

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 April 2017

Public Authority: Wirral Metropolitan Borough Council

Address: Town Hall
Brighton Street
Wallesey
Merseyside
CH44 8ED

Decision (including any steps ordered)

1. The complainant has requested a copy of a report in to the treatment of a group of whistle-blowers. The Council applied section 36(2)(b) to the report in its entirety and, during the course of the Commissioner's investigation, it also applied section 40(2) to some parts of the report.
2. The Commissioner's decision is that the Council is entitled to rely on section 40(2) to withhold the majority of the report. There is however a limited amount of information which the Commissioner has found cannot be withheld under either section 40(2) or section 36(2)(b) and therefore should be disclosed.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the information set out in the confidential annexe.
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

5. On 5 August 2016 the complainant emailed the Council via the WhatDoTheyKnow website and referred to a report, the terms of reference for which had been the subject of a previous request. That report was of an enquiry lead by [named individual] in to the way a group of whistle blowers had been treated by the Council The complainant went on to make the following request:
6. "Can I please request a copy of the final report pertaining to the Terms of Reference contained within this Freedom of Information Act 2000 request.

<https://www.whatdotheyknow.com/request/n...>

(https://www.whatdotheyknow.com/request/nick_warren_investigation_terms#outgoing-508282)

I understand that a draft was completed in April 2015 and returned to Mr Warren by senior officers of Wirral Council for him to consider additional information.

I am assuming that in the intervening 16 months he has been able to complete this report."

7. On 3 October 2016 the Council responded. It refused to provide the information under section 36 on the basis that its disclosure would inhibit the free and frank provision of advice or the free and frank exchange of views for the purpose of deliberation.
8. As the matter had already been dealt with by the Council's Monitoring Officer it agreed that there was no need for the matter to go through the Council's internal review procedure before being investigated by the Commissioner.
9. During the Commissioner's investigation the Council also applied section 40(2) – third party personal information to some of the requested information.

Scope of the case

10. The complainant contacted the Commissioner on 5 October to complain about the way his request for information had been handled.
11. The Commissioner considers that the matter to be decided is whether any of the requested information can be withheld under either of the exemptions cited by the Council. The Council is relying on section 36 to withhold the report in its entirety. Section 40(2) has only been applied to some of the information contained in the report. The

Council has not specified which particular parts are being withheld under section 40(2) however having read the report the Commissioner considers the vast majority of the report constitutes personal data. She also considers the Council's application of section 40(2) to be stronger than its application of section 36. Therefore the Commissioner will start by looking at section 40(2) before going on to consider whether any information which is not protected by section 40(2) can be withheld under section 36.

Reasons for decision

Section 40(2) third party personal data

12. So far as is relevant, section 40(2) of FOIA states that personal data of someone other than the person making the request can be withheld if its disclosure to the public would breach any of the data protection principles set out in the Data Protection Act 1998 (DPA). In this case the Council is arguing that the disclosure of the third party personal data contained in the report would breach the first data protection principle. However before looking at the first principle the Commissioner will first consider the extent to which the report contains the personal data of third parties.
13. Personal data is defined in section 1 of the DPA as being data which relates to a living individual who can be identified from that data or from that data and any other information which is in the possession of the data controller or which is likely to come in to the possession of the data controller.
14. 'Data controller' is a technical term used in the DPA. In broad terms, it refers to the person who holds the information and decides how it is to be used. Since disclosures made in response to a freedom of information request are treated as being a disclosure to the world at large, the data controller is each and every member of the public. Therefore although the report itself does not include the names of those involved the Commissioner has to consider whether there is other information available that some member of public could access which would allow them to identify the parties involved. This may include information which only someone who is reasonably determined is likely to track down as well as information which is in the public domain and already in the easily available.
15. The thirty four page report (including its appendix) was produced by an external consultant following his investigation in to the consequences for a group of whistle-blowers following their raising of concerns over the process following by a senior officer during a procurement exercise which resulted in the outsourcing of Council

services. It includes findings on the actions of senior officers towards the whistle-blowers and details the repercussions for those whistle-blowers. It contains significant biographical information, particularly about the whistle-blowers themselves and expressions of opinion about both managers and whistle-blowers.

