

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 28 February 2022

**Public Authority:** London Borough of Waltham Forest  
**Address:** Waltham Forest Town Hall  
Forest Road  
Walthamstow E17 4JF

### Decision (including any steps ordered)

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1. The complainant has requested correspondence between the now former leader of the London Borough of Waltham Forest ("LB Waltham Forest") and Stella Creasy MP about a Community Protection Notice. LB Waltham Forest cited section 40 (personal data) as its basis for refusal. It upheld this at internal review. It introduced additional reliance on section 36 (prejudice to the effective conduct of public affairs) and section 38 (prejudice to health and safety) during the Commissioner's investigation.
2. The Commissioner's decision is that LB Waltham Forest is entitled to rely on section 36(2)(b)(i) as its basis for withholding all the requested information.
3. No steps are required.

### Request and response

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4. On 11 March 2020 the complainant requested information of the following description:

"BACKGROUND:

<https://www.theguardian.com/world/2019/oct/03/london-council-orders-anti-abortion-activists-to-remove-foetus-poster>

'Clare Coghill, the leader of Waltham Forest council, said the authority had received numerous complaints from members of the public about the campaign and "had responded proportionately, having due regard to

the right to protest and safety and wellbeing of all our residents and visitors”.

I request:

1. All correspondence, in date order, regarding Centre for Bio-Ethical Reform/members between you and Stella Creasy MP/her representatives. You may redact names and other personal data of lower-ranking council officers only. You may not redact names of Creasy's representatives acting in a political or professional capacity.
  2. The Community Protection Notice and Written Warning(s).
  3. All complaints you have received from the public before you issued the warning notice about the activities that led to you issuing the final notice. You may redact all names and other personal data. Handwritten data can be transposed into typed data. If the complaint was not in writing then the note of the complaint made such as telephone note.
  4. Correspondence between you and the hoarding company Clear Channel.
  5. A list of all items taken from the activists (such as placards) and a list of items since returned.
  6. Correspondence between you and police regarding the Community Protection Notice.
  7. Legal advice received regarding the Community Protection Notice.
  8. Video or other image data taken of the day protest on 29.9.19.”
5. LB Waltham Forest wrote to him on 3 April 2020 to explain that it would be unable to respond within 20 working days. It explained that the Council’s response to the Covid-19 pandemic was having an impact on its response times.
  6. The complainant chased a response on 19 April 2020. LB Waltham Forest acknowledged this in a letter of 22 April 2020. He wrote on 24 April 2020 and gave it a deadline of 1 May 2020. He reported the delay to the Commissioner on 6 May 2020.
  7. On 4 September 2020, LB Waltham Forest responded.
  8. In respect of the first request, it argued that the information it held within the scope of this request was exempt under section 40. It argued that the correspondence from Stella Creasy was not in her capacity as an MP but as a local resident.

9. In respect of the second request, it provided the requested information. In respect of the third request, it explained that some complainants did not provide contact details but had appeared as witnesses in court proceedings, others were complaints made publicly via social media and two complaints were sent directly to the Leader of the Council and it attached them with its response. In respect of the fourth request, it said that it did not correspond with Clear Channel. In respect of the fifth request it explained that the billboard on display in Walthamstow town square was removed on 3 October 2019. The following day CBR UK were contacted and informed they could retrieve it. In respect of the sixth request, it said that it did not correspond with the Metropolitan Police regarding the Community Protection Notice. In respect of the seventh request, it said that this was exempt from disclosure under section 42 of the FOIA (legal professional privilege). It said the advice was recent and was "an action taken in the furtherance of the protection of the rights of individuals affected at the time". In respect of the eighth request, it said that it did not hold any video footage or images from 29 September 2019.
10. The complainant requested an internal review on 4 September 2020 and argued that Stella Creasy was acting solely as an MP. He argued that the information was not personal data and, if it were, it would not breach data protection legislation to disclose it. This relates to LB Waltham Forest's response to his first request.
11. LB Waltham Forest sent him the outcome of its internal review on 1 October 2020. It upheld its original position with respect to the first request. It also apologised for the delays in handling the request, referring to the pressures on its resources arising from the Covid-19 pandemic. It also added "In this instance there was also a requirement to consult with the MP who was entitled to seek legal counsel before a response could be provided to you".

