

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: **6 November 2013**

Public Authority: **West Berkshire Council**

Address: **Market Street
Newbury
Berkshire
RG14 5LD**

Decision (including any steps ordered)

1. The complainant requested correspondence exchanged between West Berkshire Council and the Information Commissioner. The Council withheld the requested information by relying on sections 36(2)(b)(i) and (ii) and (c), and 40(2).
2. The Commissioner's decision is that the aforesaid sections did not operate so as to withhold requested information.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Provide the complainant with the requested information that it has withheld, save for certain extracts which the Commissioner has found to be exempt from disclosure by virtue of section 40(1).
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. The complainant made a complaint against West Berkshire Council ("WBC") to the Commissioner in 2011. In order to determine that complaint the Commissioner entered into correspondence with WBC. The Commissioner concluded that matter by issuing decision notice FS50421845¹ on 17 May 2012.
6. Following the issuing of decision notice FS50421845 there was an exchange of correspondence between WBC and the Commissioner regarding his investigation of that complaint. This exchange of correspondence generated letters between the Commissioner and WBC dated 12 June 2012 and an undated one sent on 8 August 2012.
7. On 31 October 2012, the complainant requested information from the Commissioner that included the two letters. The Commissioner withheld these letters and to do so relied on section 44(1)(a) of the FOIA, read together with section 59 of the Data Protection Act 1998 (DPA). The complainant complained to the Commissioner about this withholding of the information. The Commissioner's adjudication on that complaint culminated in the issuing of decision notice FS50481536².

Request and response

8. On 8 January 2013, the complainant requested from WBC information of the following description:
 1. Letter from WBC to the Commissioner dated 12 June 2012.
 2. Undated letter sent by the Commissioner in response on 8 August 2012.
 3. A copy of the letter from the Commissioner requesting permission to disclose the information.
 4. WBC reply to (3) above.
 5. Any subsequent correspondence on the matter.

¹ http://www.ico.org.uk/~/media/documents/decisionnotices/2012/fs_50421845.ashx

² <http://www.ico.org.uk/~/media/documents/decisionnotices/2013/FS50481536.pdf>

9. On 4 February 2013 WBC responded as follows:
 1. While it held this information it relied on section 36(2)(b)(i) and (ii) not to communicate it to the complainant.
 2. While it held this information it relied on section 36(2)(b)(i) and (ii) not to communicate it to the complainant.
 3. It disclosed this information to the complainant.
 4. While it held this information it relied on section 36(2)(b)(i) and (ii) not to communicate part of it to the complainant but released the remainder.
 5. It did not hold this requested information.
10. Following an internal review WBC wrote to the complainant on 5 March 2013. It stated that it substantively upheld its original decision. However it now also relied on section 36(2)(c) to withhold the information and clarified its reliance on section 36(2)(b)(ii).

Scope of the case

11. The complainant contacted the Commissioner on 9 March 2013 to complain about the way her request for information had been handled by WBC. As part of his ensuing investigation the Commissioner has viewed the withheld information and taken cognisance of all submissions by both parties. During the investigation WBC also sought to withhold some of the information by reference to section 40(2) of the Act. Additionally the complainant averred that WBC may hold further requested information which it had not informed her about.

Reasons for decision

Information held

12. Section 1 of the Act provides two distinct but related rights of access to information that impose corresponding duties on public authorities. These are:
 - the duty to inform the applicant whether or not requested information is held and, if so,
 - the duty to communicate that information to the applicant.

13. In scenarios where there is a dispute between the amount of information located by a public authority and the amount of information that a complainant believes may be held, the Commissioner determines the issue on the balance of probabilities.
14. WBC informed the Commissioner that the complainant, on 25 September 2012, had made to it a "section 7" request under the DPA. The complainant had asked for all correspondence discussing her which had been exchanged with external organisations or individuals.
15. As a result it had obtained and looked through a large number of emails containing the complainant's name, from October 2010 to October 2012, in an effort to identify any relevant correspondence. Additionally it had looked at the correspondence filed under or in her name (Word or hard copy documents). The work involved took around two and a half weeks to complete, and it had supplied all the relevant information.
16. If there had been any information relevant to her later request relating to the correspondence with the Commissioner, it would have been identified at that time, and would have been able to retrieve this at the time she made her request in January 2013. The searches did identify the various letters she later requested, which were anyway held within a separate file.
17. Further, WBC's officer, who had initiated the correspondence with the Commissioner in June 2012, confirmed that there had been no subsequent correspondence, either with the Commissioner or internally. Following the exchange of correspondence with the Commissioner, the authority had considered the matter closed.
18. The Commissioner has no reason to doubt the explanations of WBC as to searches they have undertaken which would have identified information that falls within the ambit of the complainant's request. Additionally there is no indication within the withheld information, which the Commissioner has viewed, that further information would be likely be held by WBC. Accordingly the Commissioner, on the balance of probabilities, is satisfied that WBC has informed the complainant of the totality of the requested information it holds.

