

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 September 2011

Public Authority: Harrow Council

Address: Civic Centre
Station Road
Harrow
HA1 2UH

Decision (including any steps ordered)

1. The complainant requested the Council to release all documents that were submitted to the Budgetary Challenge Panels in October 2010 for the setting of the council's budget for 2011 and 2012. The Council responded to this request refusing to release this information under sections 36(2)(b)(i) and (ii) and 36(2)(c) of the Act.
2. The Commissioner's decision is that Council correctly relied on section 36(2)(b)(i) and (ii) of the Act for the non disclosure of the requested information.
3. As the Council complied with the provisions of the Act in this case he requires no further action to be taken.

Request and response

4. On 5 January 2011, the complainant wrote to the Council and requested information in the following terms:

" I request all documents (not including minutes or any notes taken of the discussions) that went to the various budgetary Challenge Panels, as mentioned in paragraph 20 of the Draft Revenue Budget 2011/12 to 2015/16".
5. The Council responded on 19 January 2011. It stated that it considered the information requested was exempt from disclosure under section 36 of the Act.

6. The Council was unable to offer an internal review and directed the complainant to the Commissioner.

Scope of the case

7. On 17 February 2011 the complainant contacted the Commissioner to complain about the way his request for information had been handled. He specifically asked the Commissioner to consider whether the Council had acted appropriately by withholding the requested information under section 36 of the Act.
8. During the Commissioner's investigation further information was disclosed to the complainant. This Notice will focus of the remaining withheld information, which was described by the Council as the "specific budgetary proposals" submitted by each Directorate to the various Budgetary Challenge Panels that took place in October 2010.

Reasons for decision

9. The Council claimed that the remaining withheld information is exempt from disclosure under sections 36(2)(b)(i) and (ii) and 36(2)(c) of the Act.

Section 36 – prejudice to the effective conduct of public affairs

10. Section 36(2) of the Act states that information is exempt from disclosure if its disclosure –
 - (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.
11. The Commissioner considers information can only be exempt from disclosure by virtue of section 36 of the Act if in "the reasonable opinion of a qualified person" disclosure would or would be likely to lead to any of the adverse consequences identified in sections 36(2)(b) and 36(2)(c) as outlined above.
12. When considering the application of section 36 of the Act the Commissioner must:

- (a) ascertain who the qualified person is for the public authority concerned;
 - (b) establish that an opinion was given;
 - (c) ascertain when that opinion was given; and
 - (d) consider whether the opinion given was reasonable in substance and reasonably arrived at.
13. For elements a) to c) the Commissioner has reviewed the Council's application of section 36 and is satisfied that these elements are met. In this case it is apparent that the complainant's request was directed to the qualified person of the Council for him to consider the application of this exemption. The qualified person confirmed that he considered the requested information held by the Council at the time of the request and, himself, issued a refusal notice to the complainant outlining his opinion that sections 36(2)(b)(i) and (ii) and section 36(2)(c) applied.
14. The Commissioner now needs to consider the qualified person's opinion and whether he agrees that this is reasonable in substance and reasonably arrived at.
15. The Commissioner made further enquiries to the qualified person to establish exactly how his opinion was arrived at and to request further more detailed arguments to support his opinion.
16. The qualified person confirmed that he was familiar with the contents of the remaining withheld information prior to making his decision and that he has personal knowledge and experience of the Budgetary Challenge Panels process. He confirmed that he was directly involved in the panels that deliberated in October 2010 which discussed the remaining withheld information as an officer making his own submissions on his Directorate and as a panel member for other submissions. The qualified person advised the Commissioner that he was therefore well advised when reaching his opinion in this case that sections 36(2)(b)(i) and (ii) and 36(2)(c) are engaged.
17. The Commissioner has considered the way in which the qualified person reached his opinion and he is satisfied that the opinion was reasonably arrived at. In this case, it is evident that the qualified person has in depth knowledge of the Budgetary Challenge Panels process and had reviewed and considered the contents of the remaining withheld information at the time of making his opinion.
18. Turning to the opinion itself and whether it is reasonable in substance, the qualified person presented arguments for the application of both section 36(2)(b)(i) and (ii) and section 36(2)(c) of the Act.