## **Scope of the case**

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12. The complainant contacted the Commissioner on 5 October 2020 to complain about the way the first of his requests for information had been handled.
13. During the course of the Commissioner's investigation, LB Waltham Forest introduced reliance on section 36(2)(b)(i) (prejudice to effective conduct of public affairs) as its basis for withholding the requested information. It also introduced reliance on section 38 (health and safety). The Commissioner is prepared to accept late reliance on

exemptions although, obviously, a public authority contravenes a number of provisions of the FOIA<sup>1</sup> when it does so. The Commissioner will take such late reliance into account when considering any patterns of non-compliance by a public authority and whether additional regulatory action is needed.

14. The Commissioner has therefore considered whether LB Waltham Forest is entitled to withhold any information it holds within the scope of the complainant's first request.

### Reasons for decision

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15. The Commissioner understands that in October 2019, a Community Protection Notice ("CPN") was issued following the appearance of a large poster supporting the campaign of an anti-abortion group. This poster apparently showed an image of an aborted foetus (described by LB Waltham Forest in correspondence with the Commissioner as "graphic and enlarged") next to an image of Stella Creasy MP (who was pregnant at that time). Ms Creasy regularly campaigns for women to have greater access to abortion services. This CPN was challenged in court but, following a court case which post-dated this request, the challenge was unsuccessful, as reported in *The Guardian* on 6 May 2020<sup>2</sup>. As a reminder, the request under consideration in this case was made on 11 March 2020. It therefore predated the court hearing.
16. The core of the complainant's argument in favour of disclosure is that Stella Creasy MP was acting in her official capacity as MP for the Walthamstow constituency (MP for the local area to which the request relates). As such, she should reasonably have a lower expectation of confidentiality in her correspondence with organisations on matters relating to her constituency. This is a powerful argument which the Commissioner has carefully considered.

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<sup>1</sup> Section 10(1) requires a public authority to provide a response within 20 working days of a request. Sections 17(1) and 17(2) require a public authority to state which exemption it is relying upon (where applicable) within that time frame and to explain why it believes it is entitled to do so.

<sup>2</sup> [Court upholds ban on anti-abortion poster targeting Stella Creasy | Abortion | The Guardian](#)

17. LB Waltham Forest argued that the requested information relates to Ms Creasy not as an MP but as a local resident. In correspondence with LB Waltham Forest, the Commissioner has asked LB Waltham Forest to ensure it justifies this argument. The Commissioner has focussed on the particulars of the withheld information and the arguments of both parties when considering this case.
18. The Commissioner also notes that Ms Creasy MP was contacted directly by LB Waltham Forest about this request. In her response to LB Waltham Forest (which the Commissioner has seen), Ms Creasy MP did not object to the disclosure of the emails but asked that all names of staff members or third party names listed in the emails be withheld when any disclosure was made. Ms Creasy MP made additional remarks which the Commissioner has considered but does not propose to include on the face of this Notice. They broadly pertain to matters which will be addressed later in this Notice.
19. If LB Waltham Forest had only submitted arguments regarding section 40, the Commissioner would have looked solely at whether the names could be withheld under that exemption. This is because Ms Creasy has made it clear that she has no objection to the disclosure of the remainder of the withheld information as long as any names continue to be withheld. The remainder of the withheld information is not personal data and therefore section 40 cannot apply to it.
20. However, given that it has also cited two other exemptions in respect of all the withheld information, the Commissioner has looked first at whether all the withheld information can be withheld under those two other exemptions. If one of the two exemptions cited applies to all the withheld information, the Commissioner will not consider whether the names can be withheld under section 40. If he concludes that neither exemption applies in whole or in part, he will consider whether the names are exempt from disclosure under section 40.

