

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 15 February 2012

**Public Authority:** Wirral Borough Council

**Address:** Town Hall  
Brighton Street  
Wallasey  
Merseyside  
CH44 8ED

### Decision

---

1. The complainant has requested information about costs associated with the early retirement of the Chief Executive of Wirral Borough Council. The public authority stated that some of the requested information was not held, and refused some information under the provisions of the exemption at section 40 of FOIA: that disclosure would breach the data protection principles. The complainant has appealed against the refusal of information, and about the public authority's claim that some specified information is not held by it.
2. The Commissioner's decision is that Wirral Borough Council has incorrectly applied the exemption in this case and has therefore breached section 1(1)(b) of FOIA. He finds that the public authority correctly stated that some of the information requested was not held.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Disclose the information withheld under section 40 of FOIA – namely: a report which was considered as Agenda item 3 by the Council's Employment and Appointments Committee on 17 August 2010
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 3 January 2011, the complainant wrote to Wirral Borough Council (the council) and requested information in the following terms<sup>1</sup>:

*"A. Specifically, I wish you to provide me with copies of all information you hold that refers to and/or is about the former Chief Executive, Steve Maddox, including the above mentioned report submitted by the Director of Law, HR and Asset Management, all emails, letters, memos, notes, reports, aide memoirs, interviews, etc, in which he is called 'Steve Maddox', 'S Maddox', 'Steve', 'SM' or by some other term or where he is not expressly indentified but can be recognised from the context, previous email exchange and/or surrounding circumstances, etc. that led to the decision that it was in the Council's best interests to pay Mr Maddox 'additional pension costs'.*

*B. Clear calculations displaying the precise total these 'additional pension costs' will amount to, and a clear indication of the budget(s) from which they will be drawn.*

*C. Copies of all correspondence between the Director of Finance and the District Auditor in relation to this particular matter, including details of specifically what the 'Audit Commission's requirements' are in relation to the payment of 'additional pension costs'."*

6. The council responded on 14 February 2011. It stated that some of the requested information was not held by it and refused some information on the grounds that it was personal data and therefore exempt from disclosure under the provisions of section 40(3) of FOIA, that disclosure would be unfair and would therefore breach the first data protection principle.
7. Following an internal review the council wrote to the complainant on 1 August 2011. It continued to uphold its position that the information was exempt from disclosure under the provisions of section 40(2) and 40(3) of FOIA.

---

<sup>1</sup> [http://www.whatdotheyknow.com/request/stephen\\_maddox\\_former\\_chief\\_exec#outgoing-142029](http://www.whatdotheyknow.com/request/stephen_maddox_former_chief_exec#outgoing-142029)

## Scope of the case

---

8. The complainant contacted the Commissioner on 26 July 2011 to complain about the way his request for information had been handled. His initial complaint related to the delay in conducting the internal review of his request. The internal review response was received by the complainant shortly after this complaint was made. Subsequently the Commissioner established that the complaint was about the refusal of information held covered by parts "A" and "B" of the request, and the council's claim that no information is held in respect of part "C".
9. The Commissioner investigated the council's refusal of information under section 40 of FOIA, as personal data, and also the council's claim that no information was held in relation to part 'C' of the request, regarding correspondence between the Director of Finance and the District Auditor.

## Reasons for decision

---

### Personal information.

#### **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."

#### **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

10. The Commissioner accepts that the information requested at part 'A' of the complainant's request is likely to be the personal data of the former Chief Executive, not least because he is the subject of the request:

*"all information you hold that refers to and/or is about the former Chief Executive [...] that led to the decision [relating to the Chief Executive]"*

Therefore the context requires that the information disclosed is inevitably linked to him in some degree. Clearly it cannot be anonymised, because the simple fact of disclosure must imply a link to the individual who is named in the request.

11. The question for the Commissioner is therefore whether or not the information can be disclosed under FOIA without breaching the data protection principles. The applicable principle is the first, which requires disclosure to be 'fair and lawful'. The Commissioner is not aware of any grounds that disclosure would be unlawful, and will therefore consider the question of 'fairness' in disclosure of the information. This will require consideration of the reasonable expectations of the data subject (ie, the former Chief Executive) as to how his personal data would be treated, and also whether disclosure would be unfair due to any unwarranted prejudice to the rights and freedoms of the data subject.
12. The complainant has argued that the circumstances of the former Chief Executive's departure have similarities with the case of *Gibson –v- IC and Craven District Council* (EA/2010/0095)<sup>2</sup> and, for the reasons given by the First-Tier Tribunal in that case, disclosure of the information he had requested would be warranted. Wirral Council disagreed and gave its view that in the *Gibson* case the Chief Executive had agreed a compromise agreement as part of a severance package whereas in the present case the Chief Executive had requested early retirement, and the circumstances which led to the tribunal's decision to disclose some of the information were not applicable to the present case.
13. The council did acknowledge, however, that its draft statement of accounts would contain a figure which was understood to be the figure requested by the complainant at part 'B' of his request. As the council's accounts are a public document, it recognised that this figure would, in due course, be published anyway, and it offered to disclose this information to the complainant.
14. The Commissioner responded to the council's view that the recent tribunal decision in respect of *Gibson* is not relevant as in the present case no compromise agreement was entered into. He noted that the underlying argument employed by the tribunal in the case of *Gibson* was that the Chief Executive had left the council in some difficulties and therefore the disclosure served the public interest and could override the