16. The Commissioner is satisfied that the majority of the report relates to both managers and whistle-blowers. Since much of the reports explains the events following the whistle-blow it describes how one party behaved to another or one person's perception of another. Therefore, more often than not information about these parties is intertwined. The most notable exception to this being the short appendix to the report which sets out the personal consequences of their actions for each of the whistle-blowers in turn. This, obviously, relates solely to the particular whistle-blower in question.
17. The Commissioner has conducted basic internet searches. The whistle-blowing generated a great deal of local media interest and there is still easy access to newspaper reports on those events. These reports name the most senior manager involved. There are also reports of earlier investigations on line and, unfortunately, one of the whistle-blowers' identity was disclosed in Council papers by error. The Commissioner is therefore satisfied that some of the main parties discussed in the report can be easily identified. There is also sufficient biographical information about other parties contained in the report which would assist a determined member of the public to identify the job roles of the other individuals concerned. There is a realistic possibility that this information could be combined with information contained in number of internet blogs which focus on the Council, or obtained through other local enquiries, to identify the remaining parties. The Commissioner is therefore satisfied that those parts which relate to managers and whistle-blowers can be combined with other information to identify them. This information constitutes personal data as defined by the DPA.
18. The next question is whether the disclosure of this personal data would breach the first data protection principle. This states that personal data shall only be processed fairly and lawfully, and in particular shall only be processed if a condition in Schedule 2 of the DPA can be met.
19. The Commissioner's approach when considering the first principle is to start by looking at whether the disclosure would be fair. Only if the Commissioner finds that it would be fair will she go on to look at lawfulness, or whether a Schedule 2 condition can be satisfied.
20. 'Fairness' is a difficult concept to define. It involves consideration of:

- The possible consequences of disclosure to the individual.
- The reasonable expectations of the individual regarding how their personal data will be used.
- The legitimate interests in the public having access to the information and the balance between these and the rights and freedoms of the particular individual.

Often these factors are interrelated.

21. The request for the report was prompted by an earlier request which resulted in the terms of reference of the report being disclosed. It is clear from these terms of reference that it has been alleged that the names of the whistle blowers were disclosed by Council officers (this is apart from the accidental disclosure of one whistle-blower's name in Council papers, see para 17). One of the issues at the heart of the report is the consequences for the whistle-blowers of being identified as such and details the impact on the careers of those whistle-blowers. From this it is very clear that being identified as a whistle-blower can have serious ramifications. Therefore, having accepted that the contents of the report would allow a determined individual to identify the whistle-blowers, the Commissioner is satisfied that its disclosure would renew interest in the issues and so increase the potential for the whistle-blowers to suffer discrimination. The Commissioner is satisfied that there is a risk that those involved would have real concerns over the disclosure of this information and would suffer distress as a result.
22. As well as examining the treatment the whistle-blowers received from the Council and it is also clear from the terms of reference that its conclusion would assist the Council to determine what if any action it should take to address the situation, including the award of compensation. Commissioning of the report was recognition of the concerns over how the whistle-blowers were treated and therefore it would be strange to disclose the report if this was to add to the problems which it is claimed they suffered. In light of this the Commissioner is satisfied that the whistle-blowers would not have any expectation that any of their personal data would be disclosed. This is particularly so in respect of the appendix to the report which discusses the impact being a whistle-blower has had on their private and family lives.
23. Moving on to the third test of fairness bulleted in paragraph 20, the Commissioner recognises that there is a legitimate interest in the public having access to information that would shed light on the Council's actions and the conduct of some of its senior officers. The provisions of the Public Interest Disclosure Act 1998 provides

protection to whistle-blowers and this is recognition of the value of having a mechanism in place which allows employees to raise genuine concerns in a responsible manner. Therefore there is a public interest in disclosing information which reveals how the Council did or did not safeguard the interests of these whistle-blowers.

24. However the consequences for the whistle-blowers could be significant if their personal data was disclosed. The Commissioner finds that protecting their interests override the public interest in releasing the information.
25. The Commissioner will now consider the personal data of the senior council officers referred to in the report. Although not named in the report itself the Commissioner is satisfied that its disclosure would enable their identification, and in one particular case the officer concerned could be identified by the most rudimentary of internet searches. When considering the fairness to these individuals of disclosing their personal data it is important to note that much of their personal data is inextricably linked to that of the different whistle-blowers, so it would be difficult to release it without exposing the whistle-blowers to the risks already discussed.
26. The consequences of disclosing the personal data for the senior officers involved would potentially be twofold. It would place the report's findings in respect of their conduct in the public spotlight again. This could be an uncomfortable and stressful experience for them. Secondly their association with the events in question could have an impact on their professional careers.
27. The issues addressed by the report relate to the professional conduct of these senior officers. The normal expectation of someone who was the subject of allegations about their conduct would be for any investigation to be conducted in confidence and that its findings would only be disclosed to those with responsibility to action any findings. Furthermore, it is very clear from correspondence between one of the officers and the Council that he had no expectation that information about his involvement in these matters would be made public by the report's disclosure.
28. Looking at the third test, there is an important public interest in understanding the way the Council treated the whistle-blowers. However this again has to be balanced against the impact on the senior officers. Although more finely balanced than when applying this test to the case of the whistle-blowers, the Commissioner is satisfied that the right of senior officers to have their expectations that an investigation into their actions would remain confidential respected, outweighs the legitimate interest of disclosing the information.

