

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 1 September 2014

Public Authority: Wirral Metropolitan Borough Council

Address: Wallasey Town Hall
Brighton Street
Wallasey
Wirral
CH44 8ED

Decision (including any steps ordered)

1. The complainant has requested information from Wirral Metropolitan Borough Council ("the council") about a disciplinary investigation into two council officers. The council withheld the information under the exemption provided by section 40(2) of the Freedom of Information Act ("the FOIA").
2. The Commissioner's decision is that the council has correctly applied section 40(2), but has breached the requirement of section 10(1) by failing to respond to the request within 20 working days.
3. The Commissioner does not require any steps to be taken.

Request and response

4. On 15 January 2012, the complainant wrote to the council and requested the following:

"Please disclose the first investigation made into claims from the whistleblower [redacted name] which seemingly cleared two senior members of DASS of any wrong doing."
5. The council responded on 7 June 2013 and refused the request citing section 40(2).

Scope of the case

6. The complainant contacted the Commissioner on 17 July 2013 to contest the council's response.
7. The Commissioner considers that the scope of this case is the determination of whether the council has correctly applied the exemption provided by section 40(2).

Reasons for decision

Section 40(2) – Third party personal data

8. Section 40(2) provides 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."*

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..."

Is the withheld information personal data?

9. Personal data is defined by section 1 of the Data Protection Act 1998 ("the DPA") as:

"...data which relate to a living individual who can be identified–

(a) from those data, or

(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the data controller or any person in respect of the individual..."

10. In order for the exemption to apply the information being requested must constitute personal data as defined by section 1 of the DPA. In this instance the Commissioner has reviewed the report that has been withheld, and has identified that it specifically relates to two individuals who are council officers. Additionally, the Commissioner identified that the report also contains the personal data of other individuals, including council officers and councillors who have given statements for inclusion within the report, officers who work for other public authorities, and members of the public.

Would disclosure breach the data protection principles?

11. The data protection principles are set out in schedule 1 of the DPA. The Commissioner considers that the first data protection principle is most relevant in this case. The first principle states that personal data should only be disclosed in fair and lawful circumstances, the conditions of which are set out in schedule 2 of the DPA.
12. The Commissioner's considerations below have focused on the issues of fairness in relation to the first principle. In considering fairness, the Commissioner finds it useful to balance the reasonable expectations of the data subject and the potential consequences of the disclosure against the legitimate public interest in disclosing the information.

Reasonable expectations of the data subject

13. When considering whether a disclosure of personal data is fair, it is important to take account of whether the disclosure would be within the reasonable expectations of the data subject. However, their expectations do not necessarily determine the issue of whether the

disclosure would be fair. Public authorities need to decide objectively what would be a reasonable expectation in the circumstances.

14. In this case the council has proposed that the two individuals who are the subjects of the report would not have a reasonable expectation of their personal data being disclosed into the public realm. This is because the withheld information relates to a disciplinary investigation into the two individuals whilst they were employees of the council, and as such would be considered to be personnel records maintained for the purposes of employment.
15. Further to this, the council considers that the individuals who have submitted statements to be included within the report are unlikely to have an expectation that their personal data is disclosed. This is because the individuals were directly advised that the statements were for the purposes of a disciplinary investigation, which would have led to an expectation of confidence on the part of the individuals.
16. Notwithstanding the council's position, the Commissioner has reviewed the disciplinary report, and has specifically identified that it considers the actions of the senior officers in respect of their public duties. In such situations, the Commissioner accepts that this can enhance the public interest in disclosure even where the individual holds an expectation of privacy.

The consequences of disclosure

17. The council has proposed that the disclosure of the report would have an unjustified adverse effect on the two individuals to whom it relates. This is because their rights and freedoms as data subjects would be interfered with should the report, held for the purposes of employment, be disclosed to the public. The Council considers that this effect would be compounded as the two individuals are no longer being employed by the council, and as former employees would expect a higher level of privacy in respect of their personal data.
18. In addition to the council's position, the Commissioner also considers that the disclosure of the report would be likely to impede such investigations by the council in the future. This is because the expected disclosure of such information would be likely to inhibit the willingness of individuals, council officer or otherwise, to contribute to such investigations.

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

19. The council has not advised the Commissioner of any legitimate interests in disclosure that it has identified. However, the Commissioner considers that the need to promote transparency and accountability on the part of the council, and particularly in relation to the public duties of senior officers, to be a legitimate argument for the fairness of disclosure.
20. However, while the information is related to the public duties of the individuals as senior council officers, the Commissioner appreciates that it would be held as part of the council's personnel files for the purposes of employment. In relation to this, the Council has referred the Commissioner to the decision of the First Tier Tribunal in the case of *Gibson v Information Commissioner & Craven District Council* (EA/2010/0095), in which the Tribunal accepted that information relating to an individual acting in a professional capacity may be held for the purposes of human resources management, and as such attract a strong expectation of privacy on the part of the individual.
21. The Commissioner is further aware that the withheld information has previously been considered in a decision by the First Tier Tribunal in the case of *Cardin v Information Commissioner* (EA/2012/0264). In that decision, the Tribunal likewise considered the fairness of the information being disclosed, and concluded that under the terms of the DPA it would not be fair, and that the exemption provided by section 40(2) was therefore engaged. The Commissioner, having regard to that decision, does not consider that the circumstances in this case are materially different.

Conclusion

22. There is always some legitimate public interest in the disclosure of any information held by public authorities. This is because disclosure of information helps to promote transparency and accountability amongst public authorities. This in turn may assist members of the public in understanding decisions taken by public authorities and perhaps even to participate more in decision-making processes.
23. However, whilst the information relates to the public duties of senior council officers, the Commissioner has identified that it derives from a disciplinary investigation that took place into two individuals for the purposes of their employment, and as such would be held within personnel files with a strong expectation of privacy. Additional to this, the Commissioner has identified that the withheld information also contains the personal data of other individuals, and that a substantial

proportion of those individuals contributed to the report under what is likely to have been a strong expectation of confidence.

24. Further to this, the Commissioner considers that the routine disclosure of such information relating to disciplinary investigations, as contained in personnel files, would be highly likely to impact on the ability of the council to deal with any future employment issues that might arise.
25. The Commissioner has therefore concluded that disclosing the information would not be fair under the first principle of the DPA, and that the exemption provided by section 40(2) is engaged.

Section 10(1) – Time for compliance

26. Section 10(1) requires that a public authority must issue a refusal notice within the time for compliance, which is 20 working days following the date of receipt.
27. In this case the Commissioner has identified that the council issued its refusal notice outside 20 working days, and therefore breached the requirement of section 10(1).

Right of appeal

28. 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

29. 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.
30. 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
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