

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 30 January 2012

**Public Authority:** Ealing Council  
**Address:** Perceval House  
14-16 Uxbridge Road  
London  
W5 2HL

### Decision

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1. The complainant has requested a copy of Ealing Council's (the "council") report into the theft of a laptop, which led to the issuing of a Civil Monetary Penalty Notice by the Information Commissioner's Office ("ICO").
2. The Commissioner's decision is that the council has correctly applied the 'prejudice to effective conduct of public affairs' exemption to the report but that it wrongly concluded that the public interest in maintaining the exemption outweighed the public interest in disclosure.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Disclose the withheld information to the complainant.
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.

### Background

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5. Under sections 55A and 55B of the Data Protection Act 1998 (the "DPA"), the Commissioner may, in certain circumstances, serve a monetary penalty notice on a data controller. A (civil) monetary penalty ("CMP") notice is a notice requiring a data controller to pay a monetary penalty of an amount determined by the Commissioner and specified in

the notice. The Commissioner may impose a CMP if a data controller has seriously contravened the data protection principles and the contravention was of a kind likely to cause substantial damage or substantial distress<sup>1</sup>.

6. In February 2011, a CMP notice was issued to the council following the theft of an unencrypted laptop which contained personal information. The notice was published on the ICO website with some details redacted. At the time the notice was issued, the Commissioner also published a news release<sup>2</sup>.
7. The withheld information comprises a report produced by the council which relates to the issues addressed by the CMP notice. The notice had not been issued at the time the report was produced, however, the council had been provided with a 'notice of intent' which invited its representations prior to the Commissioner reaching a final decision about the issuing of a notice.

## Request and response

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8. On 30 May 2011, the complainant wrote to the council and requested information in the following terms:
  - "...a copy of the report into the loss of the unencrypted laptop which resulted in an £80,000 fine from the ICO"
9. The council responded on 2 June 2011, directing the complainant to the Monetary Penalty Notice published on the ICO's website<sup>3</sup>.

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<sup>1</sup> Further details about monetary penalty notices can be found in the Commissioner's guidance, published on the ICO website:

[http://www.ico.gov.uk/what\\_we\\_cover/taking\\_action/~media/documents/library/Data\\_Protection/Detailed\\_specialist\\_guides/ICO\\_GUIDANCE\\_MONETARY\\_PENALTIES.ashx](http://www.ico.gov.uk/what_we_cover/taking_action/~media/documents/library/Data_Protection/Detailed_specialist_guides/ICO_GUIDANCE_MONETARY_PENALTIES.ashx)

<sup>2</sup> The monetary penalty notice is published here:

[http://www.ico.gov.uk/what\\_we\\_cover/taking\\_action/~media/documents/library/Data\\_Protection/Notices/ealing\\_council\\_monetary\\_penalty\\_notice.ashx](http://www.ico.gov.uk/what_we_cover/taking_action/~media/documents/library/Data_Protection/Notices/ealing_council_monetary_penalty_notice.ashx); the news release appears on the ICO website here:

[http://www.ico.gov.uk/news/latest\\_news/~media/documents/pressreleases/2011/Monetary\\_penalties\\_ealing\\_and\\_hounslow\\_news\\_release\\_20110208.ashx](http://www.ico.gov.uk/news/latest_news/~media/documents/pressreleases/2011/Monetary_penalties_ealing_and_hounslow_news_release_20110208.ashx)

<sup>3</sup>

[http://www.ico.gov.uk/what\\_we\\_cover/taking\\_action/~media/documents/library/Data\\_Protection/Notices/ealing\\_council\\_monetary\\_penalty\\_notice.ashx](http://www.ico.gov.uk/what_we_cover/taking_action/~media/documents/library/Data_Protection/Notices/ealing_council_monetary_penalty_notice.ashx)

10. On 2 June 2011 the complainant wrote back to the council and explained that it was the council's own internal report into the matter that was being sought.
11. The council responded on 8 June 2011, refusing to provide the requested information. It stated that the information was being withheld under the 'prejudice to effective conduct of public affairs' exemption, namely section 36(2)(b) of the FOIA.
12. Following an internal review the council wrote to the complainant on 24 June 2011. It stated that it considered that its original decision to withhold the information was correct and that the public interest test was appropriately applied.

### **Scope of the case**

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13. The complainant contacted the Commissioner to complain about the way his request for information had been handled. They specifically asked the Commissioner to investigate whether the council had correctly applied the exemption to the requested information.
14. The Commissioner's investigation will be confined to considering whether, in refusing the request, the council correctly applied the prejudice to effective conduct of public affairs exemption.

