

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 14 September 2009

Public Authority: Haringey Council
Address: Chief Executive Services
5th Floor
River Park House
225 High Road
Wood Green
London
N22 8HQ

Summary

The complainant requested information from Haringey Council ("the Council") relating to an investigation carried out by the Councils Monitoring Officer into allegations the complainant had made regarding the Chief Executive of the Council. The Council initially stated that the request was for personal data about the complainant must be treated as a subject access request under the Data Protection Act 1998 but altered its position following an internal review of the case when it stated that the information is exempt under section 36 and section 42 of the Freedom of Information Act 2000 Act (the "Act"). The Commissioner has reviewed the requested information and has decided that the Council correctly applied section 36 in this case. During the investigation the Council retracted its reliance on the exemption at section 42 and disclosed the information previously withheld under that exemption. The Council also committed a number of procedural breaches but the Commissioner does not require any steps to be taken.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Act. This Notice sets out his decision.

The Request

2. On 25 August 2007 the complainant made a request for the following information:

“A copy of all documents, files notes, and interview notes relating to an investigation carried out by John Suddaby, Haringey Council Monitoring Officer and Councillor George Meehan, Council Leader, into allegations raised by myself against Ita O'Donovan, Chief Executive. (Please note that the outcome of this investigation was communicated to me on the 27th July 2007).”

3. This request was followed by four others which the Commissioner is not investigating as they were not included in the complainant's letter of complaint.
4. The Council responded on 1 October 2007 stating that the request is for personal data about the complainant and is therefore not covered by the Freedom of Information Act and must be treated as a subject access request under the Data Protection Act. The Council advised that given the nature of the request it may need the full 40 calendar day period allowed for under the Data Protection Act to provide a response.
5. On 27 February 2008 the complainant wrote to the Council stating that as he has not received a response he would like a review of the decision not to accede to his request to have a copy of the requested data.
6. The Council responded on 3 March 2008 stating that the request should have been treated as a Freedom of Information request, not a subject access request under the Data Protection Act 1998, as it was not for personal information about the complainant. The Council disclosed some of the information, namely a copy of the final report by the Monitoring Officer to the Leader of the Council and a copy of all documents in the investigation file with the exception of the following three sets of information:
 - i) The notes of interviews and email exchanges between the investigator and various Council officers.
 - ii) Appendix 2 of an Informal Executive Committee report dated 12 October 2004 dealing with CRB (Criminal Records Bureau) issues and suggested courses of action.
 - iii) An email exchange between officers dated 6 – 9 March concerning the treatment of a data protection complaint received from the complainant on 5 March 2007 containing legal advice from the Council's lawyers.
7. The Council gave the qualified person's reasons for withholding information in i) and ii) under the exemption contained in section 36 of the Act, that disclosure of the information would be likely to prejudice the effective conduct of public affairs. In relation to the information in iii) the Council cited section 42 of the Act, that the information is subject to legal professional privilege. The Council also provided the reasons why it believes the public interest in favour of maintaining the exemption outweighs the public interest in favour of disclosing the information for each of the three categories of withheld information as per paragraph 6.

The Investigation

Scope of the case

8. On 29 May 2008 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant requested that the Information Commissioner's Office investigate the legality and appropriateness of the response as in his view the Council should not be able to deny the public access to information about unlawful and possibly criminal actions that have been undertaken by senior officers within the authority.
9. The Commissioner has considered whether the Council was correct to apply the exemption at section 36 of the Act to the request and whether it responded to the request in accordance with the procedural requirements of the Act.
10. During the course of the Commissioner's investigation the Council reconsidered their application of the exemption at section 42 of the Act and came to the view that, on balance, the public interest in maintaining the exemption does not outweigh the public interest in disclosing the document. The Council therefore retracted its reliance on this exemption and disclosed the email exchange containing legal advice. Therefore the application of the exemption at section 42 is not addressed in this Notice.
11. The complainant also raised other issues that are not addressed in this Notice because they are not requirements of Part 1 of the Act.

