

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 24 August 2015

**Public Authority:** Wirral Borough Council  
**Address:** Town Hall  
Brighton Street  
Wallasey  
Wirral  
CH44 8ED

#### **Decision (including any steps ordered)**

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1. The complainant has requested a copy of an incomplete internal audit investigation report held by the Council. The Council considered this information exempt on the basis of section 40(2) and 36(2)(c) of the FOIA.
2. The Commissioner's decision is that the section 36 exemption is engaged but the public interest favours disclosure. However, he also finds the section 40(2) exemption to be engaged in relation to the withheld information which constitutes personal data. The Commissioner finds this to be the names of current and ex-Council employees.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Disclose the withheld information with redactions made under section 40(2) for the names of individuals within the report.
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 pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Request and response

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5. On 20 August 2014, the complainant wrote to Wirral Borough Council ("the Council") and requested information in the following terms:

*"Mrs Lyons emailed myself this week the unredacted paragraph J of the Timmins review. See also the Agenda supplement of the Audit and Risk Committee of 22 July 2014. page 48. I quote the paragraph*

*'There is on file a previous, and much more detailed, draft report which includes numerous evidential appendices ..... However for the avoidance of doubt I would not consider that this report could be released into the public domain, and has, in any case, been superseded.'*

*This review was conducted in autumn 2012. The D Garry report and, now, the Grant Thornton reports have entered the public domain. The Grant Thornton report contradicts the D Garry report.*

*I believe that this original evidenced file is the work of an employee who left Counter Fraud in January 2012, that it is a true representation of the facts in the BIG case and that it would directly highlight malpractice and subversion by Mr Garry. Mr Garry at the November 2011 whistleblower meeting re BIG was merely the note-taker and the employee who left January 2012 was leading the investigation, posing the questions whilst Mr Garry remained silent.*

*1) I ask you for a suitably redacted copy of the file referenced in the quote from the Timmins review."*

6. The complainant followed up his request on 21 August 2014 and added to it by asking:

*"If you find yourself unwilling to provide the full file, of the 'superseded' report, until the Information commissioner has considered the same, then please provide in the interim:*

*1) Department producing report i.e. Internal Audit or Finance or Invest Wirral etc*

*2) Dates of the report. Computer date stamps will allow you to provide*

*a) commencement date of the work*

*b) date of last work done*

*c) the date at the head of the report*

*3) Was a copy of this 'superseded' report provided to the Grant Thornton investigators?"*

7. Following intervention from the Commissioner, the Council eventually responded to this request on 26 November 2014 and stated that the information that was held was exempt on the basis of section 36(2)(c) of the FOIA. This information was the earlier draft report with detailed evidential appendices from 2012 that was superseded by an external investigation report conducted by Grant Thornton. The Council also sought to rely on section 40(2) to withhold some personal information.
8. The complainant requested an internal review of this decision on 2 December 2014. Unfortunately despite further intervention from the Commissioner no internal review was conducted by the Council and, in the circumstances, the Commissioner accepted this for investigation.

### **Scope of the case**

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9. The complainant contacted the Commissioner on 7 February 2015 following the failure of the Council to conduct an internal review.
10. The Commissioner considers the scope of his investigation to be to determine if the section 36 and 40 exemptions have been correctly applied and provide a basis for withholding the information within the scope of the request.