Section 36

19. WBC relies on sections 36(2)(b)(i) and (ii) and (c) and section 40 not to communicate the following information to the complainant
 1. Letter from WBC to the Commissioner dated 12 June 2012.
 2. Undated letter sent by the Commissioner in response on 8 August 2012.

3. Part of WBC reply to (2) above.
20. Information is exempt from disclosure on the basis of section 36(2)(b) if, in the reasonable opinion of a qualified person, disclosure of the information under the Act would, or would be likely to inhibit the free and frank provision of advice or the free and frank exchange of views for the purpose of deliberation.

Qualified Person's Opinion

21. Section 36 requires that, other than for statistical information, the qualified person for the public authority must give their reasonable opinion that the exemption is engaged. Therefore, in order to use section 36, public authorities must establish who their qualified person is.
22. The qualified person is not chosen by the authority itself. Section 36(5) explains what is meant by the 'qualified person'. For WBC, as an English local authority, its qualified persons are its Monitoring Officer and its Chief Executive.³⁴ A qualified person cannot delegate this decision-making function to others.
23. WBC explained to the Commissioner that the original opinion was sought from its Monitoring Officer, on 31 January 2013. The opinion relating to the internal review was sought from a Deputy Monitoring Officer on 5 March 2013. Copies of both minutes of the meetings were provided to the Commissioner. However the Commissioner is only satisfied that the Monitoring Officer is a qualified person for the purposes of section 36. The Deputy Monitoring Officer, the Commissioner finds, is not such a qualified person. The Commissioner is therefore able to consider the application of section 36(2)(b) due to the Monitoring Officer having provided an opinion on it for the refusal notice but cannot consider the application of section 36(2)(c) relied upon at the internal review stage as the Deputy Monitoring Officer was not qualified to apply it.

³ Section 36(5)(o)(iii)

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<http://webarchive.nationalarchives.gov.uk/20100512160448/http://www.foi.gov.uk/guidance/exguide/sec36/annex-d.htm#part2>

24. Having viewed the notes of the qualified person it is apparent that his opinion was that the prejudice contained in section 36(2)(b)(i) and (ii) "would" occur.
25. In the Commissioner's opinion the substance of a qualified person's opinion must be objectively reasonable. He also considers the term 'would' means that the possibility of prejudice should be real and significant. However, the opinion only has to be a reasonable opinion. 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. *Therefore the Commissioner does not have to agree with the opinion*; he only has to recognise that a reasonable person could hold it in the circumstances.
26. In this context an opinion either is or is not reasonable. In deciding whether an opinion is reasonable the ICO will consider the plain meaning of that word, rather than defining it in terms derived from other areas of law.
27. The Commissioner's preferred definition of 'reasonable' is in the Shorter Oxford English Dictionary: "in accordance with reason; not irrational or absurd". 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.
28. The Commissioner's view is that the qualified person's opinion was a reasonable one to express. By this, he means that it is within the definition of reasonableness for the qualified person to consider that releasing the withheld information would inhibit the free and frank provision of advice or the free and frank exchange of views for the purpose of deliberation. In other words the opinion expressed cannot be said to be an unreasonable one. The opinion expressed therefore falls within the band of opinions that are reasonable ones to hold. The exemptions provided by these section 36(2)(b)(i) and (ii) are therefore, engaged.

Public interest test

29. The public interest test is separate from the qualified person's opinion which is restricted to the reasonableness of their opinion regarding the likelihood of prejudice occurring. When considering the public interest test the Commissioner must judge – as far as he is able to - the actual severity, extent and frequency of that prejudice *in the particular circumstance of the individual case* and balance this against the public interest in disclosure.

30. The Commissioner notes the view of the Information Tribunal⁵ that the only valid public interest arguments in favour of maintaining an exemption are those that relate specifically to that exemption. Conversely, the Commissioner notes, this restriction when applying the public interest test does not apply to those factors favouring the release of information. The Information Tribunal in Hogan made this point at paragraph 60 where it said:

“While the public interest considerations against 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.”