Chronology

12. On 28 August 2008 the Commissioner wrote to the Council informing it of the complaint and requesting a copy of the withheld information.
13. The Council responded on 16 October 2008 providing "complete information, including the information that was withheld from...(the complainant)."
14. The Commissioner commenced the full investigation by telephoning the Council on 9 July 2009 to enquire which parts of the information provided to the Commissioner on 16 October 2008 were disclosed and which were withheld as this was not clear from the correspondence.
15. On 14 July 2009 the Commissioner wrote to the Council requesting more detail on its application of the exemptions and the public interest test.
16. On the 3 August 2009 the Council confirmed that the information provided to the Commissioner on 16 October 2008 was in fact the withheld information, not, as previously indicated, the entire information.
17. The Commissioner received a copy of the documents disclosed to the complainant from the Council on 6 August 2009.

18. On 14 August 2009 the Council provided the Commissioner with further arguments in relation to section 36(2)(b)(ii) and the public interest test. As mentioned in paragraph 10, it also retracted its reliance on the exemption at section 42 to the email exchange containing legal advice.

Findings of fact

19. The complainant informed the Commissioner that the allegations raised by him against the Chief Executive concerned unlawful actions made by the Council with respect to criminal record checks, the failure of the Council to respond to freedom of information and subject access requests, the failure of senior officers to follow internal procedures and the obstruction by the Council of attempts to gain information about their unlawful actions.

Analysis

Exemptions

Section 36

The engagement of the exemption

20. Section 36 states that information is exempt from disclosure where, in the reasonable opinion of a qualified person, disclosure would or would be likely to prejudice the effective conduct of public affairs. The full text of section 36 is included in the legal annex attached to this notice. As the text of the legislation indicates, section 36 operates in a slightly different way to the other prejudice based exemptions contained in the Act. For section 36 to be engaged, information is exempt only if, in the reasonable opinion of a qualified person, disclosure of the information in question would, or would be likely to prejudice any of the activities set out in sub-sections of 36(2).
21. In this case the Council has relied upon section 36(2)(b)(ii), 'would or would be likely to inhibit the free and frank exchange of views for the purposes of deliberation', to the following pieces of information:
1. The notes of interviews, draft notes of interviews and email exchanges relating to the interview notes compiled in connection with the investigation undertaken by the Monitoring Officer
 2. Appendix 2 of a report to the Council's Informal Executive Committee dated 12 October 2004.
22. When investigating cases involving the application of section 36, in order to establish whether the exemption has been applied correctly the Commissioner has:
- Ascertained who is the qualified person or persons for public authority in question;

- Established that an opinion was given;
 - Ascertained when the opinion was given; and
 - Considered whether the opinion given was reasonable.
23. With regard to the first criterion, the qualified person in this case also undertook the investigation that is the subject of the request. The Council queried the propriety of the monitoring officer exercising his section 36 role in these circumstances. The Commissioner is of the opinion that the monitoring officer may still exercise his judgement despite his involvement in the incident that was the subject of the request as the authority to form a reasonable opinion cannot be delegated and so there will be occasions when the qualified person forms an opinion about something in which he has been previously involved.
24. With regard to the fourth criterion, in deciding whether the opinion was 'reasonable' the Commissioner has been led by the Tribunal's decision in the case *Guardian Newspapers & Brooke v Information Commissioner & BBC* (EA/2006/0011 & EA/2006/0013) in which the Tribunal considered the sense in which the qualified person's opinion is required to be reasonable. It concluded that 'in order to satisfy the sub-section the opinion must be both reasonable in substance and reasonably arrived at' (paragraph 64). In relation to the issue of reasonable in substance, the Tribunal indicated that 'the opinion must be objectively reasonable' (paragraph 60).
25. The Commissioner has also been guided by the Tribunal's findings in which it indicated that the reasonable opinion is limited to the degree of likelihood that inhibition or prejudice may occur and thus 'does not necessarily imply any particular view as to the *severity* or *extent* of such inhibition [or prejudice] or the *frequency* with which it will or may occur, save that it will not be so trivial, minor or occasional as to be insignificant' (paragraph 91). Therefore, in the Commissioner's opinion this means that when assessing the reasonableness of an opinion the Commissioner is restricted to focussing on the likelihood of that inhibition or harm occurring, rather than making an assessment as the severity, extent and frequency of prejudice or inhibition of any disclosure.
26. With regard to the degrees of likelihood of prejudice the Commissioner has been guided on the interpretation of the phrase 'would, or would be likely to' be a number of Information Tribunal decisions. In terms of 'likely to' prejudice, the Tribunal in *John Connor Press Associates Limited v The Information Commissioner* (EA/2005/0005) confirmed that 'the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk' (paragraph 15). With regard to the alternative limb of 'would prejudice', the Tribunal in *Hogan v Oxford City Council & The Information Commissioner* (EA/2005/0026 & 0030) commented that 'clearly this second limb of the test places a stronger evidential burden on the public authority to discharge' (paragraph 36).
27. In order to assess whether an opinion provided by a qualified person was reasonably arrived at the Commissioner asked the Council to provide:

- A copy of the submissions given to the qualified person in order for them to reach their opinion.
 - A copy of the reasonable opinion which was subsequently provided.
28. In response to this the Council provided the Commissioner with a copy of the reasonable opinion supplied for the purpose of the Council's response. There were no submissions in this case as the qualified person carried out the investigation which was the subject of the request.
29. On the basis of the above the Commissioner is satisfied that the opinion is one that was reasonably arrived at and reasonable in substance and therefore the exemption contained at section 36(2)(b)(ii) is engaged. The Commissioner has reached this conclusion for the following reasons:
- The opinion was given by the appropriate qualified person who, having carried out the investigation which is the subject of the request, had detailed knowledge of the circumstances surrounding the request.
 - The opinion was given after the receipt of the request and before the response to the internal review.
 - The Council has stated that the level of likelihood of prejudice is 'would be likely to' therefore, as per paragraph 26, there must be a real and significant risk of the prejudice occurring rather than the stronger evidential burden of the prejudice needing to be at least more probable than not.
 - In relation to the notes of interviews, draft notes of interviews and email exchanges the Council explained that the qualified person considered that disclosure of these would be likely to prejudice the free and frank exchange of views for the purposes of deliberation by making it less likely that officers will co-operate fully with Council investigations in the knowledge that anything they say may be placed in the public domain. The qualified person submitted that future free expressions of opinions in similar investigating situations are likely to be inhibited if staff are aware that what they say in relation to allegations may be brought into the public domain and would have the harmful effect on the deliberative process of drawing conclusions in investigations. The Commissioner believes that these suppositions are objectively reasonable.
 - In relation to Appendix 2 of the report to the Informal Executive Committee, the Council has explained that the process of Criminal Record Bureau checking of relevant staff is an important legal responsibility for the Council as well as being time consuming and resource intensive. The appendix contains preliminary thinking and advice on the risk assessment and service implications of different options in implementing the Criminal Record Bureau checks. The qualified person proposed that because of the potential consequences of failures in the process and the public concern that this invariably and understandably produces, it is important that officers are not inhibited from expressing themselves and feel able to explore different options before coming to final conclusions. It was argued that disclosure of the appendix would likely lead to less candid and robust discussions and hard choices being avoided on issues of this and a similar nature and that it is essential for the purposes of informed decision making that free and informed debate and consideration of a broad range of options is not discouraged at a

preliminary stage by concerns that such discussions may find their way into the public domain. Again, the Commissioner believes that this supposition is objectively reasonable.

Public interest test under section 36

30. Section 36(2) is a qualified exemption and therefore the Commissioner must consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure of the information. The Tribunal in *Guardian Newspapers & Brooke v Information Commissioner & BBC* (EA/2006/0011 & EA/2006/0013) indicated the distinction between the consideration of the public interest under section 36 and consideration of the public interest under the other qualified exemptions contained within the Act:

“The application of the public interest test to the s 36(2) exemption involves a particular conundrum. Since under s 36(2) the existence of the exemption depends upon the reasonable opinion of the qualified person it is not for the Commissioner or the Tribunal to form an independent view on the likelihood of inhibition under s36(2)(b), or indeed of prejudice under s36(2)(a) or (c). But when it comes to weighing the balance of public interest under s2(2)(b), it is impossible to make the required judgment without forming a view on the likelihood of inhibition or prejudice.”
(Paragraph 88)

31. As noted above, the Tribunal indicated that the reasonable opinion is limited to the degree of likelihood that inhibition or prejudice may occur and thus ‘does not necessarily imply any particular view as to the *severity* or *extent* of such inhibition [or prejudice] or the *frequency* with which it will or may occur, save that it will not be so trivial, minor or occasional as to be insignificant’ (paragraph 91). Therefore, in the Commissioner’s opinion this means that whilst due weight should be given to reasonable opinion of the qualified person when assessing the public interest, the Commissioner can and should consider the severity, extent and frequency of prejudice or inhibition to the subject of the effective conduct of public affairs.

