

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 9 May 2013

**Public Authority:** London Borough of Croydon  
**Address:** Taberner House  
Park Lane  
Croydon  
CR9 3JS

#### Decision (including any steps ordered)

---

1. The complainant requested correspondence dating from a specified period that related to the funding of the Warehouse Theatre. London Borough of Croydon (the Council) refused to disclose this information, citing the exemptions provided by sections 36(2)(b)(i) and (ii) (inhibition to the free and frank provision of advice and to the free and frank exchange of views) of the FOIA.
2. The Commissioner's decision is that the Council cited these exemptions correctly and so it is not required to disclose this information.

#### Request and response

---

3. On 20 July 2012 the complainant wrote to the Council and requested information in the following terms:

*"Under the provisions of the Freedom of Information Act, I request all correspondence, in all formats, sent and received between December 1, 2011 to July 12, 2012 by:*

1. *The Chief Executive of Croydon Council;*
2. *The Council's executive directors; and*
3. *Elected Councillors.*

*Where it relates to the funding of and future arrangements for the Warehouse Theatre Company."*

4. The Council responded on 13 September 2012, outside twenty working days from receipt of the request. It stated that the request was refused under section 36 of the FOIA (prejudice to the effective conduct of public affairs).
5. The complainant responded to this on 8 October 2012 and requested an internal review. The Council responded with the outcome of the internal review on 5 November 2012 and stated that the refusal to disclose the requested information was upheld. At this stage it introduced further exemptions and specified subsections from section 36:

36(2)(b)(i) (inhibition to the free and frank provision of advice)

36(2)(b)(ii) (inhibition to the free and frank exchange of views)

36(2)(c) (other prejudice to the effective conduct of public affairs)

40 (personal information)

41 (information provided in confidence)

42 (legal professional privilege)

43 (prejudice to commercial interests)

### **Scope of the case**

---

6. The complainant contacted the Commissioner on 9 November 2012 to complain about the refusal of his information request under section 36 of FOIA. The complainant indicated that he disagreed with the reasoning given by the Council and that his view was that the public interest favoured disclosure of the information requested.

### **Reasons for decision**

---

#### **Section 36**

7. The Council has cited the exemptions provided by subsections 36(2)(b)(i), (2)(b)(ii) and (2)(c). These subsections apply where disclosure of the requested information would, or would be likely to, have the following results:

36(2)(b)(i) – inhibition to the free and frank provision of advice.

36(2)(b)(ii) – inhibition to the free and frank exchange of views for the purposes of deliberation.

36(2)(c) – other prejudice to the effective conduct of public affairs.

8. Consideration of these exemptions is a two-stage process. First, the exemptions must be engaged and, secondly, these exemptions are qualified by the public interest. This means that the information must be disclosed if the public interest in the maintenance of the exemptions does not outweigh the public interest in disclosure.
9. Covering first whether these exemptions are engaged, the exemptions provided by section 36 can be cited only on the basis of the reasonable opinion of a specified qualified person (QP). Reaching a conclusion as to whether these exemptions are engaged involves establishing whether an individual authorised to act as QP has given an opinion and whether, if such an opinion was given, that opinion was reasonable. If these conditions are met, the exemption is engaged.
10. The Council has stated that its Monitoring Officer acted as QP in relation to the complainant's request. The now archived website [foi.gov.uk](http://foi.gov.uk) states that Monitoring Officer has received Ministerial approval to act as QP for local authorities in England.
11. As to whether the Monitoring Officer did give an opinion on the citing of these exemptions, the Council has provided evidence of this in the form of two completed pro-formas provided on the ICO website for the recording of the opinion of the QP. These show that the QP viewed the information and gave an opinion that these exemptions were engaged on 13 September 2012. The second pro-forma shows that the QP gave an opinion again at internal review stage on 5 November 2012.
12. The Commissioner accepts, therefore, that these exemptions were cited on the basis of the opinion of an authorised QP. The next step is to consider whether the opinion of the QP was reasonable. In forming a conclusion on this point the Commissioner has considered the explanation in the pro-formas of the reasoning for the opinion of the QP and compared this to the content of the information in question.
13. The pro-formas give the following explanations of the grounds for the QP's opinion:
  - Section 36(2)(b)(i)

The issue of Council funding for the Warehouse Theatre is sensitive and, therefore, it is important for Council staff to be able to provide advice about this in private.