31. The effect of the previous paragraph is that the public interest factors to maintain the exemptions of section 36(2)(b)(i) and (ii) are those unique to those exemptions. However, the public interest factors (in this matter) for not maintaining the exemption(s) are common.

32. WBC's own views as to the public interest factors for maintaining the exemptions were as follows-

- In order to operate effectively as a regulator, the Commissioner and the organisations with which he corresponds require a 'safe space' in which to exchange views and opinions, discuss the application of the legislation, and arrive at resolutions. Where information of more general public use arises from these deliberations, the Commissioner publishes relevant guidance, advice and decisions on his website. This fulfils the requirement to provide a transparent process on decision making without inhibiting the effectiveness of the regulator's role to correspond with and advise the organisations subject to the access to information legislation.
- The withheld information consists of an exchange of correspondence between this authority and the Commissioner which deals with the handling of one specific review, the actions of the officers concerned, and more general issues around how reviews are handled. In both letters, criticism of the other party is apparent. Were this correspondence between the other regulator (the Local Government Ombudsman) and this authority, its confidentiality would be assured by a simple request to treat the

⁵ (Christopher Martin Hogan and Oxford City Council v Information Commissioner EA/2005/0026 and 0030 paragraph 59).

correspondence in confidence. Such confidentiality gives an organisation security to engage in frank discussion, without which the value of a regulator as an advisory body is questionable. Not every discussion can be carried out verbally without some audit trail to record the views of, and understanding reached between, the organisations concerned.

- The authority has argued that its capacity to engage with the Commissioner and the Commissioner's role as regulator are compromised by placing this correspondence (or similar correspondence in the future) in the public domain. Put simply, to do so encourages 'trial by media'...The authority is strongly of the opinion that not only will placing this correspondence in the public domain denigrate the Commissioner's role; it will also impact on this authority's desire or intention to approach the Commissioner for advice or guidance in the future.
 - It is its view that the Commissioner shares this opinion that the role of the regulator depends in part upon a voluntary supply of information and views from relevant organisations which would be likely to be affected by a disclosure of all the information thus obtained.
 - It, in support of this, points to an ICO email of 4 March 2013 which said, in part: "When responding to an information request from the complainant, for the same information West Berkshire Council is now considering (following a similar/identical request), the ICO relied upon s.44 /s.59. This because the ICO did not want to undermine the voluntary supply of information to us as a regulator. The ICO needs public authorities / data controllers to be able to have a general expectation that it won't give out information sent to it in the course of / concerning our casework investigations for the purpose of our regulatory functions unless we have lawful authority to do so".
 - It is clear from this that the Commissioner understands the general expectation of public authorities, that correspondence with him on FOI issues is likely to have a degree of confidentiality. This remains the case whether the request is made to the Commissioner or the authority. Confidentiality, and the effective workings of the Freedom of Information process, cannot be maintained if one organisation supplies what another refuses.
33. Regrettably, notwithstanding the opportunities it has had (both in correspondence with the complainant and the Commissioner), WBC has not laid out clearly the public interest in releasing the withheld

information. In spite of this the Commissioner has identified them to include the following-

- The general public interest in promoting transparency, accountability, public understanding and involvement in public affairs.
 - Engendering a better understanding of the Commissioner's investigations of the public's complaints against a public authority.
34. On balance the Commissioner's view is that the public interest in releasing information is not outweighed by the public interest in maintaining the exemption.
35. There is a general public interest in promoting transparency, accountability, public understanding and involvement in the democratic process. The Act is a means of helping to meet that public interest, so it must always be given some weight in the public interest test. As well as the general public interest in transparency, which is always an argument for disclosure, there is also a legitimate public interest in the subject the information relates to.
36. It is in the public interest to promote a better understanding of the relationship between the Commissioner and a public authority in the context of the Commissioner investigating a complaint from a member of a public. Releasing the information illuminates, for the public, what tensions can arise in that relationship. It also illustrates the burdens a public authority believes it carries as a result of the Act, both with complying with the Act and the Commissioner's investigations pursuant to the Act.
37. Releasing the withheld information will aid the public to determine how fair the Commissioner is to public authorities and complainants when he investigates and adjudicates on whether the Act has been complied with. Thus the public will gain further insight into how the regulation of the Act operates in practice. It will better learn how the Commissioner goes about investigating complaints against public authorities. The Commissioner is aware that releasing the information cannot give the whole picture of investigations made under the Act. However releasing the information will provide a helpful view of what can and does occur.
38. The Commissioner does acknowledge the general concerns highlighted by WBC if the information is released. However, the Commissioner does not consider WBC's public interest arguments to sufficiently engage with the specific information being withheld in this case and views the arguments to be generic ones in relation to exchanges of this kind

between a public authority and the Commissioner. In the particular circumstances of this case, particularly having closely analysed the withheld information, the Commissioner has not been able to identify evidence that such stymieing of a public authority's ability to have a free and frank dialogue with the Commissioner about how his investigation has been conducted will be overly severe, extensive or frequent. Therefore in the absence of such evidence, the Commissioner has not been persuaded by WBC's arguments on this point.