Public interest arguments in favour of disclosing the requested information

32. In relation to the notes of interviews, draft notes of interviews and email exchanges the Council has acknowledged that factors supporting disclosure are the transparency of the investigation itself and furthering the understanding of the reasoning for the conclusions reached.
33. In relation to Appendix 2 of the report to the Informal Executive Committee the Council has acknowledged that factors in favour of disclosure are the transparency of decision making of the Council and the furtherance of understanding of how decisions have been made.
34. The Commissioner agrees with the Councils arguments in favour of disclosing the information and is also of the opinion that disclosure might enhance the quality of discussions and decision making generally. He also considers that the fact that

the member of staff being investigated is the most senior in the Council is an argument in favour of disclosure.

Public interest arguments in favour of maintaining the exemption

35. In relation to the notes of interviews, draft notes of interviews and email exchanges the Council has argued that the public interest in maintaining the exemption lies in securing the continued cooperation of staff in internal investigations. The fact that the disclosed final report by the Monitoring Officer to the Leader of the Council was a full exposition of the investigation partially meets the public interest in disclosure lowering the public interest in disclosure of the residual information.
36. In relation to Appendix 2 of the report to the Informal Executive Committee the Council has submitted that the public interest in maintaining the exemption lies in the need to ensure that a free and frank debate can occur on the options available to the Council at various stages of the decision making process and the continued confidence in the confidentiality of informal and preliminary policy discussions.
37. The Commissioner accepts the Councils arguments in favour of maintaining the exemption.

Balance of the public interest arguments

38. Where, as with this case, a qualified exemption is engaged the information must still be disclosed unless the public interest in maintaining the exemption outweighs the public interest in disclosing it.
39. In relation to the notes of interviews, draft notes of interviews and email exchanges the Council has proposed that having looked specifically at the information for which the exemption is claimed, and compared it with that which is contained in the disclosed final report by the Monitoring Officer to the Leader of the Council, it has concluded that it is of limited additional significance and therefore the public interest in favour of disclosure is outweighed by the public interest in maintaining the exemption.
40. The Commissioner has given weight to the above argument as although he recognises that in some cases the disclosure of information can further public understanding of an issue, he is of the opinion that as the report was a full exposition of the investigation, no further public understanding could be gained in this case.
41. The Commissioner has given considerable weight to the argument that the public interest in maintaining the exemption lies in securing the continued cooperation of staff in internal investigations. He acknowledges that disclosure of information given by individuals may dissuade employees from being frank in future which could hamper similar internal investigations. Although the Commissioner recognises that employees have a duty to be honest and open in investigations, he places weight on the argument that where individuals may be seen to be at

fault they may take action to minimise their degree of culpability particularly so where a report concerns senior management.

42. The Commissioner therefore considers that the degree of inhibition employees could feel if they were aware that their responses given as part of internal investigations were to be made public would be severe and frequent, and could disrupt investigations frequently and to a sizeable extent.
43. Furthermore, if staff were inhibited to the degree that internal investigations did not establish the real cause for complaints or allegations the effectiveness of the Council's management could be prejudiced. Any disruption to the ability of the Council to scrutinise its actions leaves open the possibility that problems remain unidentified and ongoing. The Commissioner considers this to be a factor in favour of maintaining the exemption in this case.
44. In balancing the public interest the Commissioner has also taken account of the expectation of confidence of those being interviewed, in relation to inhibiting future discussion, and the subject matter of the investigation and is of the opinion that, in this case, the bigger public interest lies in protecting the investigation process rather than putting specific details of the investigation into the public domain. The Commissioner considers that given the subject matter of the investigation in this case there is limited value to the wider public of disclosing precise details in comparison to the benefit of ensuring the completeness of future investigations.
45. The Council were asked whether the length of time which had elapsed since the events which gave rise to the requested information altered the consideration of the public interest test. The allegations were made by the complainant in early 2007 and the investigation was concluded by mid 2007. It responded to the effect that as the key issue was not just the disclosure of information from an earlier investigation but the likely prejudice to the substance and quality of all such future investigations through staff being unwilling to participate openly in circumstances where the record of their interviews would be known to be potentially subject to public disclosure the lapse of time would not change the balance of the public interest test. The Commissioner considers that even when considering the inhibition of future discussions the age of the information can be relevant. In his view there may come a point at which the age of information means that it only involves staff who are no longer employed, and at which it becomes of historical interest only. In this circumstance the Commissioner considers that any impact of disclosure, on the quality of future discussions, is likely to be reduced. In the present case, however, he accepts that the events were relatively recent and that the Council's arguments are therefore valid.
46. In relation to Appendix 2 of the report to the Informal Executive Committee the Council has argued that the public interest in disclosure of the report is weak bearing in mind the date of the report and the fact that much of the information, including the options progressed after preliminary discussions, is included in a subsequent Chief Executive Management Board Report dated 15 December 2004 which has been disclosed. Therefore it submitted that the balance of the public interest lies in maintaining the exemption.

