

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 19 March 2014

**Public Authority:** Wirral Metropolitan Borough Council

**Address:** Municipal Building  
Cleveland Street  
Birkenhead  
Merseyside  
CH41 6BU

#### Decision (including any steps ordered)

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1. The complainant has requested information from Wirral Metropolitan Borough Council ("the council") about the departure of a named council officer. The council withheld the information under the exemptions provided by section 40(2) and section 42(1) of the Freedom of Information Act ("the FOIA").
2. The Commissioner's decision is that the council has correctly applied the exemption provided by section 40(2). However, the Commissioner identified that the council's response was provided outside of 20 working days, and therefore breached the requirement of section 10(1).
3. The Commissioner does not require any steps to be taken.

#### Request and response

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4. On 5 October 2012, the complainant wrote to the council and requested information in the following terms:

*"Please provide all information you have which is connected to the departure of [redacted name]. This will relate to meetings, hearings, discussions, reports, and may be stored in the form of recorded minutes, verbatim and non-verbatim notes, emails, letters, memos, aide memoirs, documents, whether electronically or manually stored.*

*Please confirm and provide details of the existence of any payments made to [redacted name] in relation to his departure. This will indicate which position / role he was fulfilling and the total amount(s) of final salary pension monies released attached to that role. This will include precise amounts, the method of payment and the budget from which the payment was / is to be derived.*

*Please confirm details of the existence of any "compromise agreement" or "confidentiality agreement" or "compromise contract" or "confidentiality contract" agreed and signed by [redacted name] in relation to this departure or to his involvement in abuse or malpractice. This will include confirmation and description of any 'gagging clauses' and whether a positive / neutral / negative reference was provided regarding potential future employment.*

*In light of the [strangely] recent discovery by Wirral's [redacted position] [redacted name] that "compromise contracts" were NOT being recorded but were being arranged behind closed doors, beyond any councillor scrutiny and beyond view of the public:  
<http://democracy.wirral.gov.uk/documents...>*

*...please describe the exact process that was followed and supply the documents, reports, aide memoirs, notes, etc. that were created and recorded as part of the NEW process. Please take a deep breath before you do this, and ponder your overriding duty to act not out of self-interest, but fairly and impartially in the unbending service of us the public.*

*Please provide the names and addresses of all organisations / bodies involved in providing legal advice to [redacted name]. Please also provide details of meetings which occurred including times, dates and matters discussed.*

*Please confirm the details of any disciplinary charges either planned or levelled against [redacted name] in relation to any failures / malpractice / abuse which may or may not have brought about his departure from the Council.*

*If [redacted name] was provided with a "clean bill of health" regarding his time served at the council, please provide a copy of this / these document(s)."*

5. The council responded on 5 November 2012, and refused the request under section 22.

6. The council provided its internal review to the complainant on 7 June 2013. It revised its position and refused the request under section 40(2).

### **Scope of the case**

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7. The complainant contacted the Commissioner on 19 June 2013 to complain about the way his request for information had been handled.
8. During the Commissioner's investigation, the council advised that it considered part of the withheld information would also be exempt under section 42(1).
9. The Commissioner considers that the scope of the case to be whether the council was correct to rely on section 40(2) to withhold the requested information.

### **Reasons for decision**

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

10. 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."*

11. 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?

12. 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..."*

13. 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 information that has been withheld on this basis and accepts that the information in its entirety is the personal data of the individual who has been directly named in the complainant's request.

Would disclosure breach the data protection principles?

14. 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 to this case. The first principle states that personal data should only be disclosed in fair and lawful circumstances. 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*

15. When considering whether a disclosure of personal information 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.
16. In this case the council has explained that the named individual, who was previously a council officer, would not have a reasonable expectation of their personal data being disclosed into the public realm through an FOIA request. This is because the withheld information pertains to the individual's agreed retirement from the council, and the relevant negotiations that were made between his and the council's solicitors. Additionally, the individual is no longer employed by the council, and would therefore have an even greater expectation that his personal data would be held securely by the council.

*Consequences of disclosure*

17. The council considers that the disclosure of the withheld information would cause damage and distress to the individual, whose rights and freedoms would be interfered with should the information, concerning as it does negotiations and arrangements about retirement, be disclosed.

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

18. The council advised the Commissioner that it considers there to be limited legitimate interest in the disclosure of the withheld information. Information relating to the public cost relating to the individual's departure has already been disclosed to the complainant for the purpose of transparency and public accountability. The council has explained that it has released that information after having considered the decision reached in *Gibson v Information Commissioner and Craven District Council (EA/2010/0095)*, in which the Information Tribunal found that the legitimate interest of the public only outweighed the prejudice to the rights, freedoms or legitimate interests of the individual concerned to the extent that the information concerns the use of public funds. However, to release further contextual information regarding the negotiations that were undertaken would interfere with the rights and freedoms and legitimate interests of the individual.

Conclusion

19. 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.
20. The Commissioner has reviewed the withheld information, and has concluded that releasing this information would not be within the expectations of the individual to whom it pertains. Relevant to this conclusion is that part of the information is contained in legal exchanges that would have been undertaken with the expectation of legal professional privilege. It is highly likely that this would have increased the individual's expectation of privacy.
21. A legitimate public interest has already been met through the release of the public cost of the matter, in addition to further information that the Commissioner understands the council has disclosed in response to the request. The Commissioner considers that this is proportionate to the position that the individual held within the council. The disclosure of the

information that has been withheld would clearly infringe on the rights and freedoms of the individual in a manner that is not outweighed by any outstanding public interest.

22. In view of the above, the Commissioner finds that disclosing the withheld information would contravene the first data protection principal because it would be unfair. The council was therefore correct to withhold the information.
23. The Commissioner has identified that the withheld information in its entirety is exempt under section 40(2). He has therefore not needed to make decision in respect of the council's application of section 42(1).

### **Section 10(1) – Time for compliance**

24. Section 10(1) requires that a public authority must provide a substantive response within the time for compliance, which is 20 working days following the date of receipt.
25. In this case the Commissioner has identified that the council provided its response outside 20 working days, and therefore breached the requirement of section 10(1).

## Right of appeal

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26. 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: [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)

27. 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.
28. 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**