39. In any event the Commissioner attributes more robustness to public authorities and his office, in dealing with any negatives caused by the release, than WBC did or does. That is, he does not feel that WBC releasing the information in this case will overly or extensively hinder his office and public authorities exchanging views as to how an investigation was or was not conducted.
40. WBC, as stated above, relies on an extract from an email from the Commissioner to it dated 4 March 2013, which states:

"When responding to an information request from the complainant, for the same information West Berkshire Council is now considering (following a similar/identical request), the ICO relied upon s.44 /s.59. This because the ICO did not want to undermine the voluntary supply of information to us as a regulator. The ICO needs public authorities / data controllers to be able to have a general expectation that it won't give out information sent to it in the course of / concerning our casework investigations for the purpose of our regulatory functions unless we have lawful authority to do so."

41. However the email of the 4 March 2013 goes on to say -

"We are of the opinion that, as it is now the Council deciding whether to make the disclosure rather than the ICO, we do not believe the issue of undermining the voluntary supply of information to the ICO as a regulator arises.

I can confirm that we have also consulted with the Manager who wrote the ICO response letter of 8 August 2012, who has confirmed he is happy if the Council decide to release the information."

42. The email of 4 March 2013 makes it clear that the Commissioner did not object to WBC releasing the withheld information. This, of course, does not mean that automatically the Commissioner disregards the arguments for maintaining the exemption. In any event the email did not say that WBC *should disclose* the information and the Commissioner takes cognisance of this distinction. However, in respect of this information there is a difference between WBC's application of section

36 and the Commissioner's ability to rely on section 44 of the Act to withhold this same information. The Commissioner would not disclose correspondence of this nature as a matter of routine due to the protection section 59 of the DPA affords *him* in respect of it. However, this also explains why the Commissioner's email of 4 March 2013 did not require or advise WBC to withhold the information, particularly as WBC releasing this information – as opposed to the Commissioner doing so – would not undermine the voluntary supply of information to him. This is because section 59 of the DPA explicitly affords the Commissioner the ability to withhold information supplied to him in the course of his duties.

43. Consequently, the Commissioner does not agree that he treats correspondence with him from public authorities as confidential simply because of the general expectation of public authorities. The Commissioner attaches this confidentiality to the correspondence due to the statutory bar he is afforded under section 59 of the DPA. However, this statutory bar operates only in respect of the Commissioner and his staff, not the public authority. Therefore it is not inconsistent for the Commissioner to apply the statutory bar when a request is made to him but for a different conclusion to be reached when the request is made to the public authority to which the information relates.
44. Furthermore, the Commissioner takes issue with WBC's analogy regarding correspondence between itself and the Local Government Ombudsman. Such information would be exempt from disclosure if requested from the Ombudsman under section 44 of the Act, due to a statutory bar under the Local Government Act 1974, rather than as a request from WBC that it be treated as confidential.
45. The Commissioner gave no weight to the argument that releasing the information would result in public criticism of the way he conducted the investigation. The fact that public criticism of the Commissioner (or any public authority) will be caused by public dissemination of withheld information cannot be used to block the effectiveness of the Act. If information is not to be released to avoid criticism of public authorities then the Act itself would virtually be redundant. In any event the Commissioner believes that his office and WBC are, or should be, sufficiently robust to address any ensuing criticism (if such occurs) arising from the release of the withheld information.
46. As stated above, though the exemptions are engaged consideration of the public interest test entails looking at the severity at the relevant prejudice caused by releasing the information. The Commissioner's view is that the severity is unlikely to be so great as to warrant the prevention of the information to be released. Dissemination of the issues contained within the withheld are unlikely to, in the Commissioner's

view, severely or frequently to inhibit the free and frank provision of advice or views. In any event the WBC has not provided evidence to the contrary and therefore the Commissioner is not prepared to speculate that the harm will be overly severe or frequent to justify not publically releasing the information. Additionally the Commissioner is neither persuaded by WBC's arguments for the maintenance of the exemption overriding the public interest arguments for releasing the information in the context of this case.

