

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 October 2022

Public Authority: Sandwell Metropolitan Borough Council
Address: Sandwell Council House
Oldbury
West Midlands
B69 3DE

Decision (including any steps ordered)

1. The complainant has requested information regarding any meetings that Sandwell Metropolitan Borough Council ('SMBC') has held with various external bodies about avian influenza. SMBC refused the request, citing sections 36(2)(b)(i) and (ii), and 36(2)(c) (Prejudice to effective conduct of public affairs) of FOIA.
2. The Commissioner's decision is that SMBC was entitled to rely on sections 36(2)(b)(i) and (ii) to refuse the request. However, by failing to respond to the request within 20 working days, SMBC breached sections 1, 10 and 17 of FOIA.
3. The Commissioner requires no steps to be taken as a result of this decision.

Request and response

4. On 9 December 2021, the complainant made the following request for information to SMBC:

"Please provide by electronic means the minutes of meetings held with APHA, DEFRA, RSPCA, UKHSA and others this year regards Avian Flu. I also include any attachments to these minutes. I am aware that council officers have met with these bodies recently, and minutes were taken.

Please also disclose any written communications with these bodies, including emails and attachments generated between officers and their officers on the subject of avian flu, prevention measures and public communications advice."

5. On 18 March 2022, SMBC refused the request, citing sections 36(2)(b)(i) and (ii), and 36(2)(c) of FOIA:

"...it is the view of the Qualified Person that disclosure of this information would inhibit the Councils [sic] and other agencies willingness to take part in the free and frank discussions and expression of views for fear of the information being made public. Disclosure of this information would be likely to cause an adverse effect on the authority's ability to offer an effective public service or to meet its wider objectives.

The Council has considered the public interest test and finds that maintaining the exemption outweighs the public interest in disclosing the information as the ability to have frank, full and confidential discussions is crucial to the effective management of Avian Influenza and any future scenarios where correspondence with these agencies is critical."

6. At internal review, SMBC maintained its position. It referred the complainant to information about avian influenza published on its website¹ and stated that section 36 was applied "to ensure that there is a safe space for professionals to discuss matters relating to Avian flu in an open and frank manner".

Reasons for decision

Section 36 – Prejudice to the effective conduct of public affairs

7. Section 36 of FOIA states that information is exempt where, in the reasonable opinion of a qualified person, disclosure would, or would be likely to, prejudice the effective conduct of public affairs.
 8. SMBC has applied sections 36(2)(b)(i) and (ii) to withhold the requested information in its entirety. Arguments under these sections are usually based on the concept of a 'chilling effect'. The chilling effect argument is
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https://www.sandwell.gov.uk/info/200248/parks_and_green_spaces/4723/avian_flu_-_frequently_asked_questions

that disclosure of discussions would inhibit free and frank discussions in the future, and that the loss of frankness and candour would damage the quality of advice and deliberation and lead to poorer decision making.

9. The Commissioner's guidance on section 36² states that information may be exempt under sections 36(2)(b)(i) and (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. In this case, SMBC believes that the external bodies it consults on avian influenza may, going forward, be more circumspect with their advice, if they are concerned that the views they express may be made public.
10. The exemptions at section 36 can only be engaged on the basis of the reasonable opinion of a qualified person. The Commissioner is satisfied that SMBC's Monitoring Officer is authorised as the qualified person under section 36(5) of FOIA and that he gave the opinion that the exemption was engaged. The Commissioner accepts that it was reasonable for the qualified person to consider that there was a need to protect the confidentiality of discussions and deliberations with external agencies about options for combating and responding to avian influenza in the local area. He is also satisfied that the qualified person's opinion - that inhibition relevant to those subsections would be likely to occur through disclosure of the withheld information - is reasonable. He is therefore satisfied that the exemption was engaged correctly.
11. When considering whether the public interest favours maintaining the exemption or disclosing the requested information, the Commissioner has taken account of the age of the requested information (less than 12 months old at the time of the request) and that avian influenza is a notifiable animal disease³ which continues to represent a significant public health concern. SMBC needs to be able consider advice, from a variety of informed sources, on a range of measures for the disease's prevention and management. Some of the options discussed might be considered controversial (eg culling). If contributors were concerned that these discussions might be made public, the resultant loss of frankness and candour in the course of discussions and deliberations would be likely to damage the quality of advice to decision makers, and

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

³ <https://www.gov.uk/government/collections/notifiable-diseases-in-animals>

thus inhibit SMBC's ability to make informed decisions relating to the management of avian influenza in the local area.

12. The Commissioner considers the public interest in good decision-making by SMBC to be a compelling argument in favour of maintaining the exemption. While he acknowledges that the public interest in openness and transparency would be served if the information was disclosed, on balance, he finds the public interest in protecting SMBC's access to unfiltered and frank advice on an ongoing public health matter to be the stronger argument.
13. Consequently, he is satisfied that, in this case, the public interest favours maintaining the exemption. It follows that his decision is that SMBC was entitled to rely on sections 36(2)(b)(i) and (ii) of FOIA to refuse the request.
14. In light of this decision, he has not gone on to consider SMBC's application of section 36(2)(c) of FOIA.

Procedural matters

15. Section 1(1) of FOIA states that an individual who asks for information is entitled to be informed whether the information is held and, if the information is held, to have that information communicated to them. Where a public authority considers the information is exempt from disclosure, section 17 of FOIA requires it to issue a refusal notice, explaining why.
16. Section 10(1) of FOIA requires these actions to be taken within 20 working days of receipt of the request.
17. In this case, SMBC took 68 working days to respond to the request, and it was necessary for the complainant to send several reminders. It therefore breached sections 1(1)(a), 10 and 17 of FOIA.
18. The Commissioner has made a note of the delay for monitoring purposes.

Right of appeal

19. 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: 0203 936 8963
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

20. 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.
21. 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

Samantha Bracegirdle
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF