

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 4 November 2022

Public Authority: London Borough of Hillingdon
Address: Civic Centre
High Street
Uxbridge
Middlesex
UB8 1UW

Decision (including any steps ordered)

1. The complainant submitted a request to the London Borough of Hillingdon (the Council) seeking information about its use of an IT program 'RentSense' provided by the company Mobysoft. The Council provided the complainant with some information but sought to withhold further information on the basis of sections 36(2)(c) (effective conduct of public affairs) and 43(2) (commercial interests) of FOIA. The complainant challenged the Council's reliance on the former exemption to withhold a copy of a Cabinet Member Report.
2. The Commissioner's decision is that section 36(2)(c) does not provide a basis to withhold the Cabinet Member Report.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Provide the complainant with a copy of the Cabinet Member Report.
4. The public authority 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 FOIA and may be dealt with as a contempt of court.

Request and response

5. The complainant submitted the following request to the Council on 3 March 2021:

'I am writing under the Freedom of Information Act 2000 to request information about the use of Mobysoft's Rentsense program.

Specifically, I am asking the following:

- *[1] Any briefing, reports, audits or evaluations relating to your use of Mobysoft's Rentsense program.*
- *[2] Any data sharing agreements, Data Protection Impact Assessments, Equalities Impact Assessments, Privacy impact assessments or similar relating to your use of Mobysoft's Rentsense program.*
- *[3] Any contracts* you have with Mobysoft.*
- *[4] Any documents or information on the performance of the software, and any equalities monitoring*
- *[5] What data types are used by the software for profiling (ie, tenancy type, employment status, income, postcode, payment method etc).*

Please provide all this information dated for the last three years, or the most recent document if all are older.'

6. The Council contacted the complainant on 7 April 2021 and explained that it needed an additional 20 working days to consider the balance of the public interest test.
7. The Council provided him with a substantive response to his request on 26 April 2021. In relation to question 1 it explained that such information was exempt from disclosure on the basis of section 43 of FOIA; in relation to question 2 it confirmed that the Council had a contract with Mobysoft for RentSense; in relation to question 3 it confirmed that this contract ended on '29/20/2021'; in relation to question 4 it confirmed again that it had a contract with MobySoft; and in relation to question 5 the Council explained the categories of data transferred for processing and used by the software.
8. The complainant contacted the Council on 7 May 2021 and asked it to conduct an internal review of this request. He challenged the Council's decision to withhold the information falling within the scope of question 1. He also explained that in relation to questions 2 and 4 he was not simply seeking confirmation of what information the Council held, but copies of the documents themselves.

9. The Council informed him of the outcome of the internal review on 11 June 2021. In relation to question 1, it provided some of the information it held but withheld a copy of a Cabinet Member Report on the basis of section 36 of FOIA. In relation to question 2, it provided the information sought. In relation to question 3 it provided the contract with MobySoft but explained that certain information had been redacted on the basis of section 43 of FOIA. In relation to question 4, it explained that no further information was held.

Scope of the case

10. The complainant contacted the Commissioner on 16 June 2021 in order to challenge the Council's decision to withhold the Cabinet Member Report on the basis of section 36 of FOIA.

Reasons for decision

Section 36 – effective conduct of public affairs

11. The Council is seeking to withhold the Cabinet Member Report on the basis of section 36(2)(c) of FOIA.
12. This 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—...
- ... (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.'
13. In determining whether section 36(2)(c) is engaged the Commissioner must determine whether the qualified person's opinion was a reasonable one. In doing so the Commissioner has considered all of the relevant factors including:
- Whether the prejudice relates to the specific subsection of section 36(2) that is being claimed. If the prejudice or inhibition envisaged is not related to the specific subsection the opinion is unlikely to be reasonable.
 - The nature of the information and the timing of the request, for example, whether the request concerns an important ongoing issue on which there needs to be a free and frank exchange of views or provision of advice.