Section 40(2)

47. WBC maintains that both the names of its employees and the opinions expressed in the withheld information constitute personal data as defined by section 1(1) of the DPA and are therefore exempt from disclosure by virtue section 40(2) the FOIA.
48. The withheld information also contains the names of case officers at the Commissioner's office. Though WBC has not stated these names should be withheld the Commissioner's position is that where personal data is likely to be involved, he has a duty to consider the rights of data subjects. These rights, set out in the DPA, are closely linked to Article 8 of the Human Rights Act 1998 (the HRA) and the Commissioner would be in breach of his obligations under the HRA if he ordered disclosure of information without having considered those rights.
49. Personal data is defined in section 1(1) of the DPA as -

...data which relate to a living individual who can be identified from those data or from those data and other information which is in the possession of, or likely to come into the possession of, the data controller; and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any person in respect of the individual.
50. Thus, two criteria need fulfilling for information to constitute personal data. The information must relate to an individual, and that individual must be identifiable from that information directly or in combination with other information available to the holder of that information.
51. The Commissioner notes that the withheld information, that comprises the names and opinion of staff of WBC or the Commissioner, is information that clearly relates to living individuals. Accordingly they constitute personal data for the purposes of the DPA and section 40(2) of the FOIA
52. Section 40(2) of the FOIA states that information is exempt from disclosure if it constitutes the personal data of a third party and its

disclosure under the FOIA would breach any of the data protection principles or section 10 of the DPA.

53. In considering whether disclosure of personal data would be unfair and therefore contravene the requirements of the first data protection principle, the Commissioner considers the following factors:
- The data subject's reasonable expectations of what would happen to their personal data.
 - The consequences of disclosure.
 - The balance between the rights and freedoms of the data subject and the legitimate interests of the public.
54. Personal information is exempt from disclosure under the FOIA if disclosure would lead to a breach of the data protection principles, for example if the disclosure would be unfair to an employee. This exemption is intended to ensure that greater public openness does not compromise personal privacy.
55. The Commissioner understands that ICO employees in different roles will have different expectations of what information about them could be released in response to a freedom of information request. The expectations of a Case Officer and Senior Case Officer whose job role involves dealing with the public on a daily basis is likely to be different from that of backroom janitorial staff who have very little external contact with the public. The Commissioner will normally disclose work-related information about senior employees or those in a public-facing role. He does not see any sufficient reason to deviate from this position, particularly given that the case officers here were engaged in work generic to their role that can properly be described as public facing.
56. Turning to the position of the council employees named in, or author of, the withheld information, the Commissioner considers that there are no substantial differences between ICO staff and these staff of WBC in the context of this material. The council employees were going about their professional public life when they corresponded with the Commissioner. Their work (and their role) is ascertainable by a view of the WBC's website. That is they have consented (either actually or by default) that their personal data, in the context of their employment (name and job role), is publically known or readily ascertainable. Furthermore, the Commissioner is satisfied that the opinions expressed are those that arise out of fulfilling their employment role with WBC.
57. The Commissioner next considered whether disclosure would be lawful. The most obvious example of where disclosure is likely to be unlawful is if disclosure would contravene a statutory prohibition. However, the

Commissioner is not aware of any statutory prohibition which would serve to prevent disclosure in a case like this.

58. The Commissioner finds that the disclosure of the information would not be unfair and therefore not breach the first data protection principle. The information that comprises the names or opinions of staff at WBC and the Commissioner's office is therefore not exempt from disclosure by virtue of section 40(2).

Section 40(1)

59. Section 40(1) of the FOIA states that:

"Any information to which a request relates is exempt information if it constitutes personal data of which the applicant is the data subject."

60. Therefore under section 40(1) requested information that constitutes the applicant's 'personal data' is exempt information. This exemption is absolute and requires no public interest test to be conducted. In other words, first party personal data is absolutely exempt from disclosure under the Act by virtue of section 40(1).
61. The complainant's name and address that appears in the withheld information is her personal data. In addition, there are a number of extracts contained within WBC's letter to the Commissioner of 12 June 2012 which the Commissioner also considers to be the complainant's personal data. These extracts are listed in a confidential annex so that WBC can be aware of them.
62. Accordingly, by virtue of section 40(1), the complainant's name and address, together with the extracts listed in the confidential annex, are to be withheld and not disclosed. (The Commissioner is satisfied that none of the remaining withheld information constitutes the complainant's personal data.)

Right of appeal

63. 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

64. 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.
65. 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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