**Section 36(2)(b)(i) – prejudice to the free and frank provision of advice**

21. Sections 36(2)(b)(i) states that:

“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,

22. Section 36 operates in a slightly different way to the other prejudice based exemptions in the FOIA. It is engaged only if, in the reasonable opinion of a qualified person, disclosure of the information in question would, or would be likely to, result in inhibition or prejudice relevant to any of the activities set out in the sub-sections of 36(2).
23. To determine whether the exemption was correctly engaged by the council, the Commissioner is therefore required to consider the qualified person's opinion as well as the reasoning that informed the opinion. Therefore the Commissioner must:
  - ascertain who the qualified person is;
  - establish that they gave an opinion;
  - ascertain when the opinion was given; and
  - consider whether the opinion was reasonable.
24. The qualified person ("QP"), in this case, is LB Waltham Forest's Monitoring Officer. LB Waltham Forest did not seek the qualified person's opinion at the time of the request. It confirmed that he was shown a copy of the withheld information, and gave his opinion on 8 November 2021. It provided the Commissioner with a record of the opinion given.
25. The Commissioner is satisfied that this person is LB Waltham Forest's QP for the purposes of section 36(5) of the FOIA. The QP gave the opinion that the information in question was exempt under sections 36(2)(b)(i) and that prejudice "would" arise rather than "would be likely to" arise.
26. The Commissioner must therefore consider whether this opinion is a reasonable one to hold. The Commissioner will consider the plain meaning of reasonable, that being: in accordance with reason, not irrational or absurd. If it is an opinion that a reasonable person could hold, then it is reasonable for these purposes. This is not the same as saying that it is the only reasonable opinion that could be held on the matter. The qualified person's opinion is not rendered unreasonable simply because other people may have come to a different (and equally reasonable) conclusion. Neither is it the case that it has to be the most reasonable opinion that could be held; it only has to be a reasonable opinion.

27. The Commissioner has also been guided by the Tribunal's indication, in the case *Guardian Newspapers & Brooke v Information Commissioner & BBC*<sup>3</sup>, 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, 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 to the severity, extent and frequency of prejudice or inhibition of any disclosure.
28. 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" by a number of Information Tribunal decisions. In terms of "likely to" prejudice, the Tribunal in *John Connor Press Associates Limited v The Information Commissioner* (see note 3) 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* (see note 3) commented that "clearly this second limb of the test places a stronger evidential burden on the public authority to discharge" (paragraph 36).
29. The QP's opinion records that he had full access to all of the information in scope of the request. It is his opinion that sections 36(2)(b)(i) apply to all documentation held within the scope of the request. It also says that the prejudicial outcome "would" arise if the information were disclosed. Therefore, the Commissioner considers that it is appropriate to apply the stronger evidential test.
30. The QP opinion says that where there is disclosure, this would have the 'chilling effect' of inhibiting free and frank discussions between elected Council members and/or their representatives, elected members of Parliament and/or their representatives and Council officers regarding the actions of the group which is the subject of this request.

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<sup>3</sup> 1) Appeal numbers EA/2006/0011 & EA/2006/0013 2) Appeal number EA/2005/0005 3) Appeal number EA/2005/0026 & 0030

31. The QP opinion explains that the QP reached his view considering not only what it describes as the sustained harassment experienced by Ms Creasy but also attacks on other MPs. It references the recent and tragic murder of Sir David Amess MP. It also drew attention to the fact that the matter was a live issue.
32. The QP considered points to counter the argument that disclosure would give rise to prejudice. It noted no issues of transparency or accountability that needed to be assuaged which would counter the alleged prejudice.

