

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 August 2012

Public Authority: Wirral Borough Council
Address: Town Hall
Brighton Street
Wallasey
Wirral
Merseyside
CH44 8ED

Decision (including any steps ordered)

1. The complainant requested any information relating to the preparation of a report on the subject of interim management arrangements. The council refused to disclose the information that it held on the basis that it was exempt under section 36(2)(b)(i) and (ii) of the Freedom of Information Act 2000 ("the FOIA"), the exemption that relates to prejudice to the conduct of public affairs. During the Commissioner's investigation, the council also sought to rely on section 40(2) in relation to some of the information on the basis that it would be unfair to disclose some personal data.
2. The Commissioner's decision is that the council correctly withheld some information under section 40(2) of the FOIA. However, it incorrectly withheld some information using section 40(2) and 36(2)(b)(i) and (ii). It therefore breached section 1(1) and 10(1) of the FOIA by failing to disclose this information within 20 working days of the request.
3. The Commissioner requires the public authority to disclose the following information to ensure compliance with the legislation. For clarity, where part of the information is to be withheld, the Commissioner has described directly below what information is to be redacted.
 - Parts of a memo dated 8 September 2011.

The council should redact all the information that the council specifically claimed was exempt under section 40(2) in the highlighted bundle

provided to the Commissioner, apart from the job titles and grades that it sought to withhold. In addition, it should redact the three options considered in full on page 4 of the bundle.

- Email dated 26 September 2011 timed 16:31
- Letter dated 26 September 2011
- Parts of document entitled "Interim Structure"

The council should redact all the information that the council specifically claimed was exempt under section 40(2) in the highlighted bundle provided to the Commissioner. In addition, it should redact paragraphs 3, 9, 11 in full and 12.

- Email dated 27 September 2011 timed 13:42 and parts of attached draft report

As regards the draft report, the council should disclose any parts of the draft that are different from the published version except where those alterations are revealing of changes in the specific proposals regarding the job roles.

- Email dated 27 September 2011 timed 20:23
- Parts of letter dated 27 September 2011

The council should redact all the information that it was claimed was exempt under section 40(2) in the highlighted bundle provided to the Commissioner, except that it should also disclose the last two paragraphs at the end of the letter that it sought to withhold. For clarity, the first paragraph begins "If you are not..." and the second begins "I do not believe..."

- Email dated 28 September 2011 timed 15:06 and parts of attached draft report

As regards the draft report, the council should disclose any parts of the draft that are different from the published version except where those alterations are revealing of changes to the specific proposals regarding the job roles.

- Email dated 28 September 2011 timed 15:33 and parts of attached draft report.

As regards the draft report, the council should disclose any parts of the draft that are different from the published version (including in this version, the tracked changes) except where those alterations are revealing of changes to the specific proposals regarding the job roles.

- Email dated 28 September 2011 timed 16:50 and parts of attached draft report

As regards the draft report, the council should disclose any parts of the draft that are different from the published version (including in this version, the tracked changes) except where those alterations are revealing of changes to the specific proposals regarding the job roles.

- Various appendices

The council should disclose the final version of the appendices in full.

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 (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 18 October 2011, the complainant requested information in the following terms:

"I am submitting the following FOI request on behalf of [name of complainant].

[name of complainant] is requesting access to any documents, emails, letters or texts pertaining to the preparation of the report of the Chief Executive – Interim Management Arrangements presented to the Employments & Appointments Committee on 29th September 2011 sent or received by: [names]. [Name of the complainant] is concerned that the Council is exposing itself to equal value claims".

6. The council responded on 17 November 2011. The council refused to provide the information because it was exempt under section 36(2)(b)(i) and (ii) of the FOIA and the public interest did not favour disclosure.
7. The complainant requested an internal review on 18 November 2011.
8. The council completed its internal review on 15 December 2011. It said that it wished to maintain its position, although it added that it also

sought to rely on section 36(2)(c).