Also, some of the information in question, which consists of emails exchanged between Council staff and staff of the Warehouse Theatre, as well as emails between Council staff on this issue, concerned the

drafting of responses to the theatre. The pro-formas implied that it was necessary to maintain a safe space for advice on draft responses to be provided in private.

- Section 36(2)(b)(ii)

The opinion of the QP was that disclosure of this information would be likely to lead to Council officials being inhibited from providing frank views in future in relation to this specific situation, and in relation to other similar situations.

- Section 36(2)(c)

This subsection provides an exemption where the harm that the public authority believes would be likely to result through disclosure is not covered by the other subsections of section 36, or any of the other exemptions provided by part II of the FOIA. In this case the view of the Commissioner is that the section 36(2)(c) factors covered in the pro-formas are relevant to the other subsections of section 36, or are covered by other exemptions, such as section 43(2) (prejudice to commercial interests), which was also previously cited by the Council. As a result, the Commissioner has disregarded the citing of section 36(2)(c) and focussed on sections 36(2)(b)(i) and (ii).

14. Turning to the content of the information, the Commissioner notes that this could be fairly described as free and frank. As specified in the request the exchanges concern arrangements for the future funding of the Warehouse Theatre. Given the financial position of the Warehouse Theatre at that time – it went into administration shortly after the date that the information in question was recorded – some of these exchanges were robust. Given the content of this information and the context of the parlous state of the finances of the Warehouse Theatre at that time, the Commissioner accepts that the authors of these emails would have expected them to remain confidential.
15. Given this, the Commissioner also accepts that it was reasonable for the QP to be of the opinion that disclosure of this information would be likely (which was the level of inhibition specified in the internal review schedule) to result in inhibition in future, either in relation to future exchanges about the Warehouse Theatre, or in relation to other comparable situations. As the Commissioner has found that the QP's opinion was reasonable, this means that the exemptions provided by sections 36(2)(b)(i) and (ii) are engaged.
16. The next step is to consider the balance of the public interest. The role of the Commissioner here is to consider whether the public interest in disclosure outweighs the concerns identified by the QP. When assessing

the balance of the public interest in relation to section 36, the Commissioner will give due weight to the reasonable opinion of the QP, but will also consider the severity, extent and frequency of the inhibition and prejudice that he has accepted would be likely to result through disclosure.

17. Covering first the issue of the severity, extent and frequency of the inhibition, the opinion of the QP was that inhibition would be likely to result first in relation to future discussions about funding for the Warehouse Theatre. The Commissioner notes that the Theatre was closed at the date of the request, but that at that time this was possibly a temporary closure. The Commissioner considers that, as the future of the Theatre was still uncertain as at the date of the request, there was a real possibility of further discussions being initiated. He also accepts that, if this were to happen, the severity of the prejudice to such discussions, arising from disclosure of this information would be relatively severe.
18. The QP was also of the opinion that inhibition would be likely to result in relation to discussions in similar situations. As to what would constitute a similar situation, the Commissioner believes that this would be another scenario in which the Council is discussing funding for a third party organisation. As covered further below, local authority budgets are currently under extreme pressure, meaning that discussions about funding decisions are likely to take place with some regularity. The Commissioner is of the view, therefore, that inhibition to other similar funding discussions would also be likely to occur with some regularity.
19. As to the severity and extent of this inhibition, the current pressures on local authority budgets means that the importance of allocating these funds appropriately is particularly marked. Decision making as to how to allocate funds may be adversely effected if discussions on this issue were not conducted in a fully free and frank manner. Given the current context of pressure on local authority funding, the Commissioner's view is that the severity and extent of the inhibition that he has accepted would be likely to occur as a result of disclosure would be considerable. The regularity of the inhibition in relation to other similar situations, and the extent and severity of the impact of this inhibition, add weight to the public interest in the maintenance of the exemptions.
20. The context of the pressure on local authority finances means that it is vital that Councils are able to make correct decisions on the allocation of funding. The Commissioner accepts that, at least in some cases, it will be necessary for a safe space away from the possibility of disclosure to be maintained in which to make those decisions. In this case the Commissioner accepts that there is a public interest in maintenance of the exemptions in order to preserve a safe space to guard against the

inhibition that he has accepted the QP was reasonable to expect would be a likely result of disclosure, and that the Commissioner has found would occur with some regularity and result in an extensive and severe impact.