- The qualified person's knowledge of, or involvement in, the issue.
14. Further, in determining whether the opinion is a reasonable one, the Commissioner takes the approach that if the opinion is in accordance with reason and not irrational or absurd – in short, if it is an opinion that a reasonable person could hold – then it is reasonable. This is not the same as saying that it is the only reasonable opinion that could be held on the subject. The qualified person's opinion is not rendered unreasonable simply because other people may have come to a different (and equally reasonable) conclusion. It is only not reasonable if it is an opinion that no reasonable person in the qualified person's position could hold. The qualified person's opinion does not have to be the most reasonable opinion that could be held; it only has to be a reasonable opinion.
 15. With regard to the process by which this opinion was sought, the Council explained that during the course of the Commissioner's investigation it was unable to access the record relating to its original handling of the request. Therefore it explained that it had determined that the best course of action was for its Monitoring Officer (who was also the Commissioner's contact point for this request) to consider the matter afresh. The Monitoring Officer then set out to the Commissioner why in his view section 36(2)(c) of FOIA applied. The Council's submission to the Commissioner is therefore also the qualified person's opinion.
 16. The Commissioner is satisfied that a local authority's Monitoring Officer is a qualified person for the purposes of section 36 of FOIA. The timeline by which the qualified person provided the opinion which the Commissioner is considering for the purposes of this case is clearly somewhat irregular. The opinion was set out in letter sent to the Commissioner dated 17 June 2022 and post dates both the request, and the original section 36 refusal, by over a year. However, public authorities have the right to raise an exemption, including section 36, during the course of the Commissioner's investigation of a complaint. Therefore the second qualified person's opinion in respect of this request is akin to a public authority seeking a qualified person's opinion for the first time during the course of the Commissioner's investigation.
 17. Consequently, in light of this the Commissioner is satisfied that although the process by which the section 36 opinion was provided is irregular, this does not ultimately undermine the Council's reliance on section 36(2)(c).
 18. Turning to the substance of the opinion, the qualified person set out the following background to this request. He explained that it was necessary for the Commissioner to be aware of the provisions of Part VA of the

Local Government Act 1972 (LGA)¹ which relates to access to information. The qualified person explained that a local authority can only make a decision at a Council meeting based upon a written report which has been published and been available for public inspection five clear days ahead of the meeting. Under the LGA all documentation considered by elected members other than 'exempt information' is to be made available for inspection by the public. He further explained that in 2006 the categories of 'exempt information' were considerably reduced.² Furthermore the qualified person explained that the Regulations specifically require the Council (ie the elected members rather than the local authority itself) to be satisfied that the public interest lies in withholding disclosure of the 'exempt information'. If the Council is not so satisfied, the 'exempt information' has to be published.

19. With regard to the specific information which the local authority was seeking to withhold on the basis of section 36(2)(c) of FOIA, the qualified person explained that this report contained 'exempt information' (as per the Regulations) because it related to the 'financial or business affairs of any particular person'. Furthermore, in accordance with legislation the Cabinet Member resolved that the public interest lay in withholding the information.
20. The qualified person explained that as the decision to withhold publication was taken by an elected member, any decision to now disclose the report would have to also be taken by a councillor. He explained that given the statutory mechanism for the Council to make decisions was under section 100 of the LGA, it follows that a fresh meeting of Cabinet would have to be convened and for a report to be prepared for them to consider whether to release the information. The qualified person explained that in his experience it took around 6 weeks from a report being drafted for it to be considered by elected members, including the 5 days notice of a meeting this required. The qualified person noted that current legislation does not permit remote or hybrid meetings. The qualified person noted that the maximum period allowed for the Council to respond to an FOI request is 40 working days and that such a deadline would be impossible to meet in these circumstances.
21. The qualified person explained that under the Council's constitution, the Leader has delegated authority to make urgent decisions. This

¹ <https://www.legislation.gov.uk/ukpga/1972/70/part/VA>

² Under the Local Government (Access to Information) Variation Order 2006 (SI 2006/88). (The Regulations) <https://www.legislation.gov.uk/uksi/2006/88/contents/made>

delegation allowed the qualified person to consult him on this matter³, but as decisions are made by Cabinet collectively, the qualified person argued that in his view a full Cabinet Report would be required to consider future requests to disclose 'exempt information'.

