

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 28 February 2023

**Public Authority:** London Borough of Havering  
**Address:** Town Hall  
Main Road  
Romford  
RM1 3BB

#### **Decision (including any steps ordered)**

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1. The complainant has requested a copy of an internal "self-assessment" report held by the London Borough of Havering (the council).
2. The council refused to provide the requested information, citing section 36 - effective conduct of public affairs, of FOIA.
3. It is the Commissioner's decision that the council has failed to demonstrate that section 36 of FOIA is engaged.
4. In addition, as the council failed to issue a refusal notice within 20 working days, the Commissioner has also found a breach of section 17 of FOIA.
5. The Commissioner requires the council to take the following steps to ensure compliance with the legislation.
  - 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.
6. The council must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Request and response

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7. The council commissioned the Local Government Association (LGA) to undertake an independent Race, Equality, Diversity and Inclusion (READI) Review. As part of this process, the council prepared, and submitted, an internal self assessment document to the LGA to assist with this review. The LGA's [READI Review Feedback Report](#) was then published by the council.

8. On 10 November 2021, the complainant wrote to the council and requested information in the following terms:

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

[FINAL Cabinet report INDEPENDENT LGA READI REVIEW With sign off.pdf \(havering.gov.uk\)](#)

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."

9. The council advised the complainant that their request had been considered by the qualified person, and that it was to be refused under section 36(2)(b)(ii) and section 36(2)(c) of FOIA. The council went on to confirm that it considered the public interest to favour maintaining the exemptions cited. The council upheld its original decision at the internal review stage.

## Scope of the case

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10. The complainant has raised concerns about the council's decision to withhold the requested information, and also the timeliness of its responses.

11. The council, in its representations to the Commissioner, has maintained its position that it is entitled to withhold the requested information under section 36 of FOIA. It has gone on to say that, in the event that this is not the case, that it may be that section 22A – research information, of FOIA could be engaged. However, the council has not provided any

submissions in support of this exemption, and therefore the Commissioner does not intend to consider this further within this decision notice.

12. The Commissioner will consider the council's application of section 36 of FOIA to the withheld information. He will also consider certain procedural matters as requested by the complainant.

## **Reasons for decision**

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### **Section 36 – effective conduct of public affairs**

13. Section 36(2)(b) and section 36(c) of FOIA state the following:

“Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under the 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 to otherwise prejudice, the effective conduct of public affairs.”

14. It is section 36(2)(b)(ii) and 36(c) of FOIA which the council has said that it is relying upon as its basis for withholding the information relevant to the complainant's request.

### **The qualified person's opinion**

15. In determining whether section 36 is engaged, the Commissioner must consider whether the qualified person's opinion was a reasonable one.
16. Section 36 differs from all other prejudice exemptions in that the judgement about prejudice must be made by the legally authorised qualified person for that public authority.
17. The qualified person's opinion is crucial to engage the exemption. If the opinion is not given by the appropriate person, the exemption cannot

apply. Therefore, in order to establish that the exemption has been correctly applied, the Commissioner must:

- Establish that an opinion was given, and that it was given by a "qualified person" (within the meaning of section 36(5)(o));
  - ascertain when the opinion was given; and,
  - consider whether the opinion was reasonable.
18. In this case, the Commissioner accepts that the Chief Executive of the council was authorised as the qualified person under section 36(5) of FOI at the time of the request.
  19. In the case of the [Chief Constable of Surrey Police v Information Commissioner \(EA/2009/0081 8 July 2010\)](#), the Tribunal emphasised the importance of documenting the qualified person's opinion.
  20. A public authority should record who gave their opinion, their status as the qualified person and the dates that the opinion was sought and given. If there is no record taken at the time of the discussion about the request and the relevant information, then the Commissioner's guidance states that, as a minimum, a signed statement from the qualified person recording their opinion should be made available.
  21. In this case, the council has indicated that the withheld information was made available to the qualified person, as an "experienced LGA Peer Reviewer". The council states that the qualified person's opinion was sought and received on 11 May 2021.
  22. The council has also provided the Commissioner with a copy of an email sent by the Monitoring Officer dated 11 May 2021. This states that, in the event of an FOIA request being submitted, consideration should be given to the information contained within the self assessment report; the Monitoring Officer goes on to say that, in their opinion, the "evidence documents" should be withheld under section 36 of FOIA.
  23. However, the Monitoring Officer's email was sent six months before the complainant's request was received, and also before the READI Review Report was published. Furthermore, it contains no evidence of the opinion of the qualified person.

### **The Commissioner's conclusion**

24. Section 36 of FOIA will only be engaged if the opinion of the council's qualified person has been sought and obtained at the time of the request (or by the time of the internal review, if not done within 20 days of the request).

25. Whilst the council has advised that the qualified person gave their opinion on the withheld information on 11 May 2021, it has not provided any evidence to support this claim. Furthermore, the Commissioner's [guidance on section 36](#) states that the qualified person must consider the circumstances at the time of the request before forming an opinion on whether the relevant information can be released in response to that request.
26. As a result, the Commissioner has no option but to conclude that the council has failed to demonstrate that section 36 of FOIA is engaged in this case.
27. Given that the council has failed to meet the requirements necessary for section 36 to be engaged, the Commissioner has not considered it to be necessary to go on and consider the council's reasoning for relying on section 36.
28. The council must now reconsider the request, and either release the requested information, or issue a refusal notice which meets the statutory requirements of FOIA.

### **Procedural matters**

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29. The complainant submitted their request on 10 November 2021. As the council then failed to issue a refusal notice until 7 March 2022, the Commissioner has found a breach of section 17 of FOIA.

## Right of appeal

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30. 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)

31. 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.
32. 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 .....**

**Suzanne McKay**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**