21. Turning to those factors that favour disclosure of the information, having taken the pressures of local authority spending into account as a factor in favour of maintenance of the exemptions, this must also be addressed as a factor in favour of disclosure. In relation to any expenditure of public money by a council, there is a public interest in disclosure of all information that explains the background to this. This public interest is heightened at the current time due to the restrictions on local authority spending.
22. In relation specifically to spending decisions concerning the Warehouse Theatre, brief research reveals that the closure of this theatre was the subject of considerable comment with some suggestion that a decision was made by the Council to withdraw funding from it and that this decision was responsible for the closure. There is a specific public interest in the disclosure of the information in question in order to inform whether any such decision was taken by the Council, and the extent to which Council funding was connected to the closure of the theatre.
23. In the internal review response the Council argued that the public interest had already been satisfied, at least in part, by the disclosure of information relating to the funding of the Warehouse Theatre. In this response it provided links to the minutes of Council meetings available on its website and referred to published lists of expenditure of more than £500.
24. The view of the Commissioner is that disclosure of this information is a positive step on the part of the Council towards increased openness, which he believes is in the public interest. However, the specific information in question here is not in the public domain and the approach of the Commissioner is that where public interest exists in information on a particular matter, that public interest will extend to all information about that matter. The public interest in disclosure of the information in question therefore remains valid, notwithstanding this disclosure of information on the same subject matter.
25. In conclusion, the Commissioner has recognised valid public interest in the disclosure of this information on the basis of the heightened interest in local authority spending decisions given the current budgetary pressures in this area and on the basis of the specific subject matter of this information. However, having recognised that it is vital that local authorities are able to make correct decisions as to how to allocate their

resources, his view is that the public interest in avoiding the inhibition that the QP believed would be likely to occur, and which may be to the detriment of the ability of the Council to make correct decisions on spending, tips the balance against disclosure.

26. The Commissioner finds, therefore, that the public interest in the maintenance of the exemptions provided by sections 36(2)(b)(i) and (ii) outweighs the public interest in disclosure. The Council is not, therefore, required to disclose this information.
27. As the above conclusion on section 36 covers the entirety of the information within scope, it has not been necessary to go on to also consider the other exemptions cited by the Council.

### **Other matters**

---

28. The response to the complainant's requests was not provided within the statutory deadline of 20 working days from receipt of the request. The Council should ensure that responses to future requests are provided on time. A record of this late response has been made by the ICO and this issue may be revisited should evidence come to light that this is a recurring problem with the Council's information request handling.
29. The exemption provided by section 40 was cited only in relation to very minor redactions from one email, the remainder of the content of which was disclosed to the complainant. The complainant did not raise the issue of these redactions specifically when making his complaint to the ICO. Given that the complainant did not raise the issue of the citing of section 40, these redactions are not covered in the analysis above, but the Commissioner would make the following observation.
30. The Council disclosed an email with redactions made on the basis that it did not believe it was appropriate to identify the sender of the email. Amongst these redactions was content naming the city in which the sender lives.
31. When redacting information under section 40(2) the Council must ensure that it is doing so in a proportionate manner and that any redactions are only of information that constitutes personal data. In this case, the view of the Commissioner is that the content identifying the city in which the sender lives was very unlikely to identify that individual and that the redaction of that content was disproportionate and unnecessary.

## Right of appeal

---

32. 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: 0300 1234504

Fax: 0116 249 4253

Email: [informationtribunal@hmcts.gsi.gov.uk](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

33. 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.
34. 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 .....**

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