

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 26 April 2017

**Public Authority:** Powys County Council  
**Address:** County Hall  
Spa Road East  
Llandrindod Wells  
Powys  
LD1 5LG

#### Decision (including any steps ordered)

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1. The complainant has requested salary, pay scale, car lease and pension contributions for senior employees of Powys County Council (the council). The council provided some information and withheld the remainder under section 40(2) and section 21 as the information was either third party personal data, or was otherwise reasonably accessible to the applicant.
2. The Commissioner's decision is that the council did not correctly engage section 21 with regard to the salary, pay scale and pension information of employees earning over £60,000. The Commissioner also found that the council was entitled to rely on section 40(2) to withhold the outstanding requested information
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Provide the complainant with specific directions as to how the requested information which is reasonably accessible to the applicant can be accessed.
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.

## Request and response

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5. On 19 July 2016, the complainant made the following request for information to the council:
  - "1. Can you provide me with a list for all job titles including the grade and scale point for Senior Manager, Chief Officer & Chief executive as per the Powys CC pay policy?*
  - 2. Can you provide me with a list detailing how much is paid by way of council contribution for a lease car against all job titles as per question 1?*
  - 3. Can you provide me with a list detailing how much is paid by way of pension contribution against all job titles as per question 1?"*
6. On 10 August 2016, the council responded. For question 1 it provided a list of all job titles along with the grade, but did not provide scale points. In addition, whilst it provided some summary information regarding car lease and pension contribution, it relied on section 40(2) to withhold the specific information in respect of each job title, including the scale point information.
7. The complainant requested an internal review on 11 August 2016. Following further chaser emails, the council sent him the outcome of its internal review on 10 October 2016. For the most part it maintained its application of section 40(2) to withhold the information as it considered that it was personal data and to disclose it would be a breach of the Data Protection Act 1998 (the DPA). However, it clarified that some of the requested information in respect of Heads of Service and the Chief Executive was publicly available online in the Annual Statement of Accounts 2015-16, and so section 21 applied.

## Scope of the case

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8. The complainant contacted the Commissioner on 13 October 2016 to complain about the way his request for information had been handled. He was concerned that the council had not disclosed all the requested information.
9. The Commissioner considers the scope of the investigation to be to determine whether the council was entitled to withhold the requested information.

## Reasons for decision

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### Section 21 – Information otherwise accessible to the applicant

10. Section 21 of the FOIA states that:

*“Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.”*

11. In line with the Tribunal decisions in *Craven v Information Commissioner* (EA/2008/0002 and *Ames v Information Commissioner and the Cabinet Office* (EA/2007/0110), the Commissioner considers that information will only be reasonably accessible to the applicant if the public authority knows that the applicant has already accessed the information, or if it is able to provide the applicant with precise directions to the information so that it can be found without difficulty. When applying section 21 in this context, the key point is that the authority must be able to provide directions to the information.
12. In this case, the council simply stated to the complainant in its internal review that *“Information is also exempt under S21 in that it is already in the public domain.”*
13. The Commissioner does not consider that the council’s response to the request or the internal review response gave any specific directions as to how any of the requested information was reasonably accessible to the applicant. Nor did it specify which information it considered section 21 applied to.
14. In its submission to the Commissioner, the council provided more detail about how it considered that section 21 applied. It stated that the grades, scale points and pension contributions of the Chief Executive, Strategic Directors and Heads of Service were available to the applicant. It further explained that with regard to the scale point information, this was only available by comparing the Annual Statement of Accounts 2015/16 with the Pay Policy Statement 2016/17. The Commissioner has learned that the Annual Statement of Accounts details the specific salary of individuals earning over £60,000, and when this is referenced against the Pay Policy Statement, the scale point for each specific job title can therefore be ascertained.
15. Section 21 applies to information which is reasonably accessible to the applicant. This means that contrary to the usual stance that requests are to be treated as applicant blind, the public authority is required to consider who the applicant is in order to determine whether the information is accessible to them. In this regard, the council has advised the Commissioner that it is aware that the complainant is a councillor,

and in undertaking that role, is entitled to access information that would not ordinarily be disclosed to the world at large. It has referred the Commissioner to a response prepared for the complainant in relation to a question he has posed to the council's portfolio holder with responsibility for Human Resources. It states that this question is similar to the request under consideration here.