### **Reasons for decision**

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#### **Section 36(2)(c)**

11. Section 36(2) 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 –*

*(b) 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, or*

*(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs."*

12. The exemptions listed in section 36(2) are qualified exemptions so are subject to the public interest test. However, before considering the public interest the Commissioner must first consider whether any of the exemptions are engaged.
13. For any of the exemptions listed as section 36(2) to apply the qualified person for the public authority must give their reasonable opinion that the exemption is engaged. The qualified person for the Council is the Chief Executive. The Council has informed the Commissioner that the Chief Executive was provided with relevant arguments and the withheld information in order to form his opinion. The Commissioner is satisfied the opinion has been sought and provided. The Commissioner has next gone on to consider whether the opinion of the qualified person was a reasonable one.
14. The Commissioner has issued guidance on section 36 of the FOIA. It states the following: "*The most relevant definition of 'reasonable' in the Shorter Oxford English Dictionary is 'In accordance with reason: not irrational or absurd'. If the opinion is in accordance with reason and not irrational or absurd – in short, if it is an opinion that a reasonable person could hold – then it is reasonable.*"<sup>1</sup>
15. In order to determine whether any of the subsections of 36(2) is engaged the Commissioner will consider:
  - whether the prejudice claimed relates to the specific subsection of section 36(2) that the Council is relying on;
  - the nature of the information and the timing of the request; and
  - the qualified person's knowledge of or involvement in the issue.
16. The Council has stated it considers the withheld information to be exempt on the basis of section 36(2)(c). It explained that in determining that disclosure would be likely to prejudice the effective conduct of public affairs it had referred to the Commissioner's guidance and in particular noted that it was appropriate to consider the effect of disclosure on the effective use of resources.
17. In considering this point the Council was mindful of the large volume of information considered at its special meeting of the Audit and Risk

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<sup>1</sup> Information Commissioner's section 36 FOIA guidance, [http://www.ico.gov.uk/for\\_organisations/guidance\\_index/~media/documents/library/Freedom\\_of\\_Information/Detailed\\_specialist\\_guides/section\\_36\\_prejudice\\_to\\_effective\\_conduct\\_of\\_public\\_affairs.ashx](http://www.ico.gov.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/section_36_prejudice_to_effective_conduct_of_public_affairs.ashx), November 2011, page 6.

Management Committee on 8 October 2014 and these documents are publicly available on the Council's website<sup>2</sup>. The documents that are in the public domain include the reports that superseded the one that is the subject of this request.

18. The Council has pointed to the decision of the Information Tribunal in the case of *McIntyre v Information Commissioner and the Ministry of Defence*<sup>3</sup> in which the Tribunal acknowledged that the section 36(2)(c) exemption was intended to apply to cases where the disclosure of information would be likely to prejudice a public authority's ability to offer an effective public service or to meet its wider objectives due to the disruption caused by the disclosure or the diversion of resources in managing the impact of disclosure.
19. The qualified person therefore considered that disclosure of the requested information would prejudice the effective conduct of public affairs as disclosure of an incomplete draft internal audit report would prejudice the Council's ability to offer an effective internal audit service and cause disruption because of the diversion of resources to manage the impact of disclosure.
20. Having considered the points outlined above the Commissioner is satisfied that the opinion of the qualified person is a reasonable one. Therefore he considers that section 36(2)(c) is engaged. He will now go on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

*Public interest arguments in favour of disclosure*

21. The Council has acknowledged the public interest in the transparency of the audit process and the need to make information available to ensure openness of the process.
22. The complainant has also argued that it must be in the public interest to disclose the earlier internal draft report to show whether or not the correct process was followed, particularly by the Council's internal audit department, and this cannot be achieved solely by looking at the final external reports.
23. The complainant has explained his reasons for believing the Council's internal audit department produced a report which reached the wrong conclusion and that by disclosing the internal audit report and being able to compare it to the external report it would allow the public to

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<sup>2</sup> <http://democracy.wirral.gov.uk/ieListDocuments.aspx?CIId=119&MIId=4995&Ver=4>

<sup>3</sup> EA/2007/0068

scrutinise the work of the internal audit department and ensure it is following due process.

*Public interest arguments in favour of maintaining the exemption*

24. When making a judgement about the weight of the public authority's arguments under section 36(2), the Commissioner will consider the severity, extent and frequency of prejudice to the effective conduct of public affairs.
25. At the time of the request the Council argued that disclosure of draft incomplete internal audit reports would interfere with the integrity of the investigation process and cause diversion of resources in managing the impact of disclosure.
26. Whilst the Council recognised the public interest in transparency in the audit process it considered that the public interest in this had been met by the disclosure of the report that superseded this and other documentation. It considered that disclosure of the earlier draft internal report could "*potentially cause confusion and mislead where only partial information has been included in a draft report.*"