19. In respect of section 36(2)(b)(i) and (ii), the qualified person argued that the remaining withheld information are reports prepared by officers of each Directorate for the Budgetary Challenge Panels process. Each report constitutes the advice of each officer as to the budgetary options that should be addressed by the Council. He stated that when these reports are discussed by the panels there is a process of deliberation during which officers offer further oral advice about the budgetary options. The qualified person considers disclosure of this information would be likely to inhibit the free and frank provision of both sorts of advice by officers to the panels.
20. The qualified person explained that the purpose of these panels is to enable officers and panel members to exchange their views about different budgetary options so as to contribute to the formulation of the council's budget. Disclosure in this case would be likely to inhibit that exchange of views.
21. Although the draft budget was presented to the Council's cabinet on 15 December 2010 and was in the public domain at the time of the request, the qualified person confirmed that the Council was still engaged in the process of preparing and finalising the final budget when the complainant's request was made. There was public debate about the draft report at this time and also extensive internal further deliberations within the Council.
22. The qualified person also highlighted that the withheld information was not only relevant to the setting of the current financial year's budget but also to future budgets for 2012-13 and 2013-14. The panel process was part of a three year exercise in budget planning looking ahead to the financial years for 2012/13 and 2013/14. Separate Budgetary Challenge Panels will be held in October 2011 and 2012 to discuss the setting of the Council's budget for these financial years. The withheld information in question will form part of these future panels and will be subject to further internal deliberation. The qualified person reached the opinion that a safe space to advise, discuss, exchange views and deliberate on specific budgetary options referred to in the remaining withheld information is required until at least the three year exercise is completed.
23. In respect of the application of section 36(2)(c), the qualified person explained that he considered disclosure would also be likely to prejudice the effective conduct of public affairs because disclosure would be likely to impede the council's budgetary process. He considered disclosure would be likely to deprive the council of a proper opportunity to debate options without being exposed to public scrutiny on provisional proposals that may not come to fruition. The qualified person confirmed that he considered disclosure would be likely to deflect public debate away from the published draft budget proposals and would instead

encourage the public to focus on the panel reports. This would mean that the public debate about the draft budget would be of less value as a contribution to the process of setting a final budget. The council would then be deflected from preparing the final budget by the need to manage public responses to the disclosure of the panel reports.

24. The Commissioner has given the matter careful consideration and he has concluded that section 36(2)(b)(i) and (ii) are engaged in this case. Concerning the qualified person's opinion that section 36(2)(c) of the Act applies as well, the Commissioner has reached the view that this subsection of section 36 is not engaged in this case. He will now explain why.
25. Firstly it is important to highlight that it is not for the Commissioner to form his own view on the likelihood of prejudice under this section of the Act; this is for the qualified person of the public authority concerned to decide. He does not have to agree entirely with the qualified person's opinion on the likelihood of prejudice when considering whether the exemption is engaged. He only has to reach the view himself that the qualified person's opinion is reasonable in substance.
26. The Commissioner accepts that the remaining withheld information contains the advice and views of various officers within the Council who were representing their Directorate at the Budgetary Challenge Panels process. The withheld information contains various budgetary options put forward by each Directorate, some of which the qualified person described as extreme options. The Commissioner is satisfied from this that the withheld information is of a free and frank nature and was created for the purposes of deliberation at the Budgetary Challenge Panels process.
27. At the time of the request only the Council's draft budget had been published and this was still the subject of public consultation and further internal deliberation. As the Council was still in the process of deliberating and considering its options at the time of the request, the Commissioner considers the qualified person's opinion that disclosure at this stage would be likely to inhibit these deliberations and its officers from exchanging views and advice freely and frankly to be a reasonable one. He is therefore satisfied that sections 36(2)(b)(i) and (ii) are engaged in this case.
28. However, the Commissioner has decided that section 36(2)(c) of the Act does not apply in this case. Although the Commissioner considers that it is acceptable to claim more than one limb of section 36(2) for the same information, it is his view that separate arguments must be presented in support of each subsection. Therefore the qualified person must provide arguments to demonstrate that disclosure would be likely to be

prejudicial for other reasons than those referred to in section 36(2)(b)(i) and (ii).