16. Although the council has explained to the Commissioner how section 21 applies to the request in terms of which specific information it applies to and where that information can be found, she finds that the council has failed to correctly apply this exemption. This is because it did not provide the same information to the complainant, either during its handling of the request or during the Commissioner's investigation. Therefore, it remains for the council to do so in order to comply fully.
17. As the requested salary information and pension contribution for Heads of Service and above is otherwise reasonably accessible to the applicant, once the council has provided him with the required directions, the Commissioner has gone on to consider the remaining requested information under section 40(2). This comprises the scale point of senior managers (all of whom earn less than the council's £60,000 threshold for publication) as well as their pension contribution. It also comprises the requested car lease information of all levels included in the request.

### **Section 40(2) – third party personal data**

18. Section 40(2) of the FOIA states that:

*"Any information to which a request for information relates is also exempt information if-*

*(a) it constitutes personal data which do not fall within subsection (1), and*

*(b) either the first or the second condition below is satisfied."*

19. Personal data is defined in the DPA as any information which identifies a living individual. In this case, requested car lease and pension contribution information is about the remuneration of senior employees at the council, which is clearly personal data about each individual.
20. The council has also pointed out that due to the position of the requester as a councillor, he has access to the council's intranet and is therefore able to use the staff search facility to search by job title and discover the names of each individual. The council therefore considers that the car lease and pension contribution information will be personal data. The Commissioner notes that each of the job titles listed in the Annual Report and Pay policy are unique titles, and as such, the Commissioner

considers that regardless of whether the requester has the means to discover the names of each individual, the requested information will be personal data about them.

21. Section 40(3) provides that –

*“The first condition is-*

*(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-*

*(i) any of the data protection principles, or..."*

22. The Commissioner has considered the most relevant data protection principle, which in this case is the first data protection principle. The first data protection principle states that:

*“Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless—*

*(a) at least one of the conditions in Schedule 2 is met, and*

*(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.”*

23. In her approach to the application of the first data protection principle the Commissioner concentrates in the first instance on whether the disclosure of the information would be ‘fair’. In considering fairness the Commissioner has taken into account the nature of the information, the reasonable expectations of the data subject, the potential consequences of disclosure, and balanced the rights and freedoms of the data subject with the legitimate interests of the public in the information being disclosed to it.

*The reasonable expectations of the individual*

24. In cases regarding the remuneration of local authority employees, reasonable expectations are shaped by the legislation and codes of practice concerning local government data transparency, accounts and audits. The council states that it is not required to disclose details of remuneration of employees earning less than £60,000. It explained that *“there is an expectation of staff, even Senior Managers, that their exact salary details and benefits would remain private to an extent, even though as public sector workers they appreciate that much data in terms of pay, grade, employer’s pension contribution and car lease*

*contribution is already within the public domain through various sources."*

25. In its internal review response, the council explained that in assessing fairness, the main area for it to consider was whether the employees had a reasonable expectation that their information will be disclosed. In doing so it considered whether it was reasonable to expect a public authority to publish more information about senior employees than more junior ones. It notes that those in senior posts have greater accountability as they are likely to be responsible for major policy decisions and the expenditure of public funds.
26. The Commissioner notes that under the Accounts and Audit Regulations 2015 (the regulations), local authorities are required to publish certain salary information in respect of certain senior employees earning over £50,000. The regulations list these certain senior employees as those who have been designated as a head of paid service, a chief officer, head of staff or, a person who has responsibility for management or the authority to the extent that they have the power to direct or control major activities. In a local authority setting, this is usually considered to be the top three tiers of the organisation. The information to be published includes actual salaries, allowances, bonuses and employer's pension contribution.
27. The Commissioner recognises that the senior managers in this case, whilst earning more than £50,000, do not hold the level of responsibility which under the regulations would require the council to publish the detailed remuneration information. The commissioner is therefore satisfied that the individuals in senior manager positions at the council would have a reasonable expectation that their exact salary, employee pension contribution and any car lease information would not be disclosed to the world at large.
28. The commissioner must also consider the reasonable expectations of the Heads of Service, Strategic Directors and Chief Executive with regard to the disclosure of information about the council's contributions to car leasing.
29. The council has explained that releasing it would disclose whether an individual has a lease car, or whether they use their own vehicle for business purposes. It also advised that the contribution to a car lease is cost neutral as the contribution to a lease car scheme for an officer is the same value as reimbursing an officer for business mileage in their own vehicle at the standard HMRC rate of 45p per mile. The council states that there is no expectation that disclosure of such information will occur. The council also disclosed to the complainant the number of

positions which have an employer contribution towards a lease car, and the highest and lowest lease car contribution value.

30. The Commissioner notes that the regulations state that remuneration is defined as all amounts paid to or receivable by a person, including expenses allowances and the estimated money value of benefits received by an employee otherwise than in cash. The Commissioner considers that this could be understood to include money spent by the council on car leasing, or indeed on business mileage. However, there is no mention of car leasing or indeed benefit in kind on either the council's pay policy or the annual statement of accounts. Therefore, the Commissioner accepts that it is within the reasonable expectations of the individuals that information about whether they have a lease car for business purposes, and the amount the council contributes to it, will not be disclosed.