29. In conclusion the Commissioner finds that disclosing the personal data of either the whistle-blowers or the senior officers, which is often intertwined, would be unfair and so breach the first data protection principle of the DPA. It is therefore exempt under section 40(2) of the FOIA.
30. Although the Commissioner has found that the Council is entitled to withhold the personal data from the report there is other information within it which does not constitute personal data. It is therefore necessary to consider whether this information can be withheld under section 36.

Section 36 – prejudice to the conduct of public affairs

31. So far as is relevant, section 36(2)(b) provides that information is exempt if, in the reasonable opinion of the qualified person, its disclosure 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 purpose of deliberation.
32. Although subparagraphs (i) and (ii) are each exemptions in their own right it makes sense, in this particular case, to consider them together to avoid unnecessary repetition of circumstances under which they were applied the reasons for their application.
33. Section 36 is unique in that its application depends on the opinion of the qualified person that the inhibition envisaged would, or would be likely to occur. In determining whether the exemption was correctly engaged by the Council, the Commissioner is required to consider the qualified person's opinion as well as the reasoning that informed the opinion. Therefore the Commissioner must:
 - Ascertain who the qualified person is,
 - Establish that they gave an opinion,
 - Ascertain when the opinion was given, and
 - Consider whether the opinion was reasonable.
34. The qualified person for the Council is its monitoring officer. The Council has stated that his opinion was sought on the 9 August 2016. It is clear that he had formed his opinion by the 3 October 2016, the date of the Council's refusal notice which was sent in the name of the monitoring officer himself.

35. It is now necessary to consider whether his opinion was reasonable. To do so the Commissioner relies on the Oxford English Dictionary's definition of reasonableness, that is, the opinion must be "in accordance with reason; not irrational or absurd". There can be more than one reasonable opinion on a matter and it is not necessary for the Commissioner to agree with the qualified person's opinion. The qualified person's opinion can only be considered unreasonable if it is one that no reasonable person could hold.
36. The exemption can be engaged on the basis that the inhibition to the free and frank provision of advice or exchange of views either 'would' or 'would be likely' to occur. It is clear from Council's submission to the Commissioner and the refusal notice issued to the complainant that the qualified person considers the inhibitions envisaged would occur. This is taken to mean that he considers the likelihood of the inhibition occurring to be more probable than not, i.e. that there is a more than 50% risk of the inhibition occurring.
37. Therefore the Commissioner will consider whether it is reasonable for the qualified person to hold the opinion that disclosing the information in question would inhibit the free and frank provision of advice, or free and frank exchange of views.
38. The information being considered under section 36 is that which does not constitute personal data. Although it relates to the whistle-blowers, its focus is on the Council and there is insufficient information within it to aid any one identify the whistle-blowers. The information is very limited and consists of the reports introduction¹, an assessment of the benefits to the Council's procedures which came about as a result of the whistle-blowers' actions and a very brief conclusion. In total this amounts to a little under three and a half pages, from the total of thirty four pages.
39. The Council has explained that when forming his opinion the qualified person had access to the report itself and as the Council's monitoring officer he had a wealth of knowledge about the background of the report and the rationale for it. The manager responsible for the team dealing with information requests discussed the request and the earlier request which resulted in the report's terms of reference being disclosed with the monitoring officer. The discussion included arguments for not relying on either of the two section 36 exemptions as well as the grounds in favour of its application.
40. Based on this explanation the Commissioner is satisfied that the qualified person followed a reasonable process when applying the exemption.

¹ One sentence from paragraph 4 has been removed under section 40(2) on the basis that its inclusion could assist someone determined to identify the whistle-blowers.