29. In this case, the Commissioner considers the arguments presented by the qualified person focus mainly on the Council's ability to exchange free and frank advice, to deliberate on options that require safe thinking space and the implications of not being able to do this not on any prejudice that would be likely to *otherwise* prejudice to effective conduct of public affairs.
30. In any event a public authority needs only to demonstrate that in the qualified person's opinion one subsection of this exemption is engaged. There is no requirement to demonstrate that all of the subsections of this exemption apply in a particular case.
31. As stated above, the Commissioner is satisfied that section 36(2)(b)(i) and (ii) of the Act are engaged in this case. He will therefore go on to consider the public interest test.

Public interest in favour of disclosure

32. The qualified person confirmed that he accepted there was a public interest in the overall transparency and accountability of the Council particularly in respect of the allocation of public resources and the budget setting process. He understood that there was a public interest in members of the public gaining access to information which relates to one of the Council's most important decision making functions and that disclosure would promote public debate on the budget options being considered by the Council at the time of the request.
33. The qualified person also stated that it understood that disclosure would provide the public with reasoned explanations for the decisions it did make and that such transparency can improve the quality of decision making in general.

Public interest in maintaining exemption

34. However, the qualified person considered that there are stronger arguments in favour of maintaining the exemption. He stated that the remaining withheld information contains the frank advice and views of various officers within the Council on budget options that should be considered by the Budgetary Challenge Panels. The withheld information contains various options that were thoroughly debated and the details of those options that were discounted during the panel process. The qualified person considered that it would not have been in the public interest to reopen the debate on the options that were considered but not taken forward at the time of the request. He felt such action would have distorted the debate by deflecting it from the focus of the draft budget, which had been published at the time of the request and

detailed the Council's current thinking on the setting of the 2011 and 2012 budget.

35. The qualified person explained that it is essential that the Council can commission and receive professional advice from its officers on its options, strategies and risks and that it is allowed private thinking space to debate and consider all options that are put forward before a final decision is made. In the absence of such private thinking space there is a significant risk that the Council would not be able to obtain such frank advice in future budget setting processes and this could lead to less candid advice being given in the future and decisions being less robust. He stated that he considered officers would be less likely to present documents to panel members which contain extreme options and views on all budget options and this would in turn inhibit the free and frank deliberation between officers and panel members to the detriment of the Council's decision making process and such consequences would not be in the public interest.

The balance of the public interest

36. The Commissioner has given the arguments presented for and against disclosure detailed consideration. While he accepts that disclosure would aid transparency and accountability within the Council, assist the public in understanding more clearly how the 2011-2012 budget was set and the options debated, in this case, the Commissioner considers the public interest in favour of disclosure is outweighed by the public interest in favour of maintaining this exemption. He will now explain why.
37. The budget setting process for any public authority is one of the most important processes it has to undertake year on year and often one of the most controversial. At the time of the complainant's request only the draft budget had been published and the draft was subject to public consultation and further internal debate at the time. The Commissioner accepts that the Council should have the space to deliberate on issues, consider certain options and exchange views and advice freely and frankly whilst formulating its decisions. The Council was still undertaking these sorts of deliberations at the time of the request. The Commissioner considers disclosure at the time of the complainant's request would have been likely to prejudice the free and frank internal deliberations that were required in order to set the final budget.
38. By its very nature, various options are considered during the setting of a budget some of which will be extreme options. Many options that are put forward for deliberations at the Challenge Panels are abandoned prior to the draft budget being set. The Commissioner accepts disclosure of this information at a time when the Council is required to consult and debate the options it has decided on in the draft budget would not be in the public interest. It would be likely to deflect the focus of public

consultation and the further internal deliberations that are required in order to set the final budget away from the draft published and towards options that were considered but then abandoned.

39. The Commissioner also notes that the withheld information contains information which will remain live for the next couple of financial years, as the withheld information are the reports from each Directorate making budgetary suggestions for the following three years. Much of the contents will therefore be subject to further internal deliberations at future Budgetary Challenge Panels in October 2011 and October 2012. Disclosure of this information would be likely to prejudice the Council's ability to review and consider the free and frank options suggested by its officers for the setting of the budget for these future years.
40. For the above reasons, the Commissioner has concluded in this case that the public interest in favouring of disclosure is outweighed by the public interest in maintaining the exemption.

Right of appeal

41. 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

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

42. 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.
43. 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

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