### **Reasons for decision**

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15. Section 36(2)(b) of the FOIA states that:

"Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-

Would, or would be likely to, inhibit-

- (i) the free and frank provision of advice, or
- (ii) the free and frank exchange of views for the purposes of deliberation"

#### *The qualified person*

16. In deciding whether the council has correctly engaged the exemption, the Commissioner has first considered who, at the council, is the 'qualified person', for the purposes of the exemption.

17. The ability of the qualified person to determine whether information is exempt cannot be delegated to another person. The reason for asking who gave the opinion is to ensure that the decision was taken by the correct person. If the person who gives the opinion is not the qualified person, then information cannot be exempt.
18. In this case, the council has confirmed that the qualified person for the purposes of the exemption is the monitoring officer. The Commissioner accepts that the council has designated the appropriate person for the purpose of providing a reasonable opinion. He has gone on to consider whether the qualified person has provided an opinion and when the opinion was provided.

*Did the qualified person give an opinion and when was it given?*

19. The Commissioner's general position is that, if a reasonable opinion has been given by the qualified person by the time of the internal review, then the exemption will be engaged.
20. Prior to considering the qualitative aspect of the opinion, the Commissioner has first considered whether an opinion was given and when it was given.
21. The council has confirmed that, prior to the receipt of the request, the qualified person had been involved in advising on the legal position regarding the incident which gave rise to the withheld report. In formulating the opinion which led to the decision to refuse the request, the qualified person also referred to the unredacted version of the CMP notice.
22. Having considered the above, the Commissioner is satisfied that the qualified person provided an opinion and that it was provided prior to the request being refused.

*The qualified person's opinion*

23. The qualified person has confirmed that, in refusing the request, they are relying on the specific limb of the exemption which states that disclosure "...would, or would be likely to inhibit the free and frank exchange of views for the purposes of deliberation..."<sup>4</sup>
24. The qualified person has explained that the withheld report was prepared in December 2010, in anticipation of the ICO CMP notice

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<sup>4</sup> Section 36(2)(b)(ii) of the FOIA.

(eventually issued in February 2011). The report represented best practice, as a mature organisation sought to understand and learn from its mistakes. The report took the form of an update, summarising the data breach, the remedial action taken and liaison between the council and the ICO. Whilst the report is high level, the council considered that it contained sufficient detail to enable informed discussion by its intended audience (the Corporate Board).

25. In formulating their opinion, the qualified person took the view that the withheld report would not have been either useful or effective if it had been written in anticipation of possible public disclosure. Had the authors believed that the report would be disclosed, the report would have been so bland and uninformative as to be useless for the purpose of informing the Corporate Board; both in terms of the errors made and steps taken to prevent a recurrence. It was important that the report was full and frank to enable Corporate Board members to challenge and question the content. The qualified person concluded that disclosure of the report would result in future reports being less free and frank, with the effect that a target audience would be less able to consider, advise upon and implement the best way forward for the council. In the words of the exemption, therefore, the qualified person concluded that disclosure of the report "would or would be likely to inhibit the free and frank provision of advice."

*Was the opinion reasonable in substance?*

26. The Commissioner agrees with the Information Tribunal (the Tribunal) that the substance of the qualified person's opinion must be objectively reasonable<sup>5</sup> but there may be room for conflicting opinions which are also reasonable<sup>5</sup>.
27. In assessing 'reasonableness', the Commissioner considers that the qualified person's opinion does not have to be the *most* reasonable opinion that could be held; it is sufficient for an opinion to simply be reasonable, in light of the factors which were considered in reaching an opinion.
28. Amongst the factors which the Commissioner considers to be relevant in determining whether an opinion is reasonable include whether the envisaged prejudice or inhibition relates to the specific subsection of the exemption that is being claimed.

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<sup>5</sup> In *Guardian & Brooke v The Information Commissioner & The BBC* EA/2006/0011 & EA/2006/0013 at paragraph 60

29. In the Commissioner's opinion, the term 'would be likely to inhibit' in section 36(2)(b) means that the possibility of prejudice should be real and significant, and certainly more than hypothetical or remote. On the other hand, 'would inhibit' places a much stronger evidential burden on a public authority and must be at least more probable than not.
30. In cases where a public authority has failed to specify the level of prejudice at which an exemption has been engaged, the Commissioner considers that the lower threshold of "likely to prejudice" should be applied. As the qualified person has not specified the level of prejudice in this case, the Commissioner has therefore considered the substance of the opinion in the context of the lower level of prejudice.
31. In this instance, the withheld report consists of an update to the Corporate Board, informing it of actions taken in response to the incident. It seems clear that it, therefore, constitutes a form of advice. Also, in view of the qualified person's previous involvement in the subject of the report, it is likely that their opinion was based on a sound understanding of the relevant issues.
32. In relation to the potential for disclosure to result in inhibition, at the time the report was produced, the authors of the report would have been aware of the impending CMP notice and the associated reputational risk and public scrutiny which would ensue. It seems reasonable to conclude that, given the seriousness of the issues, the report writers would have wanted to ensure that the Corporate Board were presented with comprehensive, frank advice.
33. Whilst, in terms of content, the report is, in the council's own words 'quite high level', it contains sufficient detail to enable appraisal of and discussion around the measures taken in response to the incident. Having considered the content of the report and the broader context, the Commissioner is satisfied that it was a reasonable opinion that the disclosure of the report would be likely to result in the inhibiting of the free and frank provision of advice. He has, therefore, concluded that the council correctly engaged the exemption and has gone on to consider whether the public interest favours maintaining outweighs the public interest in disclosure.