Scope of the case

9. 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 section 36 was engaged in this case.
10. During the Commissioner's investigation, the council also sought to rely on section 40(2). The Commissioner has also considered the use of this exemption.
11. For clarity, the Commissioner noted that the council had withheld a number of drafts of a final report that was placed into the public domain. The majority of the information within these drafts was the same as that already published. Where that was the case, the Commissioner has not ordered the disclosure of that information.

Background

12. To help to put the request into its appropriate context, the council explained to the Commissioner that the political control of the council has changed three times within the last two years. Prior to 2010, the council had a Labour-Liberal democrat administration. In May 2010, a Conservative-Liberal Democratic administration was formed, led by the Conservative group leader. In May 2011, following further local elections, a minority Labour administration returned to office. This administration held office until 13 February 2012 when it was replaced by a further Conservative-Liberal Democrat administration.
13. The council said that in August and September 2010 (i.e. during the period of the first Conservative-Liberal Democrat administration), interim senior management arrangements were agreed. These arrangements significantly altered the council's senior officer structure and included a number of senior officers acting temporarily in new roles. In June 2011, after the return of a Labour administration, it was agreed that the interim management arrangements inherited from the previous administration should continue until 30 September 2011. This was the context in which the report of the Chief Executive on 29 September 2011 that is the focus of this request was presented to the Employment and Appointments Committee.
14. The council and the complainant both explained to the Commissioner that the political climate at the council is considered to be very tense. In

particular, reference was made to a published independent report that was highly critical of many aspects of the council's governance arrangements. The council explained that following the report's recommendations, a number of outside agencies, including the Local Government Association ("the LGA"), have been engaged and are currently assisting the council to improve its corporate governance arrangements, as well as other political issues. The LGA is a member of an "Improvement Board" set up by the council, which has oversight of these matters, as is the Audit Commission.

Reasons for decision

Section 40(2) – Personal data

15. This exemption provides that third party personal data is exempt if its disclosure would contravene any of the Data Protection Principles set out in Schedule 1 of the Data Protection Act 1998 ("the DPA").

Is the withheld information personal data?

16. Personal data is defined by the DPA as any information relating to a living and identifiable individual. The council said that the information that it wished to withhold using this exemption is the following:

- Parts of a memo dated 8 September 2011
- Parts of a document entitled "Interim Structure" dated 26 September 2011
- Parts of a letter dated 27 September 2011
- The majority of the information in completed and draft appendices to the report published on 29 September 2011 (the appendices were not published as they were considered to be exempt under the Local Government Act).
- Parts of a number of draft reports that are revealing of changes to the proposals regarding job roles.

17. The Commissioner considered the withheld information above and he was satisfied that it would be reasonable to treat the information withheld by the council using this exemption as personal data. The information relates to the roles in question and the discussions and changes surrounding those roles.

Would disclosure breach the Data Protection Principles?

18. The Data Protection Principles are set out in Schedule 1 of the DPA. The first principle and the most relevant in this case states that personal data should only be disclosed in fair and lawful circumstances. The

Commissioner was satisfied that there is no evidence to suggest that the disclosure would be unlawful and therefore his considerations below have focused on the issue of fairness. In considering fairness, the Commissioner finds it useful to balance the reasonable expectations of the individual and the potential consequences of the disclosure against the legitimate public interest in disclosing the information.

Reasonable expectations

19. The Commissioner considered the nature of the withheld information and he was satisfied that the disclosure of most of this information would not have been within the reasonable expectations of the individuals concerned. While the final changes were obviously made public following the decisions regarding the individuals concerned this was not the case in relation to the considerations that led to those decisions. Information relating to corporate restructures generally carries a strong and reasonable expectation of privacy regardless of the nature or seniority of the role. The Commissioner also noted that a significant amount of the withheld information included comments on the performance of the employees concerned. There were no circumstances that would suggest to the Commissioner that the individuals concerned would expect deliberations of this nature relating to their role to be made publicly available at any stage in the process.
20. However the council sought to withhold some information, the disclosure of which the Commissioner considered would have been within the reasonable expectations of the individuals concerned. This included information that merely identified the role in question, completed appendices to the final report which the Commissioner understands simply confirmed the decisions that had been made as regards the senior roles, and a couple of paragraphs that give a sense of the general nature of the discussions that took place between the Chief Executive and another person. Given the nature of these roles, the Commissioner considered that these individuals ought to expect a level of transparency that is commensurate with those roles.

