

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 11 July 2013

**Public Authority:** Information Commissioner's Office  
**Address:** Wycliffe House, Water Lane, Wilmslow,  
Cheshire, SK9 5AF

### Decision (including any steps ordered)

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1. The complainant has requested information relating to a complaint she made to the Information Commissioner's Office about West Berkshire Council (WBC).
2. The Commissioner's decision is that the Information Commissioner's Office (ICO) has correctly applied section 44(1)(a) to the withheld information.
3. The Commissioner does not require the public authority to take any steps as a result of this decision notice.

### Request and response

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4. On 31 October, the complainant wrote to ICO and requested information in the following terms:  
  
*"I would also be grateful if under the provisions of the FOI Act/ DPA Act/ EIR Regulations you could supply the further representations (excluding those already supplied) made by WBC relating to this complaint, including the correspondence/emails they supplied in support of their argument that.... Ideally I would like this information to be supplied in electronic format."*
5. The ICO responded on 27 November 2012. It explained that this request covered the time period from 20 December 2011 to the date the request was received ie 31 October 2012.

6. The ICO provided some of the information within the scope of the request but withheld two items of correspondence. It cited section 44(1)(a) of the FOIA as its basis for doing so.
7. Following an internal review the ICO wrote to the complainant on 17 December 2012. It maintained its original position.

### **Scope of the case**

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8. The complainant contacted the Commissioner on 10 January 2013 to complain about the way her request for information had been handled.
9. The Commissioner considers the scope of this case to be to determine if the ICO has correctly applied section 44(1)(a) to the information requested.

### **Reasons for decision**

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10. Section 44(1)(a) of the FOIA states;

"(1) Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it -

(a) is prohibited by or under any enactment"

11. In this case the ICO has explained that the enactment in question is the Data Protection Act 1998 (DPA) and specifically Section 59 of the DPA. Section 59 states that neither the Commissioner nor his staff shall disclose;

*"any information which:*

- a. has been obtained by, or furnished to, the Commissioner under or for the purposes of the information Acts.*
- b. relates to an identified or identifiable individual business, and*
- c. is not at the time of disclosure, and has not been available to the public from other sources,*

*unless the disclosure is made with lawful authority."*

12. The ICO explained that the withheld information was furnished in confidence by the public authority in order to provide the ICO with input and clarification in relation to the handling of the investigation into her complaint.

13. Section 59(2) states that there are five circumstances where the ICO could have lawful authority to disclose this type of information. This is an exhaustive list. The circumstances are:
  - (a) the disclosure is made with the consent of the individual or of the person for the time being carrying on the business.*
  - (b) the information was provided for the purpose of its being made available to the public (in whatever manner) under any provision of this Act,*
  - (c) the disclosure is made for the purposes of, and is necessary for, the discharge of-*
    - (i) any functions under this Act, or*
    - (ii) any Community obligation.*
  - (d) the disclosure is made for the purposes of any proceedings, whether criminal or civil and whether arising under, or by virtue of, this Act or otherwise, or*
  - (e) having regard to the rights and freedoms or legitimate interest of any person, the disclosure is necessary in the public interest.*
14. Section 59(1)(a) is satisfied because the information was provided to the ICO for the purposes of the Information Acts. The Information Acts consist of the Data Protection Act 1998 and by amendment the Freedom of Information Act 2000. The ICO would not have received this information had it not been the regulator of the DPA and FOIA and had been provided this information as part of the consideration of an alleged breach of that legislation.
15. Section 59(1)(b) applies to the 'Information Acts' and therefore the meaning of the word 'business' must be assessed in the context of those Acts to include public authorities. Therefore, the WBC is an identifiable business and section 59(1)(b) is satisfied.
16. In relation to section 59(1)(c), the information has not been disclosed to the public and therefore this does not provide a route to disclosure.
17. In relation to section 59(2)(b), this provides circumstances where lawful authority could be achieved. In relation to (a), the ICO did not have consent from WBC to disclose this information and in relation to (b) the information was not provided to the ICO for the purpose of being made public.
18. In relation to (c) it considered whether this applied in any way without reference to the ICO having received an information request because

section 44(1) FOIA sets out that 'Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it is prohibited by or under any enactment. It concluded that it is not required to disclose this information in order to discharge a function under the information Acts or a Community obligation. Furthermore, in relation to (d), a disclosure would not be for the purposes of proceedings.

19. Finally, in relation to (e), it stated that the public interest threshold in relation to this request is very high, not least because disclosure in contravention of section 59 by the Information Commissioner or his staff may constitute a criminal offence (s.59(3)). It confirmed that it considers that there is a strong public interest in information provided in confidence to the Information Commissioner remaining confidential, to enable him to carry out his statutory duty, and that this information will not be disclosed without lawful authority. It considers that to do so would undermine the regulatory function and powers of the ICO.
20. The Commissioner has viewed the withheld information and is satisfied that this has been furnished in order to provide input and clarification to the ICO in relation to its handling of the investigation into a complaint. In addition, the Commissioner also notes this could inform future investigations.
21. It has been provided in confidence by a public authority for the purpose of clarification and assisting the ICO in its handling and investigation of a specific case (FS50421845), in accordance with the provisions of FOIA, and as noted above potentially future cases under FOIA.
22. The ICO's response either mirrors, or so closely reflects the information furnished by the public authority that its disclosure would amount to disclosure of the content of the letter from WBC.
23. The Commissioner therefore finds that the ICO correctly applied section 44(1)(a) to the withheld information.

## Right of appeal

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24. 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)

25. 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.
26. 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 .....**

**Gerrard Tracey**  
**Principal Adviser, Complaints Resolution**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**