*Public interest in favour of maintaining the exemption*

34. The council has argued that, whilst there is a public interest in transparency around how the council managed the data protection incident, disclosure of the internal methods used to minimise the risk would expose the council to further risk. This would defeat the primary objective of these activities, namely securing adequate data security.

35. In relation to the specific details of the withheld information, the council has argued that disclosure would be likely to result in future inhibition in relation to the giving of advice. This so-called 'chilling effect' describes scenarios where disclosure of information created as part of an advice-giving process results in advisors/those participating in the advice process being less likely to be free and frank in their future contributions. In this case, the council has argued that disclosure would result in future advice being so bland and uninformative as to be unfit for the purpose of facilitating decisions. This would hinder the decision-making process and, thus, affect the council's ability to function effectively.
36. The council has also argued that, in view of the sensitivity of the data associated with the security incident, disclosure of any further details about this matter would result in needless distress being caused to individuals. Even without explicit details being made available, the publicising of the potential for sensitive personal data to be accessed by unauthorised parties would create unnecessary alarm.
37. In a similar way, disclosure and any ensuing publicity would also alert those responsible for the theft of the laptop to the nature of the stored information. This could increase the risk of the information being accessed and understood.

*Public interest in favour of disclosure*

38. The council has only provided generic public interest arguments in favour of overturning the exemption, namely, that disclosure would promote better government through: transparency, accountability, public debate, better public understanding of decisions and informed and meaningful participation of the public in the democratic process.
39. The Commissioner considers that disclosure would show that the council has confidence in its decision making processes. It would also contribute to public understanding of the issues documented in the publically-available CMP notice.
40. More specifically, the Commissioner considers that disclosure would demonstrate to the public that the council has taken robust steps to address the security implications of the incident and that measures have been put in place to ensure that there is not a recurrence. This would improve public confidence in the workings of the council.

*Balance of the public interest arguments*

41. The Commissioner notes that, according to the Council's own definition, the withheld information is 'high level'. Whilst he has accepted the opinion of the qualified person that the information contains sufficient

detail to allow for disclosure to result in the inhibition described in the exemption, he is not convinced that the level of detail and any resulting inhibition is significant enough to merit strong weight in favour of maintaining the exemption.

42. In relation to the sensitivity of the issues and the potential distress resulting from disclosure, whilst the report is factual in content, it does not provide significantly more detail than that already in the public domain via the published CMP notice and the associated ICO news release. The Commissioner's general view is that the sensitivity of information declines when the related issues are no longer live. Decisions regarding actions to be taken after the theft of the laptop and the council's response to the issuing of the CMP notice were not in train at the time of the request. A 'chilling effect' will be at its severest when the 'safe space' within which authorities consider advice and reach decisions is still required. The Commissioner considers that, the timing of disclosure would not, in this instance, result in severe inhibition to these activities.
43. In considering the public interest arguments, the Commissioner has also had regard for his role as regulator of the DPA and his responsibility for investigating the issues which gave rise to the withheld report and the CMP notice. Although he acknowledges that, to some extent, the public interest has already been served by his investigation into and publication of details relating to the incident, he also considers that the FOIA provides for a different but equivalent right to scrutiny of public authorities.
44. The public interest in knowing how the council managed and responded to the issues documented in the CMP notice is directly linked to the principles of accountability and transparency around decision making. The Commissioner considers that, in this instance, these principles outweigh the public interest in preventing the likelihood of inhibition to the free and frank provision of advice. The Commissioner also does not consider that the Council has demonstrated how, in view of the level of detail contained in the report, disclosure would result in distress to individuals and how this relates to the prejudice inherent in the exemption.
45. For the reasons set out above, the Commissioner has concluded that, on balance, the public interest in maintaining the exemption is outweighed by the public interest in disclosing the report.



## Right of appeal

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46. 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](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

47. 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.
48. 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** .....

**Steve Wood**  
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**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
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