Consequences of disclosure

21. Given the nature of the information and the Commissioner's finding that disclosure would not have been within the reasonable expectations of the individuals concerned, the Commissioner considers that disclosure of this information to the wider public would be distressing to the individuals concerned.
22. The council sought to withhold some information which the Commissioner considered would not be likely to cause adverse consequences if released.

Balancing the rights and freedoms of the data subject with the legitimate interests in disclosure

23. There is always some legitimate public interest in the disclosure of information held by public authorities for the purpose of promoting transparency and accountability. In this particular case, there is a specific legitimate public interest in helping the public to understand more about how the decisions in this process were made, particularly against the background described in the notice and the fact that the decisions affected senior staff members and the council's finances.
24. The Commissioner carefully considered the above and the contents of the withheld information. In cases such as this, the Commissioner must balance the legitimate public interest in disclosure with the legitimate expectations of privacy that the individuals concerned would have had. The Commissioner considered that it would be a disproportionate intrusion into the legitimate expectations of privacy that the individuals concerned would have had to disclose to the wider public the discussions that led to the decisions that were ultimately taken in regard to these roles. As a result, the Commissioner accepted that section 40(2) was engaged in respect to this information.
25. As already mentioned, the Commissioner considered that there was some information that the council had sought to withhold that would not be likely to cause adverse consequences if disclosed and the disclosure of which ought to have been within the reasonable expectations of the individuals concerned. In relation to this information, the Commissioner is also required to consider whether the disclosure would be necessary.

Would the disclosure be necessary?

26. For clarity, when a disclosure would be fair, the Commissioner must consider whether it would be necessary in accordance with Condition 6 in Schedule 2 of the DPA. The full wording of Condition 6 is as follows:

"The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject".

27. As already highlighted, the information concerns a restructure of senior of jobs at a very senior level in the council. This involved public money and significant responsibilities. It is important therefore for the council to be as transparent as possible in relation to information about this process. The Commissioner was therefore satisfied that the disclosure was necessary in this case.

Section 36: Prejudice to public affairs

28. For clarity, the Commissioner has considered the application of this exemption only in relation to the parts of the information that he considers were not exempt under section 40(2).
29. This exemption concerns prejudice to the effective conduct of public affairs. Section 36(2)(b)(i) and (ii) are concerned specifically with prejudice to the provision of advice and the free and frank exchange of views for the purposes of deliberation.
30. Unlike other exemptions in the FOIA, it is engaged if a qualified person at the public authority confirms that it is their opinion that the exemption is engaged and that opinion is a reasonable one.
31. In order to establish whether the exemption was engaged, the Commissioner will:
 - Establish that an opinion was given
 - Ascertain who the qualified person was
 - Ascertain when the opinion was given
 - Consider whether the opinion was reasonable
32. The Commissioner confirmed that the monitoring officer had given his opinion that the information was exempt. For clarity, the qualified person had also additionally sought to rely on section 36(2)(c) but this was subsequently withdrawn during the Commissioner's investigation because the council was satisfied that the concerns it had were covered by section 36(2)(b)(i) and (ii). The Commissioner was satisfied that the opinion had been given by the appropriately qualified person at the council.

Was the qualified person's opinion reasonable?