41. The Council has only provided the Commissioner with a limited explanation of its grounds for applying the two exemptions. However further details are contained in the refusal notice it issued. The qualified person argues that disclosing the information would fundamentally undermine the discussion of sensitive issues by senior officers and other third parties. He continues that discussions with those individuals would have been inhibited had they not believed that their commentary and opinions would be kept confidential. This appears to relate to the contribution made by officers and others to the investigation which is the subject of the report. The Commissioner accepts that it is not unreasonable to hold this view, particularly in respect of the report in its entirety. She also accepts that these contributions were provided to assist the report's author to fully consider, sometimes conflicting views on how the whistle-blowers were treated. As such the Commissioner is satisfied that section 36(2)(b)(ii) is engaged, ie that the qualified person's opinion that the disclosure would inhibit the free and frank exchange of views for the purposes of deliberation, is a reasonable one.
42. It is less clear how the qualified person envisages the disclosure of the report would inhibit the free and frank provision of advice. As part of its public interest arguments the Council has explained that the issues to which the report relates are still live. This means it would still need to discuss the contents of the reports and decide what, if any, actions it needed to take to remedy any failings identified by the report. The Council has also referred to the 'chilling effect' and its impact on future discussion. The 'chilling effect' is the term used to convey the idea that if officers took the disclosure of one set of information to signal that other information, usually on the same subject or of similar sensitivity, could also be disclosed, they would be less candid when discussing those issues in the future. The Commissioner accepts that it is reasonable for the qualified person to hold such an opinion. Furthermore as these future discussions are likely to involve the provision of advice, she is satisfied that section 36(2)(b)(i) is engaged ie that the qualified person's opinion that the disclosure would inhibit the free and frank provision of advice is a reasonable one.
43. Having concluded that both section 36 exemptions are engaged the Commissioner has gone on to consider the application of the public interest test.

Public interest

44. The public interest test is set out in section 2 of the FOIA. It provides that even though information may be covered by an exemption, that information can only be withheld if, in all the circumstances of the

case, the public interest in maintaining the exemption outweighs the public interest in disclosure.

45. The Commissioner's approach to the competing public interest arguments in this case draws heavily upon the Information Tribunal's Decision in the case of *Guardian Newspapers Limited and Heather Brooke v Information Commissioner and BBC (the Brooke case)*². The Commissioner notes, and adopts in particular, the Tribunal's conclusions that, having accepted the reasonableness of the qualified person's opinion the Commissioner must give weight to that opinion as an important piece of evidence in his assessment of the balance of the public interest.
46. Although the Commissioner has accepted the qualified person's opinion to be a reasonable one in respect of the information now under consideration, and therefore will give some weight to that opinion, she will reach her own view on the severity, extent and frequency of that inhibition.
47. The Council has argued that there is a public interest in reducing any chilling effect when matters of particular sensitivity are being discussed. It has emphasised the sensitive nature of some of the issues addressed by the report and the fact that the council is still in the process considering what a fair and reasonable response to it would be.
48. In assessing the public interest it is important to have regard for the actual information in question. As discussed in paragraph 38, this information is limited to the introduction, a short section on the benefits gained from the whistle-blowing and the report's conclusion. These sections do not contain any discussion of the actual investigation or the opinions expressed by the various individuals. The focus is on the performance of the Council as a whole. In the Commissioner's opinion this makes their contents significantly less sensitive than the rest of the report which details the actions of specific individuals, their experiences and includes commentary by others on their performance.
49. In light of the reduced sensitivity of this information the Commissioner finds that its disclosure would not produce a significant or severe chilling effect, even in respect of ongoing discussions to decide what action, if any, the Council should not take. Therefore the Commissioner gives little weight to the public interest in maintaining the exemption in respect of this information.

² EA/2006/0011; EA/2006/0013

50. In favour of disclosing the information the Council has recognised the general public interest in the promotion of accountability in relation to the activities of public authorities.
51. The Commissioner considers that this very much underestimates the public interest in the information's disclosure. Even though the information in question is very limited, it does reveal how the Council as a whole responded to the whistle-blowers and so says something about the culture which existed at that time. There is a value in allowing the public, particularly those served by the Council, to understand that culture. This ability to hold the Council to account for any failings will make it more likely that any necessary lessons are learnt.
52. The Commissioner finds that the public interest in maintaining the exemption does not outweigh the public interest in disclosure. Therefore the exemption cannot be maintained in the public interest and the information should be disclosed. The exact information to be disclosed is set out in a short confidential annex which will be provided only to the Council.

Right of appeal

53. 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

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

54. 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.
55. 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

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