



Neutral citation number: NCN: [2024] UKFTT 00729 (GRC)

Case Reference: EA/2023/0436

**First-tier Tribunal
(General Regulatory Chamber)
Information Rights**

**Decided without a hearing
Decision given on: 15 August 2024**

Before

**JUDGE GRIFFIN
MEMBER MS A CHAFER
MEMBER MS S COSGRAVE**

Between

CHARLES THOMSON

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

Decision: The appeal is allowed

Substituted decision notice:

- A. The public interest in maintaining the exemption within section 36(2) Freedom of Information Act 2000 is outweighed by the public interest in disclosure of those parts of the requested information specified in the closed annex to this decision.
- B. We set aside the rule 14(6) direction made as regards the redacted section of the qualified person's opinion for the reasons given in the

closed annex. The information at box 11 in the qualified person's opinion shall be disclosed to the appellant within 42 days of the promulgation of this decision.

- C. Within 42 days of the promulgation of this decision London Borough of Havering shall send to Mr Thomson the requested information redacted to remove only the personal data contained therein in accordance with the closed annex.
- D. The closed annex shall be sent by the tribunal clerk only to the Information Commissioner it shall not be promulgated nor published to any other person without the leave of the tribunal, such leave is restricted in accordance with E below. Rule 14(1).
- E. Within 7 days of its promulgation the Information Commissioner shall send the public authority (London Borough of Havering) a copy of this decision, the closed annex and a copy of the closed bundle provided to the tribunal at which time the Information Commissioner shall remind the public authority about the restrictions on disclosure.
- F. The prohibition on promulgation and publication of this annex to our open decision in D above will end after 35 days in the absence of any application to appeal the decision of the Tribunal in this case. Any such application shall be made within 28 days of the promulgation of the open decision. In the event that an application is received the prohibition will continue pending consideration of that application.
- G. Failure to comply with this substituted decision notice may result in the certification of an offence of contempt to the Upper Tribunal.

REASONS

Background

1. The Local Government Association ("LGA") undertook a Race Equality, Accessibility, Diversity and Inclusion (READI) Review into London Borough of Havering (the "Council") at the Council's invitation. In its feedback report the LGA made recommendations for action pointing out that the review was not the end but the beginning of a process. The

information feeding into the review included focus groups and meetings, the outcomes and learning points from which are summarised in the READI Review report. As part of the steps taken for the READI Review the Council submitted an internal self-assessment document to the LGA. The READI Review does not cross reference any comments or findings to the source of the information gleaned except by the use of language which sometimes indicates that the information was passed to the review team verbally. The review took place on 18, 19 and 26 May 2021.

2. On 10 November 2021 the Council's cabinet were scheduled to discuss the READI review and the necessary actions arising from it.
3. On 10 November 2021 Mr Thomson made a request for information to the Council. The relevant part of the request read as follows:

"I am writing to request the disclosure of a document under the Freedom of Information Act.

On November 10, 2021, a report was due to be presented to Cabinet in a public meeting about the READI report. That report can be viewed here: [link given]

On page 3 of that report, it says that the council felt that "candour" was important, and the council had to take a "warts and all" approach. As part of that process, the council produced a "400-page internal self-assessment document".

This request is for the disclosure of that 400-page internal self-assessment document."

4. The Council responded stating that disclosure was refused pursuant to section 36 of the Freedom of Information Act 2000 ("FOIA"). Thereafter Mr Thomson complained to the Information Commissioner (the "Commissioner") for the first time. In a decision notice issued on 28 February 2023 reference IC-192226-C8Z8 the Commissioner decided that the Council had failed to demonstrate that section 36 of FOIA is engaged. The Council was required to reconsider the complainant's request and

either release the information that they have requested, or issue a refusal notice that meets the statutory requirements of FOIA. That decision notice is not the subject of this appeal.

5. In its response dated 7 March 2022 the Council once again refused to provide the information requested citing the exemption in section 36 FOIA and stating that the public interest in maintaining the exemption outweighed the public interest in disclosure of the requested information. Mr Thomson requested an internal review which was provided by the Council on 3 April 2023. That review maintained the position of the Council.
6. Mr Thomson complained for the second time to the Commissioner stating that in his view the Council was wrong to conclude that the balance of the public interests fell in favour of maintaining the exemption under section 36 FOIA. He suggested to the Commissioner that *"The 'public interest test' [the Council] claims to have performed is outrageous. It lists only one, nebulous factor favouring disclosure and then numerous factors favouring suppression, totally ignoring and omitting all of the public interest arguments I have already advanced."*
7. The Commissioner investigated the matter, giving the case reference IC-233181-S4V1.
8. As part of the investigation the Council wrote to the Commissioner on 13 June 2023 stating
 - a. *"Throughout the entire process, all involved – in particular staff - were given assurances that whatever they said or provided would be confidential. There are only several staff forum leads and service representatives, so it would be easy for responses to be identified and attributed."*
 - b. *"A Council officer contacted the LGA prior to sending this letter and they have again confirmed that if the Council is made to publish the self-assessment this would have a big impact on the LGA Peer Sector offer, particularly when central government is trying to push local authorities to have more of them. The LGA is also concerned that*

disclosable self-assessments would be heavily skewed to the positive and make the rationale for peer assessment less effective or desirable.”