33. The Commissioner bases his understanding of the word "reasonable" on its plain meaning. The definition in the Shorter English Dictionary is "in accordance with reason; not irrational or absurd". For clarity, while an opinion that is absurd is not reasonable, that is not the same as saying that any opinion that is not absurd is reasonable. The opinion only has to be a reasonable one and this part of the exemption is therefore not a high hurdle. An opinion that a reasonable person could hold is a reasonable opinion. It does not have to be the only reasonable opinion that could be held, or the *most* reasonable opinion. For clarity, the Commissioner does not have to agree with the opinion he only has to recognise that a reasonable person could be of that opinion.

34. The council told the Commissioner that at the time of the original refusal and the internal review, the qualified person had not actually seen copies of the withheld information although he had been provided with a detailed verbal briefing. The qualified person inspected the withheld information during the Commissioner's investigation and confirmed that he remained satisfied that it was exempt.

35. The arguments put forward by the qualified person for the exemption focused on notions of "safe space" and "chilling effect", terms that have become well-known in the context of this particular exemption. As discussed in the Commissioner's published guidance:

" 'safe space' arguments are about the need for a 'safe space' to formulate policy, debate 'live' issues, and reach decisions without being hindered by external comment and/or media involvement. Such arguments are related to, but not the same as 'chilling effect' arguments, and care should be taken to differentiate between these two concepts. The Commissioner's view is that, whilst part of the reason for needing a 'safe space' is to allow free and frank debate, the need for a 'safe space' exists regardless of any impact of the candour of debate of the involved parties, which might result from a disclosure of information under FOIA... 'Chilling effect' arguments are directly concerned with the argued loss of frankness and candour in debate/advice which it is said would result from disclosure of information under FOIA".

36. The qualified person explained to the Commissioner that he considered that a need for a safe space existed at the time of the request. He explained that he was concerned that if the information had been disclosed at that time, it would have been likely to cause disruption to the council's ability to review the restructuring arrangements in a safe space free from external commentary and involvement. The qualified person also stressed that it was particularly important to maintain a "safe space" because of the difficult context in which the changes were being made, at a time of successive political changes at the council with political groups holding differing views regarding the wisdom of the changes.

37. The qualified person also argued that if the information was disclosed, a marked "chilling effect" would have been likely in relation to future advice and contributions by officers about the arrangements in question. The qualified person pointed out that the request had been made shortly after the proposals had been agreed and they were still in the process of being implemented at that time. The restructure was also subject to further review in the future. As already mentioned, the council explained that the changes were likely to be revisited if there was a further change of political control. The qualified person said that there is a longstanding

and very strong convention at the council that discussions between officers and members are confidential and officers do not disclose the subject matter of such discussions to anyone else. He said that if this convention is breached, it will be likely to seriously inhibit the free and frank provision of advice and exchange of views for the purposes of deliberation. The qualified person pointed towards the candour of some of the exchanges, as well as the sensitivity of the discussions in terms of their subject matter and the political climate at the council, in order to support the view that the parties were not expecting the correspondence to be disclosed.

38. The Commissioner considered the withheld information and the arguments presented by the qualified person in this case. He was satisfied that the qualified person's opinion was a reasonable one in view of the nature of the information and the sensitive context in which these discussions were taking place. He was satisfied that because of these matters, it was reasonable for the qualified person to conclude that disclosure of the information may have hindered the council's ability to handle the staffing restructure as effectively as possible because officials would be inhibited in the free and frank exchange of views and provision of advice. The Commissioner therefore accepts that section 36(2)(b)(i) and (ii) were engaged in this case.

Public interest

39. Having concluded that section 36(2)(b)(i) and (ii) were engaged, the Commissioner went on to consider the public interest test. Section 36 is a qualified exemption and therefore the Commissioner must consider whether in all the circumstances of the case the public interest in maintaining the exemption outweighed the public interest in disclosing the information.
40. In *Guardian and Heather Brooke v the Information Commissioner and the BBC* (EA/2006/001 and EA/2006/0013), the Information Tribunal provided some general principles about the application of the public interest test in section 36 cases as follows:
- The lower the likelihood is shown to be that the free and frank exchange of views or provision of advice would be inhibited, the lower the chance that the balance of the public interest will favour the exemption.
 - While the Commissioner cannot consider whether prejudice is likely (that is for the qualified person to decide), he is able to consider the severity, frequency or extent of any likely prejudice.
 - Since the public interest in maintaining the exemption must be assessed in the circumstances of the case, the public authority is

not permitted to maintain a blanket refusal in relation to the type of information sought.