### **Is the exemption engaged? – the Commissioner's conclusion**

33. Given that disclosure under FOIA is disclosure to the world, the complainant is not the only person who would be considered to have access to the requested information if it were provided. The QP could reasonably have concerns about giving anyone the names of individuals and the content of their emails relating to the CPN. The national debate on abortion can, at times, be heated and extreme. While it is always hoped that controversial topics can be debated respectfully and temperately, that is not always how they develop.
34. The Commissioner recognises that, in this case, manifestations of the debate locally had been particularly heated – resulting in the issue of a CPN. In the Commissioner's view, it is reasonable in this circumstance for the QP to hold the opinion that LB Waltham Forest had a responsibility to protect the identity of a junior member of its own staff or third parties. It is also reasonable for LB Waltham Forest to seek to protect the safe space in which correspondence on the CPN was conducted during a particularly heated period. Similarly, it is reasonable for LB Waltham Forest to have concerns about the chilling effect disclosure might have on future correspondence on controversial matters that had become heated.
35. The Commissioner notes that the murder of Sir David Amess MP – which is referenced as part of the QP's opinion - happened after the request. However, the Commissioner notes that the murder of Jo Cox MP happened before the request. In other words, although the QP referenced a tragedy which occurred after the time for compliance with the request, the point he makes is still relevant.
36. That is not to say that the Commissioner agrees with the QP's opinion but he is satisfied that it is a reasonable opinion reasonably arrived at. The Commissioner notes that the opinion was reached well outside the time for compliance with the request. However, that does not, of itself, render the opinion unreasonable.



37. The Commissioner is therefore satisfied that section 36(2)(b)(i) is engaged.

### **Public interest test**

38. Section 36 of FOIA is a qualified exemption, meaning that the Commissioner must consider whether, in all the circumstances of the case, the public interest in maintaining the exemption contained at section 36(2)(b)(i) outweighs the public interest in disclosing the information.
39. The QP's opinion was that that disclosure of the requested information "would" cause inhibition, meaning that the likelihood of inhibition is greater than 50%. The Commissioner accepted that the qualified person's opinion on this higher threshold was reasonable. He will factor this into his public interest considerations.
40. In carrying out a public interest test, the Commissioner must weigh the public interest in preventing the inhibition against the public interest in disclosure. The higher the likelihood, or the higher the severity, of that inhibition, the stronger the public interest will be in preventing it from occurring.
41. The Commissioner must consider the situation at the time at which the request was submitted. LB Waltham Forest failed to cite reliance on section 36 both within the time for compliance with the provisions at note 1 and at the time of its response to the request but, as noted above, this does not, in itself, diminish the validity of that reliance.
42. The Commissioner notes that at the time for compliance with the request, the appeal against the CPN had not been settled (see note 3). It was, therefore, a live matter at the time for compliance with the request. The Commissioner would also note that LB Waltham Forest provided a response considerably outside the time for compliance with the request. This is extremely regrettable. The Commissioner acknowledges that this delay was due to the Covid-19 pandemic when many public authorities were struggling to comply with their FOIA obligations in a timely manner while, at the same time, marshalling their resources to address their pandemic response and dealing with staff absences. That said, it remains the case that the complainant was somewhat disadvantaged by not having a clear idea of LB Waltham Forest's position at the time he was entitled to receive it.

### **Public interest arguments in favour of disclosure**

43. As noted above, Stella Creasy MP, when contacted about this did not object to disclosure provided names were withheld. This would be her

name and the name of any of her team that was involved in the correspondence. She cannot, of course, speak for anyone who is not a member of her team. The Commissioner notes that the requester explicitly excluded "names and other personal data of lower-ranking council officers" in his request.

44. LB Waltham Forest's original position, particularly in correspondence with the complainant, was that Ms Creasy's correspondence with it was in her capacity as a private citizen. The complainant was sceptical about this and felt that the unlikelihood that this is the case added weight to the argument for disclosure. Having read the withheld information, the Commissioner does not agree that the correspondence was conducted on the basis that Ms Creasy was contacting LB Waltham Forest in a private capacity. Had that been the case, the Commissioner would have expected to see the emails in a different format, with different language and from a different email address. That said, the background to the correspondence is the specific targeting of Ms Creasy in a so-called "Stop Stella" campaign with the aforementioned poster appearing to have been part of the campaign. Obviously, there is nevertheless a personal element to her correspondence with LB Waltham Forest on this matter.
45. The fact that the request is about a sensitive topic can also add weight to the public interest in disclosure. When an elected representative, particularly an MP, engages with a local authority on a public order matter, there is a clear public interest in transparency about this - knowing what they said and when they said it. The subject matter which gave rise to the consideration of a CPN in this case is on a contentious topic - what constitutes reasonable protest against abortion services and the extent to which such protest against abortion services can be limited.

