

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 July 2023

Public Authority: Croydon London Borough Council
Address: Bernard Weatherill House
8 Mint Walk
Croydon CR0 1EA

Decision (including any steps ordered)

1. The complainant has requested information regarding meetings of Croydon London Borough Council's ("the Council") Corporate Management Team ('CMT') from 1 May 2022 onwards. The Council refused the request, citing sections 36(2)(b)(i) and (ii), and 36(2)(c) (Prejudice to effective conduct of public affairs) of FOIA as a basis for non-disclosure.
2. The Commissioner's decision is that the Council was entitled to rely on sections 36(2)(b)(i) and (ii) to refuse the request. As he considers that sections 32(2)(b)(i) and (ii) apply to the requested information in its entirety, he has not considered the Council's application of section 36(2)(c).
3. The Commissioner requires no steps to be taken as a result of this decision.

Request and response

4. On 22 June 2022 the complainant requested information from the Council in the following terms:-

"Please provide all agendas, report and minutes from the Croydon Corporate Management Team from May 1st 2022 onwards."

5. The Council responded to the complainant on 5 July 2022, stating that it was applying section 36(2)(b)(i) and (ii) and section 36(2)(c) of FOIA as a basis for refusing to disclose the requested information.
6. In its internal review response to the complainant on 27 July 2022 the Council upheld the original decision.

Scope of the case

7. The complainant contacted the Commissioner on 27 July 2022 to complain about how their FOIA request had been handled.
8. The Commissioner has considered the Council's handling of the complainant's request, in particular its application of the exemptions at sections 36(2)(b)(i) and (ii) and 36(2)(c).

Reasons for decision

Section 36 – Prejudice to the effective conduct of public affairs

9. Section 36 of FOIA states that information is exempt where, in the reasonable opinion of a qualified person ('QP'), disclosure would, or would be likely to, prejudice the effective conduct of public affairs.
10. The Council has applied sections 36(2)(b)(i) and (ii) and 36(2)(c) to withhold the requested information in its entirety. Arguments under the first two sections are usually based on the concept of 'safe space' and a 'chilling effect'. These arguments are 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.
11. The Commissioner's guidance on section 36¹ 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.

¹ <https://ico.org.uk/media/for-organisations/documents/2260075/prejudice-to-the-effective-conduct-of-public-affairs-section-36-v31.pdf>

12. The Council provided the Commissioner with a copy of its section 36(2)(b)(i) and (ii) and 36(2)(c) submission to the QP.
13. The Council sought this opinion from the QP on 4 July 2022 and it was provided on 5 July 2022. The Commissioner is satisfied that the Council's Director of Legal Services and 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 on the basis that it is critically important that senior officers can freely and frankly ask for and receive advice, freely and frankly exchange views and generally effectively conduct and manage the Council's affairs. This is only achievable, according to the QP, if the information held by the Council relating to CMT meetings remains confidential, otherwise the objectives of section 36 of FOIA would be seriously undermined and harmed.
14. In determining whether the exemption is engaged, the Commissioner must, nevertheless, consider whether the QP's opinion was a reasonable one.
15. The Commissioner takes the approach that 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. This is not the same as saying that it is the only reasonable opinion that could be held on the subject. The QP's opinion is not rendered unreasonable simply because other people may have come to a different (and equally reasonable) conclusion. It is only unreasonable if it is an opinion that no reasonable person in the QP's position could hold. The QP's opinion does not have to be the most reasonable opinion that could be held; it only has to be a reasonable opinion.
16. The Commissioner considers that the exemptions at section 36(2) are about the processes that may be inhibited, rather than focusing only on the content of the information.
17. With regard to the limbs of section 36(2)(b), the issue is whether disclosure would inhibit the processes of providing advice or exchanging views. In order to engage the exemption, the information itself does not

necessarily have to contain views and advice that are in themselves free and frank. On the other hand, if the information only consists of relatively neutral statements, then it may not be reasonable to think that its disclosure could inhibit the provision of advice or the exchange of views.