- The passage of time since the creation of the information may have an important bearing on the balancing exercise. As a general rule, the public interest in maintaining the exemption will diminish over time.
- In considering factors that militate against disclosure the focus should be on the particular interest that the exemption is designed to protect, in this case the effective conduct of public affairs through the free and frank exchange of views/provision of advice.
- While the public interest considerations in the exemption from disclosure are narrowly conceived, the public interest considerations in favour of disclosure are broad ranging and operate at different levels of abstraction from the subject matter of the exemption. Disclosure of information serves the general public interest in promotion of better government through transparency, accountability, public debate, better public understanding of decisions, and informed and meaningful participation of the public in the democratic process.

Public interest arguments in favour of disclosing the requested information

41. The “default setting” of the FOIA is in favour of disclosure. This is based on the underlying assumption that the disclosure of information held by public authorities is in itself of value because it promotes the interests described in the last bullet point above.
42. More specific to this case, there is a public interest in the disclosure of information that relates to public finances. The information in question relates to a significant restructure involving senior members of staff at the council. Both the council and the complainant have also referred to the tense political climate at the council, governance issues and other concerns that have been highlighted. The complainant has a number of concerns about the fairness of the restructure.
43. The council accepts that the restructure, particularly against the background described, has been a controversial issue. These concerns increase the public interest in the council being as transparent and accountable as possible in this matter. The Commissioner accepts that the withheld information provides a significant amount of additional information about the way in which the decisions connected to the restructure were made, which would help the public to understand more about the specific decision-making process in this case.

Public interest arguments in favour of maintaining the exemption

44. The council argued that the public interest in maintaining the exemption outweighed the public interest in disclosing the information in the circumstances of this case. As already discussed, the Commissioner accepts that the qualified person's opinion was reasonable that disclosure at the time of the request would have been likely to hinder the council's ability to restructure effectively in terms of intruding on the safe space that existed in which to deal with those issues and thereby increasing the likelihood of a future discussions about the same issues being less candid than they would have been otherwise.

Balance of the public interest arguments

45. It is worth highlighting for clarity that although the Commissioner must give weight to the qualified person's opinion once he has accepted its reasonableness, it is open to the Commissioner to consider the severity, frequency and extensiveness of any prejudice that would be likely to occur.
46. As part of his general analysis, the Commissioner took into account that although the restructure is currently undergoing further review, the fact is that at the time of the request, the decisions regarding the senior staff involved had been made and communicated in public. Many decisions may be subject to further review at some future point. In itself the Commissioner did not consider that this was a particularly strong argument favouring the decision to withhold the information at the time of the request. In the Commissioner's view, the fact that the decisions had been made and were, by the time of the request, in the process of being implemented, is a factor that significantly lessens the severity, frequency or extensiveness of the prejudice. The immediate need for a safe space in which to make those decisions had been reduced significantly by the time of the request, although the Commissioner accepts the point that it had not diminished entirely because the arrangements were likely to become the subject of further review. Although the Commissioner appreciates that the restructure was still in the early days of being implemented at the time of the request, the Commissioner considers that a "chilling effect" would be likely to have most impact while the initial major decisions were still being made
47. Moreover, the Commissioner considers that the arguments made by the qualified person about the sensitivity of the information mainly concern the information that has been withheld under section 40(2), rather than the residual information. The need to prolong the time period during which a "safe space" was legitimately required in order to

protect against disruption via a chilling effect would have been more convincing if the residual information had been more sensitive such as information about an individual's specific role.