### **Public interest arguments in favour of maintaining the exemption**

46. LB Waltham Forest argued that the information exists "only due to the Council's role as an enforcement authority responsible for taking action to protect its' residents under the Anti-social Behaviour, Crime and Policing Act 2014. The information does not relate to any democratic process it relates to the making of requests by [individuals] to take steps in the exercise of the Council's statutory powers to protect them from the impact of the actions taken by [Centre for Bio-Ethical Reform]".
47. It argued that there were "no issues of general public interest in transparency, accountability, public understanding and involvement in the democratic process that would arise by withholding the information requested".

48. It also argued that there was a public interest in avoiding the chilling effect that the QP had referred to in their opinion. Disclosure would, in LB Waltham Forest's view, risk prejudicing the discussions necessary for the conduct of public affairs where participants fear for their safety because their discussions had been disclosed.
49. It also emphasised the timing of the request and drew attention to the fact that the matter was a live issue.

### **Balance of public interest – the Commissioner's decision**

50. Having read the withheld information, the Commissioner disagrees with LB Waltham Forest that there were no issues of general public interest in transparency or accountability. When an elected representative engages with a public authority on a matter in their role as an elected representative rather than a private individual, that inevitably raises an issue of transparency and accountability. This is the case even if the matter raised affects them personally as well as affecting their constituents. Having read the withheld information, the Commissioner is unconvinced that the correspondence was conducted by Stella Creasy MP in her private capacity although clearly the matter covered did affect her personally.
51. Furthermore, if the public authority is taking action in its role as a law enforcement authority, there is clearly a public interest in knowing more about that.
52. The Commissioner recognises the risk that elected representatives may take by expressing views on controversial subjects, particularly when the discussion has become heated. He is also mindful of the terrible price that elected representatives have paid for doing so. This does not just mean the risk of physical harm. He recognises that elected representatives can be the subject of unacceptable levels of verbal abuse. He also notes that their co-workers, family members and other associates who are not in the public eye can also be subjected to unacceptable attack. People they correspond with or engage with may also be targeted.
53. The Commissioner does not consider that communications on sensitive topics between elected representatives and public authorities should always necessarily be withheld from disclosure because of that risk. However, in the circumstances of this case, he gives particular weight to LB Waltham Forest's arguments as to the likelihood of a chilling effect on future communications if there is a disclosure. While Ms Creasy agreed to partial disclosure in this case, the Commissioner gives weight to the QP's concerns about the chilling effect occurring more generally in the

future. The Commissioner also takes into account the fact that the QP stated that this negative outcome “would” happen as a result of disclosure rather than “would be likely to” happen.

54. The key point in the Commissioner’s deliberation on this point is the timing of the request. The debate around the CPN was a live matter when the request was made which continued past the time for compliance with the request. Although LB Waltham Forest delayed its response by a considerable period, the prevailing circumstances at the time of the request make the difference in the balance of public interest. At the time of the request and the statutory time for response to the request, the CPN was being challenged in court. There is a strong public interest in allowing a public authority to have free and frank discussions in order to obtain advice internally and externally on a live matter.

### **Conclusion**

55. The Commissioner agrees that LB Waltham Forest is entitled to rely on section 36(2)(b)(i) as its basis for withholding all the requested information. He has reached that view with particular regard to the timing of the request.
56. The Commissioner has not gone on to consider the application of section 38 because of his conclusion on section 36. However, he notes that LB Waltham Forest provided very thin arguments as to why this exemption was engaged. He would remind LB Waltham Forest of the importance of explaining reliance on exemptions as clearly and with as much detail as possible when responding to the Commissioner’s questions. Where it fails to do so, it is unlikely that the Commissioner will uphold its use of that exemption.

## Right of appeal

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

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

58. 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.
59. 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 .....**

**Alexander Ganotis**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**