47. The Commissioner acknowledges the potential consequences of failures in the criminal record checking process and the public concern that this produces. The Commissioner is also mindful that the process is a time consuming and resource intensive legal responsibility for the Council and therefore gives significant weight to the argument that officers should not feel inhibited from expressing themselves and being able to explore different options in this area. When reaching the decision that the balance of the public interest in maintaining the exemption outweighs the public interest in disclosing the information, the Commissioner has taken into account the potential severity and extent of the prejudice in this case, that being the potential consequences of failures in the criminal record checking process.
48. The Commissioner has also given consideration and weight to the fact that much of the information from October 2004 is included in a report disclosed in December 2004, and that as the options deemed worthy of progression after preliminary discussions are included in that report, the further public understanding to be gained from full disclosure would be of limited use in comparison to the benefit of ensuring the free and frank exchange of views for future deliberations.
49. Again, the Council were asked whether the length of time which had elapsed since the events which gave rise to the requested information altered the consideration of the public interest test. It responded to the effect that as the main consideration is the importance of maintaining the continued confidence in the confidentiality of informal and preliminary policy discussions, and that a significant aspect of such a consideration is that of the principle itself, the lapse of time was not seen as a factor that would change the balance of the public interest.

Conclusion on the public interest test

50. The Commissioner has considered the Council's public interest arguments in relation to the exemption taking into account the severity, frequency and extent of the likely prejudice and has concluded that in the circumstances of this case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Procedural Requirements

Section 10 – Time for compliance

51. Section 10(1) states:

“Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”

52. The Council did not comply with its duties under section 1(1)(a) and section 1(1)(b) of the Act until after the time limit set in section 10(1) had elapsed.

Section 17 – Refusal of request

53. Section 17(1) of the Act states:

“A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

- a) states that fact,
- b) specifies the exemption in question, and
- c) states (if that would not otherwise be apparent) why the exemption applies.”

54. In this case, the Council failed to issue a refusal notice within the time limit for complying with section 1(1) in breach of section 17(1).

55. The refusal notice, when supplied, also didn't specify the subsection of the exemption in question in breach of section 17(1)(b).

The Decision

56. The Commissioner's decision is that the Council was correct to rely on section 36(2)(b)(ii) of the Act as a basis to withhold the requested information.

57. However, the Commissioner has also decided that the Council breached the following sections of the Act:

- section 10(1) for late compliance with section 1(1)(a), as the public authority did not confirm that it held the requested information within the statutory time limit.
- section 10(1) for late compliance with section 1(1)(b), in relation to the information that was provided in response to the request outside of the statutory time limit.
- section 17(1) as the Council failed to provide the complainant with a notice stating that it was relying on an exemption of the Act within the statutory time period.
- section 17(1)(b) as the Council failed to specify the subsection of the exemption relied upon.

Reference: FS50202969

Steps Required

58. The Commissioner requires no steps to be taken.

Right of Appeal

59. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

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.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 14th day of September 2009

Signed

**Lisa Adshead
Senior FOI Policy Manager**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Freedom of Information Act 2000

General Right of Access

Section 1(1) provides that –

“Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him.”

Time for Compliance

Section 10(1) provides that –

“Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”

Refusal of Request

Section 17(1) provides that -

“A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies.”

Prejudice to effective conduct of public affairs.

Section 36(1) provides that –

“This section applies to-

- (a) information which is held by a government department or by the National Assembly for Wales and is not exempt information by virtue of section 35, and
- (b) information which is held by any other public authority.

Section 36(2) provides 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-

- (a) would, or would be likely to, prejudice-
 - (i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or
 - (ii) the work of the Executive Committee of the Northern Ireland Assembly, or
 - (iii) the work of the executive committee of the National Assembly for Wales,
- (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.”