

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 19 March 2015

Public Authority: London Borough of Redbridge
Address: Redbridge Town Hall
128-142 High Road
Ilford
IG1 1DD

Decision (including any steps ordered)

1. The complainant requested information from London Borough of Redbridge (the Council) relating to the Council's RAG ratings of nursery and primary schools in a specified area. The Council confirmed it held relevant information but refused to provide it citing section 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) and 36(2)(c) (prejudice the effective conduct of public affairs) of FOIA.
2. The Commissioner's decision is that section 36(2)(c) is not engaged and that while sections 36(2)(b)(i) and (ii) are engaged, the public interest in disclosure outweighs the public interest in maintaining the exemption.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:
 - disclose to the complainant the information withheld under sections 36(2)(b) and (c).
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 the Act and may be dealt with as a contempt of court.

Background

5. By way of background, the Council told the Commissioner:

"The term RAG rating refers to an internal coding (Red, Amber, Green) which the Early Years' Service, as part of their broader improvement role, use internally to monitor the quality of the provision for Early Years. The purpose of the RAG rating is to identify where to allocate additional resource (officer support) to individual settings".

Request and response

6. On 11 May 2014, the complainant wrote to the Council and requested information in the following terms:

"I would be grateful if you would please provide the council's RAG ratings showing quality of all E18 nurseries and primary schools along with the actual reports please.

Date from: 2010

Date to: 2014

Other information: I am especially interested in Kids Inc and the most recent 2013/14 rating for Rainbow Kids nursery".

7. The Council responded on 18 June 2014. It refused to provide the requested information citing section 43 of FOIA (prejudice to commercial interests).
8. Following an internal review, on 21 July 2014 the Council confirmed that it held the requested information relating to RAG ratings and reports from 2010 – 2014 for nurseries within the London E18 area. However, the Council said that it does not hold the requested information about primary schools.
9. Although it did not specify an exemption, the Council expressed concern that disclosure in this case would prejudice the exercise of the local authority's function, specifically the statutory duty *"to ensure the good quality of education across the settings"*. It told the complainant that it intended to consult with the relevant nurseries and, after considering their comments:

"respond with a decision on whether the exemption should be applied".

10. Following that consultation, the Council provided a further internal review on 20 November 2014 in which it revised its position: it stated that it considers section 36(3)(b) and (c) of the FOIA apply (prejudice to effective conduct of public affairs).
11. In correspondence with the Commissioner the Council apologised for mistakenly writing 36(3), clarifying that the qualified person considers that the tests in each of 36(2)(b)(i) and (ii) and (c) are met.

Scope of the case

12. The complainant contacted the Commissioner on 4 November 2014 in relation to this matter. At that time she had not received the outcome of the Council's consultation with the nurseries. Following receipt of that further internal review, the complainant contacted the Commissioner on 25 November 2014 to complain about the way her request for information had been handled
13. During the course of his investigation, the Commissioner had the opportunity to clarify the nature of the information at issue. Despite having told the complainant that it holds the requested information – information covering the timeframe 2010 – 2014 – in correspondence with the Commissioner the Council clarified that "*the system now in place was only introduced from 2012*". It explained:

"there were no such records, or similar, before this time".
14. The Council confirmed that it considers that section 36(2)(b)(i) and (ii) and 36(2)(c) apply to the information it holds within the scope of the request. The Commissioner considers the scope of his investigation to be the Council's application of section 36 to the withheld information. That information comprises the internal judgement, made by the Council, on the performance of the various nursery establishments within the scope of the request.

Reasons for decision

Section 36 prejudice to effective conduct of public affairs

15. To engage section 36, the qualified person must give an opinion that the prejudice or inhibition specified in section 36(2)(a)-(c) would or would be likely to occur. However, that in itself is not sufficient - the opinion must be reasonable.
14. Section 36(2) states:

"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, 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".

16. In this case the Council confirmed that it considers that section 36(2)(b)(i) and (ii) and 36(2)(c) apply.
17. These exemptions are qualified by the public interest, which means that there are two stages when applying them. First, the exemptions must be engaged as a result of having been applied on the basis of a reasonable opinion from a qualified person. Secondly, the balance of the public interest must be considered. If the public interest in the maintenance of the exemptions does not outweigh the public interest in disclosure, the information must be disclosed.
18. The Commissioner acknowledges that the terminology used in these subsections is not explicitly defined in the FOIA. However, as documented in his Commissioner's guidance on section 36¹ his understanding of the key terms is as follows.
 - 'Inhibit' means to restrain, decrease or suppress the freedom with which opinions or options are expressed.
 - Examples of 'advice' include recommendations made by more junior staff to more senior staff, professional advice tendered by professionally qualified employees, advice received from external sources, or advice supplied to external sources. However, an exchange of data or purely factual information would not in itself constitute the provision of advice or, for that matter, the exchange of views.

¹ https://ico.org.uk/media/for-organisations/documents/1175/section_36_prejudice_to_effective_conduct_of_public_affairs.pdf

- The 'exchange of views' must be as part of a process of deliberation.
- 'Deliberation' refers to the public authority's evaluation of competing arguments or considerations in order to make a decision.

