with the complainant's assertion that the public is entitled to know how monetary awards are made to key staff in an organisation such as the Council, in this particular case that very issue is what is being considered by the Council itself. She therefore does not agree that the complainant's arguments outweigh the need to maintain a NCND position at this time. The Commissioner agrees with the Council that confirmation or denial as to whether or not any further policies / procedures in respect of making financial awards / payments to the Chief Executive is held would be severely prejudicial to the ongoing investigation and could pre-empt the findings of that report.
56. The Commissioner has also viewed a confidential submission made by the Council which she is unable to share in this decision notice. However, the arguments in that submission weigh considerably in favour of maintaining the NCND position in this case.
57. Having considered the public interest, and bearing in mind that the investigation was ongoing at the time of the request, the Commissioner considers that greater weight must be given to maintaining the section 36 exemption. The Commissioner's decision is that the Council is

Reference: FS50884917



entitled to NCND whether it holds any further information under 36(3),  
by virtue of 36(2)(c), of the FOIA.

## Right of appeal

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58. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

59. 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.

60. 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** .....

**Carolyn Howes**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**