18. Therefore, although it may be harder to engage the exemptions if the information in scope consists of neutral statements, circumstances might dictate that the information should be withheld in order not to inhibit the free and frank provision of advice and the free and frank exchange of views. This will depend on the facts of each case.
19. With regard to section 36(2)(c), the Commissioner's guidance states: "..., the fact that section 36(2)(c) uses the phrase "otherwise prejudice" means that it relates to prejudice not covered by section 36(2)(a) or (b). This means that information may be exempt under both 36(2)(b) and (c) but the prejudice claimed under (c) must be different to that claimed under (b)".
20. The Council has argued that disclosure would be prejudicial to the effective conduct of public affairs. The purpose of this exemption is to carve out a safe and confidential space for public authorities to think, discuss and evaluate, to request and receive advice, and to deliberate. In a local authority context, this is particularly important in respect of senior officers and especially in respect of issues of strategic importance and high level policy discussions. It ensures the most effective use of the Council's limited resources and ensures that policy and other decision-making proposals are properly informed.
21. The Council states that it also ensures that it is not denied the legitimate space that it needs, especially at the early stages of an initiative, to privately consider the possible options and the potential advantages and disadvantages and to speak freely. This is essential in ensuring that the potential benefits are not lost or diminished and that a co-ordinated approach is taken to achieve the most effective management and conduct of Council business and its other affairs. Essential to safeguarding the effective conduct of the Council's affairs is the inherent and operational confidential nature of CMT meetings. Release of the information requested would clearly and demonstrably harm the interests protected by s36(2)(b)(i) and (ii) and (c).
22. The Commissioner, having perused the requested information, is satisfied that sections 36(2)(b) and (i) are engaged in relation to the

entirety of the information, therefore he has not gone on to consider the Council's application of section 36(2)(c).

23. As section 36 is a qualified exemption, the Commissioner has gone on to consider the public interest.
24. The public interest test is set out in section 2(2) of FOIA and the Commissioner has considered the arguments both in favour of maintaining the exemption and disclosing the requested information.

Public interest test

25. 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 two months old at the time of the request) and that the CMT meetings afford the Council's senior officers the space and confidentiality to think, discuss and evaluate issues of strategic importance and conduct high level policy discussions in a free and frank manner.
26. This process is vital for the operation of the Council, so that senior officers can freely and frankly ask for and receive advice, exchange views and generally effectively conduct and manage the Council's affairs. This not only supports the internal and formal decision-making processes of the Council but ensures that decisions made that directly affect residents and employees are properly considered, receive appropriate advice, and are thoroughly debated. This is necessary to support the legal and constitutional framework within which the Council operates, to carry out its statutory functions. This is vital for the good governance and operation of the Council as a whole.
27. The Commissioner considers the public interest in good decision-making by the Council to be a compelling argument in favour of maintaining the exemption. While he acknowledges that the public interest in openness and transparency, and greater public understanding of the Council's decision-making processes would be served if the information was disclosed, on balance, he finds the public interest in protecting the Council's space to discuss high level matters and make important decisions regarding all aspects of how the Council operates to be the stronger argument.
28. Consequently, he is satisfied that, in this case, the public interest favours maintaining the exemption. It follows that his decision is that the Council was entitled to rely on sections 36(2)(b)(i) and (ii) of FOIA to refuse the request.

Other matters

29. The Commissioner wrote to the Council to seek its submissions regarding the complaint on 20 April 2023. The Council did not respond to the Commissioner until 19 June 2023, after an information notice was served upon it, compelling it to respond within the deadline.
30. The Commissioner seeks to remind the Council of its obligations under FOIA and the necessity of engaging with the Commissioner in a prompt and timely manner in order to ensure the efficient and thorough consideration of all FOIA complaints.

Right of appeal

31. 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

32. 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.
33. 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

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