The qualified opinion

19. In determining whether section 36(2) was correctly engaged, the Commissioner is required to consider the qualified person's opinion. To establish that the exemption has been applied correctly the Commissioner must:
 - establish that an opinion was given;
 - ascertain who was the qualified person or persons;
 - ascertain when the opinion was given; and
 - consider whether the opinion was reasonable.
20. In this case, the Commissioner is satisfied that an opinion was sought from the Monitoring Officer (who is also the Borough Solicitor and Secretary) on 25 September 2014.
21. The opinion on the application of section 36(2)(b) and (c) was provided on 14 November 2014. The Commissioner is satisfied that the Monitoring Officer is the Council's qualified person for the purposes of section 36.
22. In determining whether the exemption 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;
 - the nature of the information and the timing of the request; and
 - the qualified person's knowledge of, or involvement in, the issue.
23. 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.

24. In support of its reliance on section 36, the Council provided the Commissioner with a copy of the briefing note that was provided to the qualified person upon which the opinion was based. It also provided a sample of the withheld information.
25. As a prejudice-based exemption, section 36(2) of FOIA requires the qualified person to decide either that there 'would' be a prejudicial or inhibiting effect or that it 'would be likely' that the prejudicial or inhibiting effect would occur; 'would' imposing a stronger evidential burden than the lower threshold of 'would be likely'.
26. In this case, with respect to whether the prejudice or inhibition would, or would be likely to, occur, the qualified person's opinion was that disclosure would have an inhibiting or prejudicial effect. In other words, the higher level of likelihood applies in this case.

Is the opinion reasonable?

27. In relation to sections 36(2)(b)(i) and (ii), the Commissioner considers that they are about the processes that may be inhibited, rather than what is necessarily in the information itself. The issue to determine is whether disclosure would inhibit the processes of providing advice or exchanging views.
28. In other words, in order to engage the exemption, the information requested does not necessarily have to contain views and advice that are in themselves notably free and frank.
29. In correspondence with the complainant the Council said:

"Given the nature of the work that leads to the report and rating concerned, the free and frank provision of advice based upon the professional judgement of the Council Officers doing the work is central to the integrity of the function in question".
30. Similarly, it told the complainant that the free and frank exchange of views, both within the Council and between council officers and provider, is a central part of the function being undertaken – that function being to maintain and improve the quality of care given to children in early years settings.

31. Given the nature and content of the information at issue, the Commissioner is prepared to accept as reasonable the opinion which says that disclosure would have an inhibitory effect.
32. With respect to the Council's application of sections 36(2)(b)(i) and (ii) his conclusion is that these exemptions are engaged.

Section 36(2)(c)

33. The Commissioner has next considered whether the qualified person's opinion on section 36(2)(c) was also reasonable.
34. Section 36(2)(c) provides an exemption where disclosure would or would be likely to prejudice the effective conduct of public affairs in a manner other than that specified elsewhere in section 36.
35. The Commissioner's approach to section 36(2)(c) is that this should only be cited where none of the other exemptions in part II of the FOIA are relevant. That section 36(2)(c) uses the phrase "otherwise prejudice" means that it relates to prejudice not covered by sections 36(2)(a) or (b).
36. In other words, information may be exempt under both 36(2)(b) and (c) but the prejudice claimed under (c) must be different to that claimed under (b).
37. During the course of his investigation, the Commissioner asked the Council to explain how the prejudice claimed under section 36(2)(c) is different to that claimed under (b).
38. The Commissioner considers that the Council's response failed to provide sufficient explanation as to why it considers disclosure in this case would otherwise prejudice the conduct of public affairs. He also considers that the submission to the qualified person fails to explain how the prejudice envisaged in (c) is not covered by section 36(2)(b).
39. It follows that the Commissioner is not satisfied that the qualified person's opinion about the likelihood of prejudice under section 36(2)(c) is reasonable. Therefore he does not find section 36(2)(c) engaged.

The public interest

40. The principle behind the FOIA is to release information unless there is a good reason not to. To justify withholding information, the public interest in maintaining the exemption has to outweigh the public interest in disclosure.

41. Even where the qualified person has concluded that the exemption applies, the public interest test must be applied to the decision whether or not to disclose the withheld information.

Public interest arguments in favour of disclosing the requested information

42. Albeit in respect of its application of a different exemption to the one ultimately relied on, the complainant told the Council she considers that the information should be disclosed because:

- the information relates to the health and safety and wellbeing of young children; and
- detailed reports containing similar information are made publicly available by Ofsted who also inspect childcare providers.

43. The Council recognised the strong public interest arguments in allowing access to information which would inform the public about the quality of nursery provision.

Public interest arguments in favour of maintaining the exemption

44. The Council stated that it operates:

"a robust monitoring arrangement with nurseries, which ensures that an effective, measured and supportive approach is taken, with actions identified relevant to need. The information is provided by nurseries voluntarily and engagement is based largely on trust. The open and honest relationship the LA has established with these establishments ensures that the LA can comply with its statutory duty to be aware of the quality of service provision across all settings so resources can be targeted to those in most need".