*Balance of the public interest arguments*

27. The Commissioner firstly wants to note that the arguments presented by the Council in support of the application of the section 36 exemption have been limited. As such he has taken into account the points made by the Council and has followed some of the arguments through to understand the position of the Council.
28. He also wants to clarify the chronology of the production of the various reports referred to by the Council. The withheld information consists of a draft Executive Summary, the draft Report and Appendices, all compiled by the Principal Auditor for the Council at the time. This Report was produced in January 2012. The investigation was later taken over by the Council's Chief Internal Auditor and a separate report was produced. It is this first draft report which was not finalised which is the subject of the request and has been withheld by the Council.
29. The Council's main argument in support of its decision to withhold the information is that of the potential effect of disclosure on the ability of the Council to offer effective public services and the diversion of resources in managing the effect of disclosure. However, the Council has not explained why the disclosure of the specific information in question would be likely to have this effect on the conduct of public affairs.
30. The Commissioner considers it important to highlight that the report in question was an internal audit report which was written following

concerns raised by a whistleblower into the use of BIG (Business Investment Grants) at the Council. An external auditor was then appointed to produce a report into this issue. The arguments presented by the complainant focus on the serious nature of the allegations made by the whistleblower and the public interest in the disclosure of all documents which show that the Council internally investigated these serious allegations as well as employing external auditors to investigate the matter.

31. At the time of the request and by the time of the Council's initial refusal notice the incomplete internal audit report was several years old, having been written in January 2012 and superseded by other reports. At a special meeting of the Audit and Risk Management Committee on 22 July 2014 a list of supporting documents with links was put forward<sup>4</sup>. This included redacted copies of the Grant Thornton BIG report dated 2 May 2014 and the Internal Audit Report. As such the Commissioner is satisfied at the time the request was made there was already substantial information in the public domain about this issue and there is evidence to suggest there had been local media interest in this issue for some time, certainly going back to 2013<sup>5</sup>.
32. The Commissioner considers this supports the public interest arguments in favour of disclosing the internal incomplete audit report as it shows there was genuine concern and interest in local residents understanding the issues around the business investment grants given out by the Council and in ensuring that thorough auditing took place by the Council to ensure no wrongdoing had taken place. Whilst the employment of external auditors and the production of the Grant Thornton report does go some way to meeting this public interest the Commissioner accepts that it is also important that the Council demonstrate it has the mechanisms in place to conduct internal investigations into allegations of wrongdoing.
33. Balanced against this, the Commissioner has considered the arguments the Council has put forward that disclosure would cause a diversion of resources in managing the impact of disclosure and may impact on the integrity of the investigation process. The Council has not specifically explained why the disclosure of the incomplete internal audit report would have this impact but the Commissioner has assumed it is due to the incomplete nature of the report and the fact it has been superseded by other reports. However, when making a judgement about the weight

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<sup>4</sup> <http://democracy.wirral.gov.uk/mgAi.aspx?ID=26181#mgDocuments>

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[http://www.wirralglobe.co.uk/news/10289258.Investigation\\_into\\_Wirral\\_business\\_grant\\_funding\\_handed\\_over\\_to\\_police/](http://www.wirralglobe.co.uk/news/10289258.Investigation_into_Wirral_business_grant_funding_handed_over_to_police/)



of these arguments the Commissioner has to consider the severity, extent and frequency of this potential prejudice to the effective conduct of public affairs.

34. As the Council has not provided any further explanations for its belief that disclosure would be likely to prejudice its internal investigation processes and cause a diversion of resources the Commissioner has considered whether the issue is still 'live' and how extensive the impact on the conduct of public affairs would be when determining how much weight should be given to these arguments.
35. The Commissioner understands that at the time of the request the external auditors report and other internal reports had been completed on this issue. As the incomplete internal audit report which has been withheld was completed in 2012 and the other reports which superseded this are also now publicly available it would seem this issue is no longer still 'live' in that the auditing of the BIG process has been completed and the findings made public.
36. The Commissioner has therefore focused his attention on whether, despite the audit process being completed, disclosure of this incomplete earlier audit report would have a substantial impact on the Council's internal investigation process. It cannot be argued it would impact on the internal investigation process of the issue in this case as it seems the process has been completed so it can only be argued that there may be an impact on future internal investigations.
37. Arguments of this nature generally refer to the fact that disclosure of incomplete internal reports may impact on the production of future reports. Due to the incomplete nature of this report the Commissioner is not convinced that disclosure would impact on the investigation process in the future as the Council would still be required to have an internal audit process to investigate allegations and internal issues.
38. With regard to the argument that disclosure would divert resources in managing the impact of the report being made public; the Commissioner accepts that there will inevitably be some diversion of resources but is not minded to accept the scale of this would be such that it would impact on the effective conduct of public affairs. He does not consider this argument alone to carry enough weight to justify withholding the information.
39. The Commissioner does not give much weight to the arguments presented by the Council in favour of maintaining the exemption. Conversely, he does recognise the importance of transparency and accountability in this case and considers this to carry significant weight due to the nature of issues which were being investigated and he