22. The qualified person argued that in his view section 36(2)(c) of FOIA applied to this particular request because of the disruptive effects of disclosure by having to divert resources into properly responding to FOI requests for disclosure of 'exempt information' (ie information previously deemed to be 'exempt information' under the LGA by the Council) rather than using those resources to provide services of importance to local residents.
23. The Commissioner is not satisfied that the qualified person's opinion is a reasonable one. In his view, this opinion conflates the requirements of disclosure of information in response to a request under FOIA with disclosure requirements placed on local authorities under the requirements of Part VA of the LGA. In the Commissioner's view it is important to remember that the LGA, as amended by the Regulations, lists information which is exempt from the requirements of Part VA of the LGA.
24. Part 100I states 'In relation to principal councils in England, the descriptions of information which are, for the purposes of this Part, exempt information are those for the time being specified in Part I of Schedule 12A to this Act, but subject to any qualifications contained in Part II of that Schedule; and Part III has effect for the interpretation of Parts 1 to 3 of that Schedule' (emphasis added).
25. In the Commissioner's view neither the part of the LGA cited in the previous paragraph, or any other part of those the LGA or Regulations, list information that is exempt from disclosure under FOIA. Rather the 'exempt information' referred to in the LGA and Regulations, relates only to information in the scope of Part VA of the LGA and does not apply to any other legislation, including FOIA.
26. In the Commissioner's view disclosure of information under FOIA only requires the application of FOIA categories of exempt information to the requested information. More specifically, for a disclosure to be made under FOIA the Commissioner does not accept that a Council (by which the Commissioner means the Council itself rather than the local authority) has to remove a previous restriction it has put in place in

³ The Commissioner understands that the Leader's view was that information should not be disclosed.

respect of disclosure under the LGA in order for that information to be disclosable under FOIA. As a result in the Commissioner's view the local authority in this case does not need to seek the permission of the Council in order to disclose this report under FOIA. It follows that the Commissioner's position is that nor would the local authority have to follow such a process if it received further FOI requests for other information previously withheld from public disclosure at the stage of Council meeting on the basis of the LGA and Regulations. The alleged prejudice to the effective conduct of public affairs would therefore not arise.

27. In any event, even it were the case that such consultations with a Council were necessary in such circumstances – which for the reasons set out above the Commissioner is of the view that they are not – this would have wide implications for the operation of FOIA. The situation outlined by the qualified person would in effect mean that for every report which had been withheld from disclosure by a Council under the LGA and Regulations, if any local authority received a request for any such report then they could withhold it the basis of section 36(2)(c), arguably in perpetuity, because of the alleged disruption caused by seeking the Council's permission to disclose such information. In the Commissioner's view such a position effectively creates a class based exemption for the disclosure of *any* information under FOIA by *any* local authority which has previously withheld under the provisions of the LGA and Regulations. In the Commissioner's view that is not a tenable position to adopt.
28. For the reasons set out above the Commissioner is not satisfied that the qualified person's opinion is reasonable and therefore section 36(2)(c) is not engaged. This is on the basis that in the Commissioner's view the qualified person's opinion conflates the operation of two distinct disclosure regimes, ie FOIA and the provisions with Part VA of the LGA. The Commissioner does not accept that regard has to be given the provisions of LGA and the Regulations when making a disclosure under FOIA. As a result the Commissioner does not accept that there is a need to consult the Council (ie Council members) in the process outlined by the qualified person and therefore the alleged prejudice to the effective conduct of public affairs does not arise. Taking this into account the Commissioner cannot accept that the opinion is one in which a reasonable person in the qualified person's position can reach.
29. Section 36(2)(c) is therefore not engaged.

Right of appeal

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
Website: 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

Jonathan Slee
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