45. With respect to the complainant's view that detailed reports containing similar information are made available by Ofsted, the Council told the Commissioner that there are 'major differences' between the local RAG method and the criteria that Ofsted use.

46. The Commissioner acknowledges that Ofsted routinely inspect provision of early years and that the results of Ofsted inspections are published on the Ofsted website. However, the Council explained that there is a distinction between its internal process and the statutory duty of Ofsted to make a judgement on the quality of nursery provision.

47. For example, it told the Commissioner:

"... the Redbridge criteria are internal and do not have the national validity or moderation such as would apply to Ofsted. The

judgements are an interactive process, which form part of a qualitative dialogue with providers – they are not a formal judgement”.

48. It also explained that while a RAG rating model is used by many local authorities, each will have its own criteria which are not validated across borough boundaries.
49. The Council argued that as there is no obligation on the nurseries to provide information or engage with the local authority, the general presumption in favour of disclosure would have to be carefully weighed against the risk of discouraging nurseries from participating in future.
50. It told the Commissioner that, if nurseries were less cooperative or refused to engage with the local authority, this would reduce the effectiveness of the support provided and potentially impact on performance. In its view, therefore, disclosure could potentially damage outcomes for service users.

Balance of the public interest

51. In balancing the public interest, the Commissioner has taken into account the opinion of the qualified person. In accepting that the qualified person has given a reasonable opinion that disclosure would cause the inhibition described, this carries a certain amount of weight through to the public interest test.
52. However, the exact weight that should be given to maintaining the exemption depends on the particular circumstances of the case. This means that while the Commissioner accepts that a reasonable opinion has been expressed that inhibition would occur he will go on to consider the severity, extent and frequency of that inhibition in forming his own assessment of whether the public interest test dictates disclosure.
53. In this case, the Commissioner gives limited weight to the Council's view that the information, if disclosed, could be misleading because the criteria used in RAG rating models are not validated across borough boundaries. In his view, the Council could address that issue, for example by providing the complainant with an explanation of the criteria it uses.
54. With respect to the fact that the results of Ofsted inspections are published on the Ofsted website, the Commissioner acknowledges that the public interest is met, to some degree, by the Ofsted ratings which are publically available.

55. He recognises that those ratings place information about the quality of early years' provision in the public domain and provide parents with information regarding the health and safety of their children. He also notes that there is a mechanism in place to complain about an Ofsted inspection report, for example if a childcare provider, parent or member of the public has concerns about the inspection process or the outcome of the inspection.
56. The Commissioner accepts that the RAG rating used by the Council is an internal mechanism that it uses to support the managers and owners of nurseries to improve the quality of their services.
57. He has accepted that the qualified person's opinion is a reasonable one. However, in the Commissioner's view, disclosure is unlikely either to have a significant effect on the willingness of nursery staff and others to contribute to the process carried out by the Council or else any inhibition caused to the free and frank manner with which individuals contribute is not sufficiently severe, extensive or frequent to prejudice the ability of the Council to carry out its statutory function in respect of early years provision.
58. The Council has not provided evidence in support of its view that disclosure in this case would inhibit the future exchange of views and advice. On the contrary, the Commissioner notes that the Council told the complainant:

"even though the LA has limited control to compel nurseries to provide information, there is a strong incentive for nurseries to continue to do so. It would ensure continuing support, guidance and training is accessible from the LA, to allow ongoing improvements and mitigate any risk of action from regulatory bodies such as Ofsted".
59. Having weighed the opposing public interest arguments, the Commissioner has concluded that, in all the circumstances of the case, the public interest in maintaining the exemption does not outweigh the public interest in disclosure. In reaching this view the Commissioner is mindful that any concerns about individuals being identified as a result of disclosure can be dealt with through appropriate redaction.

Section 1 – General right of access

60. Under section 1(1) of the FOIA, any person making a request for information to a public authority is entitled:
 - (a) To be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) If that is the case, to have that information communicated to him.

61. In this case, while acknowledging, albeit belatedly, that it did not hold the requested information on primary schools the Council told the complainant that the requested information about nurseries is held. It described that information as:

"consisting of termly RAG ratings and accompanying reports for nurseries within the E18 area from 2010 – 2014".

62. The Council's response understandably gave the impression that it held all the requested information about the nurseries in question.

63. However, during the course of his investigation the Commissioner asked the Council to clarify the extent of the withheld information. In response, the Council said:

"We realise that we were not clear about the period of time in which we have collected the data in this way. The request was for data from 2010 to 2014. The system now in place was only introduced from 2012 following the appointment of a new Head of Service. There were no such records, or similar, before this time".

64. The Commissioner finds that the Council contravened section 1(1) of the FOIA by failing to inform the complainant that it does not hold all of the requested information.

Right of appeal

65. 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

66. 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.
67. 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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