9. The Council also provided the qualified person’s opinion which pointed out that disclosure would reduce the effectiveness of the self assessment as a tool for self improvement not only for the Council but also the LGA. The opinion read in part:

“The purpose of the LGA Peer Review was to openly and honestly critique the Council’s operating practices and culture. The Council’s staff were invited to express frank and honest opinions about a sensitive subject having been reassured as to the ongoing confidentiality of the process.

The Self-Assessment was presented to the LGA in a raw, unfiltered and uncensored state with a view to full and frank disclosure. To allow such information into the public domain would no doubt lead to staff being more reserved in its approach going forward. The same is no doubt true for the organisation as a whole. The LGA Peer Review is a voluntary process aimed at driving improvements within the public sector. Were all information provided to be made public it would no doubt lead organisations to either not engage in the process at all or to spin such information so as to “control the narrative.

Whilst I appreciate the chilling effect argument to have limited weight, I do

consider that it would apply and add some weight to my deliberations in that

disclosure 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.”

10. Mr Thomson submitted to the Commissioner that the Council’s “perfunctory ‘public interest test’ was at best extremely superficial and at worst extremely disingenuous” pointing out that, in his view, it did not include any of the arguments he had already advanced.

11. The second decision notice (IC-233181-S4V1) was dated 15 September 2023. That is the decision notice subject of this appeal.
12. In the decision under appeal, the Commissioner noted that that qualified person considered both section 36(2)(b)(ii) and section 36(2)(c) FOIA to be engaged. The Commissioner considered the explanations provided by the qualified person for the reasoning of their application of section 36(2)(c). The Commissioner accepted that the qualified person's opinion that disclosure of the requested information would cause prejudice in the way envisaged was reasonable.
13. The Commissioner decided to accept the qualified person's opinion that section 36(2)(c) FOIA was engaged, which meant it was unnecessary to consider whether section 36(2)(b)(ii) FOIA was engaged.
14. The Commissioner went on to decide that the public interest favoured upholding the exemption. In so doing the Commissioner rejected Mr Thomson's arguments that:
 - a. there is a clear public interest in the issue of institutional prejudice such as racism and sexism, matters that have been prominent in the news agenda and public debate in recent years;
 - b. it was as a direct consequence of public interest in these issues that the Council commissioned the report in question;
 - c. it is Havering residents who will have funded the compilation of the report, and therefore it is right that they are provided with information which allows them to understand the outcome;
 - d. the LGA's report made a finding that there was a culture of normalised sexism and racism at the Council which goes beyond mere suspicion of wrongdoing, and amounts to published evidence of wrongdoing;
 - e. it is important that the public is provided with a full understanding of the background which led to the LGA's findings.
15. The Commissioner concluded that the public interest favoured maintaining the exemption because "for the self-assessment and LGA peer review process to be effective and achieve positive outcomes, it is important that a 'safe space' is provided to allow a local council to openly

and honestly set out, analyse and reflect upon, its approach to matters relating to the relevant issues, so it can effectively identify where it is both doing well, and where improvements could be made.” Furthermore he concluded that although the peer review process had been concluded at the time of the request there was a real risk that disclosure would affect the openness of future peer reviews and self-assessments conducted by councils, and there may be less willingness by councils to engage in the process on a voluntary basis.

16. The Commissioner acknowledged the weighty public interest in the subject matter of the self assessment but on balance concluded that the public interest in protecting the integrity of the process to be the stronger argument in the circumstances of this case.

The issue in this case

17. Mr Thomson appeals to this Tribunal by notice of appeal dated 6 October 2023.

18. His grounds of appeal focus on the Commissioner’s decision that the public interest in maintaining the exemption outweighed the public interest in disclosure. In summary his grounds of appeal are:

- a. There is an overwhelming public interest in disclosing the results of the Council’s investigation set out in the self-assessment;
- b. Avoidance of future public scrutiny or possible reputational damage should not be taken into account when considering the balance of the public interest in favour of maintaining the exemption;
- c. There is no evidence that people who provided information as part of the self-assessment process are opposed to the publication of its contents.

19. Mr Thomson accepts that personal data should be redacted from any disclosure made.

20. Mr Thomson does not dispute the engagement of section 36(2)(b) FOIA.

21. This appeal has been determined without a hearing pursuant to rule 32. Both Mr Thomson and the Commissioner consent to a determination without a hearing and the Tribunal is satisfied that it can properly determine the issues without a hearing.