believes full disclosure of the internal reports, incomplete or otherwise, will assist in assuring the public that the issues have been fully investigated and allow for scrutiny of the Council's internal processes to ensure they are robust.

40. The Commissioner therefore considers the public interest in this case favours disclosure. However, the Council has also applied section 40(2) to withhold some personal information from the report and the Commissioner will now go on to consider the application of this exemption.

### **Section 40(2)**

41. Section 40(2) states that a public authority is not obliged to disclose information if to do so would constitute a disclosure of personal data and if this disclosure would breach any of the data protection principles or section 10 of the Data Protection Act 1998 (DPA).
42. The Council has identified some information within the report which it considers to be personal data. The Council has informed the Commissioner it considers that all names of employees and ex-employees of the Council to be personal data and therefore exempt on the basis of section 40(2).
43. The Commissioner accepts that the names of individuals are personal data and he has gone on to consider whether disclosure of this information would breach any of the data protection principles.
44. The Council has argued that disclosure of these names would breach the first data protection principle in that it would be unfair. The first data protection principle states that personal data should be processed fairly and lawfully and must satisfy one of the conditions listed in schedule 2 of the DPA.
45. The Commissioner has firstly considered whether disclosure would be fair and in assessing fairness he has taken into account the reasonable expectations of the individuals concerned and the consequences of disclosure to the individuals. Balanced against this he has also considered the legitimate public interest in disclosure.
46. The Council has explained that most of the employees who are named in the report or who contributed to the report would have not expected their names to be released into the public domain; they would have had no reasonable expectation of disclosure.

47. The Commissioner has produced guidance on information relating to public authority employees<sup>6</sup>. This guidance recognises that public authority employees should expect that some information about them may be published as there is a legitimate public interest in accountability and transparency. However, the Council argues that in this case none of the employees or ex-employees were in senior positions and were unlikely to have any financial or managerial responsibilities which would provide an expectation of disclosure or a legitimate interest in disclosure.
48. The Commissioner is not convinced that disclosing the names of employees and ex-employees within the report will contribute to the understanding of the issues and this would not outweigh the unwarranted distress which may be caused to individuals by disclosing information that they provided with no expectation of disclosure.
49. The Commissioner therefore finds that disclosure of the personal information within the report would be unfair and would thus contravene the first data protection principle. As such, he finds that the exemption at section 40(2) is engaged in respect of the personal information in the report.

## **Conclusion**

50. The Commissioner finds that the section 36 exemption is engaged but the public interest favours disclosure. However, he also finds the section 40(2) exemption to be engaged in relation the information which constitutes personal data in the withheld information. The Commissioner finds this to be the names of current and ex-Council employees. The Commissioner therefore now requires the Council to disclose the withheld information with the names of individuals redacted under section 40(2).

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[https://ico.org.uk/for\\_organisations/guidance\\_index/~media/documents/library/Environmental\\_info\\_reg/Practical\\_application/section\\_40\\_requests\\_for\\_personal\\_data\\_about\\_employee\\_s.ashx](https://ico.org.uk/for_organisations/guidance_index/~media/documents/library/Environmental_info_reg/Practical_application/section_40_requests_for_personal_data_about_employee_s.ashx)

## Right of appeal

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51. 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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

52. 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.
53. 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 .....**

**Pamela Clements**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
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