#### *Consequences of disclosure*

31. With regard to the withheld information in respect of the senior managers, the council has argued that the withheld information relates to the individuals' personal financial circumstances, and disclosure of the requested information is more intrusive than the salary band information that is routinely published.
32. The council has also argued that disclosure of information outside an individual's expectations may cause distress and could constitute a disproportionate and unwarranted interference with their rights and freedoms.
33. The Commissioner agrees that disclosure of the withheld information, both in respect of the more detailed salary information and car lease and pension information for senior managers, and the car lease information regarding heads of service and above, would represent an unwarranted intrusion into the privacy of these individuals. Not least because disclosure would be beyond their reasonable expectations, and would therefore be likely to cause some distress.

#### *Balancing the legitimate public interest in disclosure with the rights of the individuals*

34. The Commissioner accepts that there is a legitimate public interest in the transparency of the spending of public authorities. She recognises that it is common practice now for local government to publish remuneration information about their highest paid officers. In this case, she acknowledges that the council's disclosure of salary information of the senior managers in line with the regulations (in £5000 salary bands) satisfies the public interest in this regard to an extent.



35. The council recognises that there is a legitimate public interest in knowing how public money is apportioned across an organisation, and this is why it already publishes some of the requested information. However, it argues that exceptional circumstances are required to justify the disclosure of the remaining withheld information, which is not routinely published. It outlines additional public interest factors which would weigh in favour of disclosure and outweigh any detriment to the individual. These include current controversies or allegations, a lack of safeguards against corruption, normal procedures not being followed, individuals being paid considerably more than usual for their post, or the individual(s) concerned have control over their own salaries. It states that these factors do not apply in this case, and that it would not be fair to disclose the withheld information.
36. The Commissioner also recognises that the council has satisfied the public interest in some regard in terms of the car lease information as it has disclosed to the complainant that 22 officers receive lease car contributions to the annual sum of between £468 and £440. The council also provided the complainant with an explanation that the car lease scheme is cost neutral as the employer contribution to the lease is the equivalent of what the council would reimburse an individual in mileage allowance if the individual was using their own vehicle for business use.
37. The council has also published the percentage of pension contribution for all posts, in its annual statement of accounts, which is 23.2% of pensionable pay. In addition it has disclosed in its response to the complainant the lowest and highest annual pension contributions. Again, this goes some way to satisfying the public interest in disclosure of the information.
38. The complainant in his internal review request stated that it was his personal opinion that the requested information was of public importance, and was paid for from public taxation and therefore should be available under the FOIA.
39. The Commissioner finds that the balance of the legitimate interests of the public and the rights and freedoms of the senior managers in respect of their pay scale, pension contribution and car lease arrangements, weighs in favour of withholding the information. It is clearly beyond their reasonable expectations that such information will be disclosed, and in addition, whilst their job titles include "senior manager" they do not occupy roles which are defined as senior for the purposes of the regulations. As such, the Commissioner finds that the council was entitled to withhold this information under section 40(2) of the FOIA.



40. Given the seniority of the individuals in respect of the remaining withheld information – the car lease contributions by the council, the Commissioner has separately considered the balance of the legitimate interests of the public with their rights and freedoms.
41. During the investigation, the Commissioner directed the council to consider the decision notice FS50540774 in which she found that the council in that case had incorrectly engaged section 40(2) to car lease information in respect of the chief executive. This resulted in the disclosure of the monthly amount paid by the council towards the chief executive's car lease. However, the Commissioner notes that whilst this case ordered disclosure, there was considerable public interest in the requested information in the form of a number of BBC news stories on the matter. The Commissioner has not been made aware of any such demonstrations of a clear public interest in the specific requested information in this case.
42. Therefore, whilst the seniority of the individuals clearly goes a long way to shaping their reasonable expectations of disclosure of their information in terms of their accountability for public spending, this is balanced by the information already disclosed, and the fact that the scheme is cost neutral to the council. This means that there is no additional public expenditure relating to the council's payments towards a lease car, and so there is a limited public interest in such disclosure. The Commissioner therefore finds that the balance rests with the rights and freedoms of the individuals.
43. The Commissioner's conclusion is that the council was entitled to rely on section 40(2) to withhold the car lease contribution information in respect of the most senior individuals.

## Right of appeal

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44. 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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

45. 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.
46. 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 .....

**Andrew White**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**