Legal Framework

22. Section 36 FOIA provides as relevant:

“36.— Prejudice to effective conduct of public affairs.

(1) This section applies to—

(a) information which is held by a government department or by the Welsh Government and is not exempt information by virtue of section 35, and

(b) information which is held by any other public authority.

(2) 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.

...”

23. Section 36 is a qualified exemption which means that if the exemption is engaged the Tribunal must go on to consider the test in section 2(2) FOIA which is known as the public interest balancing test, considering whether in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information. If it does not the information should be disclosed to the requestor. In the balancing exercise the scales start off level. The circumstances to be

considered will include considerations such as openness, transparency, accountability and contribution to public debate.

24. The Tribunal's powers in relation to appeals under section 57 of FOIA are set out in section 58 of the FOIA, as follows:

(1) If on an appeal under section 57 the Tribunal considers-

(a) that the notice against which the appeal is brought is not in accordance with the law, or

(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,

the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner; and in any other case the Tribunal shall dismiss the appeal.

On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.

Analysis and conclusions

25. We have examined the withheld material. It is important to disaggregate any parts of the information if possible.

26. We have proceeded on the basis that the exemption in section 36(2)(c) FOIA is engaged in relation to the requested information as that matter is not in dispute before us. We have decided that the public interest in maintaining the exemption as regards that part of the information which has not been completed at all, does not outweigh the public interest in disclosure for the reasons given below and in our CLOSED annex.

27. We conclude that the requested material, redacted to remove personal data, should be disclosed under FOIA because even although the exemption is engaged the public interest in maintaining the exemption in relation to that material does not outweigh the public interest in disclosure.

The balance of the public interests

28. The Commissioner decided that the public interest favoured maintaining the exemption, in essence, for the following reasons :
- a. the importance of providing a “safe space” for the self-assessment and LGA peer review process to be effective and avoid any chilling effect on reflection or communication;
 - b. there was a real risk that disclosure would affect the openness of future peer reviews and self-assessments conducted by councils, and may therefore act as a disincentive to councils to engage voluntarily in similar processes;
 - c. the public interest in protecting the integrity of the process was a stronger argument than the circumstances of this case.
29. We note that at the time of the request the peer review and self assessment process had been completed, thus the focus of the public interests relied upon by the Commissioner must, as a matter of logic, be restricted to future risks of prejudice to those public interests.
30. The request is restricted to the self assessment document, we are not asked to consider information recorded elsewhere as a result of focus groups, meetings or other forms of peer review. Thus our conclusions are limited to that information and different considerations may apply to information recorded as a result of other parts of the process.
31. The Commissioner suggests in the decision notice that staff were given reassurance that the information arising from the self assessment process would be used only for the purpose of internal analysis and the peer review. We acknowledge that the LGA process is voluntary for councils and the recommendations are not binding however, it is inevitable that the self assessment would be passed to an external body, the LGA, as part of that review the results of which would be publicly available. This self assessment was not for purely internal analysis by the Council and any assurance to the contrary would have been unwise.
32. We have taken into account the opinion of the qualified person in assessing the balance of the public interests. We give the opinion some weight but it is not determinative and we have dealt with the arguments

therein as accepted by the Commissioner. We must decide based on all of the evidence whether the public interest in maintaining the exemption outweighs the public interest in disclosure.

33. We have decided that the public interests in maintaining the exemption do not outweigh the significant public interests in :

- a. transparency and accountability around the subject matter to which the request relates, those being race equality, accessibility, diversity and inclusion;
- b. an informed debate about how the Council conducted the self assessment.

34. We do not accept the Commissioner's conclusion that disclosure of this self assessment report would remove the safe space that allows the free exchange of honest views. The strength of the conclusion that the effectiveness of future peer reviews would be "severely compromised" is undermined by the nature and quality of the completion of this particular self assessment which was only a part of the process. We remind ourselves that the request is restricted to the self assessment and of our conclusion that the redaction of personal data will protect identification of individuals to the limited extent that any personal data appears in the self assessment. See further the closed annex.

35. Furthermore, this case sets no precedent and any future request will need to be considered on its own merits.

36. The ability to review internal processes with a view to receiving feedback on them is a valuable one. More so when the subject matter is so important to us all in society. However, the integrity of that process would not be undermined by disclosure of this information. To the contrary any such process needs to be

- a. engaged in fully,
- b. transparent and
- c. accountable

to be effective, so far as compatible with protection of the rights of individuals, by redaction or otherwise.

37. We are satisfied that disclosure of the information requested in this case, suitably redacted to remove personal data, will not impact on the integrity of the process to the extent suggested. The negative impact is outweighed by the benefits of ensuring a rigorous and accountable process to which the disclosure of this information will contribute.

38. We find that the public interest in maintaining the exemption is outweighed by the public interest in disclosure of this information. We allow the appeal and have made a substituted decision notice.

Judge Griffin

Date : 7 August 2024

Promulgated on: 15 August 2024