48. The Commissioner also found the council's arguments about a "convention" of confidentiality in relation to information of this nature unconvincing. Since the introduction of the FOIA, there can no longer be any blanket guarantee that information will remain confidential. Decisions on whether to disclose information held by public authorities will be made on a case by case basis and the Commissioner would expect the authority's staff to be aware of this. Members are elected officials and that role must carry with it a high degree of transparency. The same also applies to senior staff, and even more so in relation to the Chief Executive's role, the most senior role at the council. The Commissioner considers that the public are entitled to expect individuals in these positions to demonstrate a degree of professionalism commensurate with the role and be robust enough not to allow the disclosure of information of this nature to impact upon the effectiveness of any future discussions to any great extent.
49. The Commissioner considered that there were a number of emails that should have been disclosed. Although this information fell within the scope of the request, the actual content of the emails is limited. The Commissioner notes that the information is primarily revealing of contact between two individuals at a crucial stage in the decision-making process, one of which was the Chief Executive. As this information is not very revealing in terms of the actual discussions that took place between the parties, the Commissioner was not persuaded that the level of prejudice would be as severe, frequent or extensive as argued by the council. Moreover, the Commissioner considers that disclosure would be justified in any event by the strong public interest in being as accountable as possible about the factors that impacted significantly upon the decision-making process. These decisions related to senior roles, involved public money and affected a number of individuals.
50. In relation to the memo dated 8 September 2011, the Commissioner considered that the information that was not exempt under section 40(2) should have been disclosed. The Commissioner noted that the residual information was of a fairly general nature and he was not persuaded that the level of prejudice to the free and frank exchange of views and provision of advice would be severe enough to justify withholding the information given the strong public interest.
51. In relation to the letter dated 26 September 2011, the Commissioner again noted that the information is primarily revealing of contact

between two individuals. Although the letter does go into more detail than the emails discussed above about the nature of that contact, the Commissioner still considered that the information was not particularly revealing of the terms of the actual discussions that took place between the parties. For this reason, the Commissioner did not consider that the level of prejudice that would be likely to result from the disclosure would be severe enough to withhold the information. Again, the Commissioner was also of the view that there was in any event a strong public interest in being as accountable as possible about the factors that impacted significantly upon the decision-making process. These decisions related to senior roles, involved public money and affected a number of individuals.

52. As regards the document headed "Interim Structure", the Commissioner considered that once the parts of the information that were exempt under section 40(2) had been removed, what was left would not be likely to prejudice the free and frank exchange of views and provision of advice to a sufficient enough extent to justify the decision to withhold it. The information is not particularly sensitive.
53. The Commissioner also considered the remaining parts of the letter to the Chief Executive dated 27 September 2011 (once the information subject to the exemption under section 40(2) had been disregarded). For the reasons given in the paragraph above, he came to the conclusion that this information should also be disclosed. The relevant parts of the letter do provide some further detail about the nature of the actual discussions, but specific job roles are not the focus of the information. Again, the information is more revealing of the relationship between the two parties to the discussion. Given the nature of those roles, the Commissioner considered that transparency would be appropriate.
54. The council withheld a number of drafts of the final report, and the completed appendices associated with the report. The final draft was published but the completed appendices were not published because the council considered that this information was exempt under the Local Government Act. The council said that only councillors could access the appendices, not members of the public. In relation to the drafts, the council did not make any specific arguments to the Commissioner to justify withholding alterations to the drafts that were not about specific job roles. The information was not particularly sensitive in the Commissioner's view. Furthermore, the drafts were created by the Chief Executive and an appropriate level of transparency is to be expected. In relation to the completed appendices, the Commissioner understands that although these were not published, they simply confirm the decisions that had already been

taken and were being implemented by the date of the request. Given the timing, the nature of the information and the other information that the authority had published, the Commissioner was not satisfied that the authority had demonstrated a sufficient level of prejudice to the free and frank exchange of views and provision of advice.

Right of appeal

55. 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

56. 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.
57. 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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