

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 16 July 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 about the departure of a senior officer from Wirral Metropolitan Borough Council ("the council"). The council disclosed some information, but withheld the remainder 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 withheld the information under 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

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4. On 17 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 (including the report of [redacted name], the external investigator), 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 full details of the existence of any*

*payments made to [redacted name] in relation to his departure. 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 NOW EX-Chief Internal Auditor [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).*

*Please redact documents as you see fit, and remove any personally sensitive information in accordance with the requirements of the Data Protection Act."*

*Please be mindful that as [redacted name] was the "Director of Law" and fulfilling that role, and paid / rewarded in line with that role as part of these as yet secret arrangements, I am making you aware that case law within this area, combined with the legitimate and compelling public interest demands a far greater degree of openness.*

*As yet, I can find no evidence either in the press or on the Council website that this departure has received ANY democratic scrutiny by elected officials. Please confirm which meetings took place. Presumably there will have been at least one gathering called to scrutinise the so-called "compromise contract" that was drawn up and agreed.*

*Please also confirm whether the July suspension of [redacted name] and his two colleagues was carried out correctly i.e. it followed to the letter the guidance laid out within the Local Government Act 2000 and was mindful of the extra protection that is afforded to Directors of Law and Finance.*

*If [redacted name], local gov troubleshooter [now departed] made an error in suspending the two officers [redacted names], and this has "blown up in his face" and potentially caused a situation in which we may find ourselves today i.e. shot in the foot; compromised; picking up the pieces, and paying off officers who have had their employment rights breached, then please confirm it if true, and release all the documents which relate to it."*

5. The council responded on 17 October 2013 and refused the request under section 14(1).
6. The council subsequently revised its response on 14 November 2013. It provided some information that fell within the scope of the request, and confirmed that it held further information which it considered to be exempt under section 40(2).
7. The council provided an internal review on 14 April 2014, in which it upheld its revised response.

## **Scope of the case**

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8. The complainant initially contacted the Commissioner on 3 January 2014 to contest the council's revised response. On the council providing an internal review, the complainant confirmed that he still wished to contest the council's position.

9. The Commissioner has identified that the withheld information in this case includes correspondence that took place between the council and the named individual, either directly or through the parties' legal representatives. It also includes the agenda and specific agenda items of a council committee in respect of the named individual, and a compromise agreement between the council and the named individual.
10. 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

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

11. 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."*

12. 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?

13. 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..."*

14. 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, and has identified that it relates to the named individual and their departure from the council's employment. On this basis, the Commissioner accepts that the information in its entirety is the personal data of the named individual.

Is any of the information sensitive personal data?

15. Section 2 of the DPA defines sensitive personal data as personal data that consists of information about the following:

- an individual's mental or physical health,
- their political opinions,
- their sex life,
- their racial or ethnic origin,
- their religious beliefs,
- whether they are a member of a trade union,
- the commission of alleged commission of an offence by them, or an proceedings for any offence they have committed or are alleged to have committed.

16. The Commissioner considers that a small proportion of the withheld information falls under one of the above categories, and therefore represents the sensitive personal data of the individual.

Would disclosure breach the data protection principles?

17. 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 for personal data, and schedule 3 of the DPA for sensitive personal data.
18. 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*

19. 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.

20. In this case the council has proposed that the named individual, who was previously a senior council officer, would not have a reasonable expectation of their personal data being disclosed into the public realm. This is because the withheld information pertains to the termination of the named individual's employment, and includes the context in which it took place and the relevant negotiations between the individual and the council.
21. However, the complainant has advised the Commissioner that he considers the high seniority of the individual, in conjunction with the amount of public money which is likely to have been paid to them, would affect the expectation of privacy that the individual would be likely to have in respect of the withheld information.

*Consequences of disclosure*

22. The council considers that the disclosure of the withheld information would have an unjustified adverse effect on the named individual, whose rights and freedoms as a data subject would be interfered with should the information, which relates to the termination of their employment, be disclosed.
23. However, the complainant's position is that the disclosure of the withheld information would inform the public about the level of "democratic scrutiny by elected officials" that the termination of employment had received. He also contends that the disclosure of the information would allow the public to consider whether the suspension of the individual had been carried out in accordance with the Local Government Act 2000.

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

24. The council has explained that it considers the legitimate public interest in the departure of the individual has been addressed through the prior disclosure of information, which included a report issued by the Employment and Appointments Sub-Committee, an Appendix referred to within the report, and the value of the termination payment that the individual received. The council has elaborated 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, the council's view is that the release of further contextual information regarding the individual's departure, including the negotiation that took place about this, would interfere with the rights, freedoms and legitimate interests of the individual.

25. The contrast with this, the Commissioner has noted the complainant's position that the senior status of the individual would attract a far greater expectation of information being disclosed, and that the disclosure of the information would allow public scrutiny of whether council processes, both legal and democratic, had been correctly followed.
26. In decision notice FS50438500 the Commissioner considered the distinction between information about the public role of an individual, and information about the individual's employment that was likely to be held within personnel files. As explained in that decision, the Commissioner and the First-tier Tribunal have previously placed a strong weight on the disclosure of personal information where this relates to the accountability of actions by senior public or civil servants in their official capacity. However, in the circumstances of this case, the requested information relates to the departure of the individual from their employment and the specific circumstances to this. Additionally, while the Commissioner appreciates the complainant's position that the public should receive assurance that the proper processes had been followed within the Council, the Commissioner is not aware of any public evidence that provides plausible suspicion that this has not taken place, and which would strengthen any legitimate interest in disclosure.

### *Conclusion*

27. 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.
28. However, having considered the circumstances of this case, the Commissioner has concluded that releasing the withheld information would not be within the expectations of the individual to whom it pertains. This is because the information represents the context behind the termination of an individual's employment, and the detailed discussion that took place between the individual and the council, both in person and through legal representatives. Additional to this, the Commissioner has identified that a small proportion of the withheld information meets

the definition of sensitive personal data, and as such he considers that this would increase the individual's expectation of privacy.

29. A legitimate public interest in the matter has been addressed through the release of information about the termination, including a committee report and the public cost of the matter. The Commissioner considers that this disclosure is proportionate to the position that the individual held within the council.
30. While the Commissioner appreciates the arguments that the complainant has proposed about the necessity of releasing information to assure the public that legal and democratic processes had been followed, there is no public evidence available to the Commissioner that suggests that the processes the council have followed have been improper, and which would increase the public interest in disclosure of the withheld information. The Commissioner has noted that included within the information that has been provided is a report on the matter by the council's Employment and Appointments Sub-Committee, which would appear to address the complainant's concern about the level democratic oversight.
31. The Commissioner further notes, as he did in his decision notice for FS50438500, that the release of the withheld information would have the potential to impede the council to deal effectively with personnel issues in the future. This is because the routine disclosure of such information could inhibit the negotiation that allows public authorities to manage the departure of senior officers in a cost effective manner.
32. 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, and that the application of section 40(2) was correct.



## **Right of appeal**

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33. 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)

34. 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.
35. 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**  
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**SK9 5AF**