---

2

<http://www.informationtribunal.gov.uk/DBFiles/Decision/i485/Decision:%20EA.2010.0095;%2022-2-11.pdf>

personal freedoms of the data subject. The Commissioner explained that he had been referred by the complainant to a recent independent report into Wirral Council conducted by AKA Associates, which is critical of the council's performance and which itself makes reference to other independent criticisms of the council's performance. This bears some parallels with elements of the *Gibson* case and the Commissioner therefore considered that the tribunal's observations may need to be taken into account.

15. The council has confirmed that the information refused under section 40 of FOIA was a confidential report which was considered by the Council's Employment and Appointments Committee on 17 August 2010. This includes the detail of the cost to the Council (based on estimates provided by Merseyside Pension Fund) of agreeing the early retirement of the former Chief Executive. A copy of this report was provided to the Commissioner, together with the council's arguments for the application of s40 of FOIA to it. The council confirmed that it had written to the former Chief Executive to ask for his consent to disclose the information, but had not received a reply.
16. The Commissioner's view is that, if the amount of the extra pension costs is to be published (in whatever form) in the council's statement of accounts, then an argument that disclosure (even if in a different form) under FOIA would be exempt under s40(2) and s40(3) of the Act, would be difficult to sustain. Even if the amount in the Statement of Accounts does not reflect the precise sum set out in the withheld report, that will presumably be down to the way the amount is accounted for (or, perhaps, that the sum calculated in the earlier report has subsequently been refined).
17. In any event, as a broadly similar sum is to be published under a statutory obligation, it is artificial to argue that disclosure under FOI would be unfair or unwarranted due to prejudice to the rights and freedoms of the former Chief Executive, as any such prejudice seems likely to occur on publication of the accounts and is, therefore, unavoidable.
18. The council subsequently confirmed that the exact sum is to be published in the council's accounts. It differs (but not significantly) from the figure in the withheld report which was an estimate. It explained that the report contained other matters which it might still have needed to withhold as they are the personal data of other parties, and some information which was potentially commercially sensitive. However, it acknowledged that this other information was now largely in the public domain anyway, and it consequently withdrew its reliance on the exemption at section 40 of the Act for this report. It made no representations as to the application of section 43 of FOIA in respect of

any commercially sensitive material and the Commissioner has not considered that issue further.

19. The Commissioner finds that as the withheld information is either already in the public domain, or falls to be disclosed within the council's published accounts, disclosure of the information under FOIA would therefore be fair. He finds that, in the particular circumstances of this case, the council incorrectly relied on the exemption at section 40(2) and 40(3) of FOIA in withholding the information it held in relation to part 'A' of the complainant's request.
20. This is therefore a breach of section 1(1)(b) of FOIA: a failure to disclose information held, on request. The Commissioner recognises that the council has withdrawn its reliance on this exemption, and acknowledges the council's willingness to disclose this information.

### **Section 1 – information not held**

21. With reference to part 'C' of the complainant's request, the council explains that it contacted its Director of Finance, who has confirmed that there was no correspondence with the Audit Commission or District Auditor concerning the application for early retirement, only a verbal discussion. The Council states therefore that it does not hold any information in connection with this part of his request.
22. The Commissioner understands that the power to grant the former Chief Executive's request for early retirement was entirely in the discretion of the Council, and the withheld report was taken as an urgent item to a Special Meeting of the Employment and Appointments Committee because of the timescale involved.
23. Where there is a dispute over whether information is held or not held by a public authority, the normal standard of proof to apply in determining whether a public authority does hold any requested information is the civil standard of 'the balance of probabilities'. In other words: is it more likely than not that the requested information is held by the council?
24. In deciding where the balance lies, the Commissioner will consider the scope, quality, thoroughness and results of the searches carried out by the public authority as well as considering, where appropriate, any other reasons offered by the public authority to explain why the information is not held. The Commissioner will also consider any evidence that further information *is* held, including whether it is inherently unlikely that the information so far located represents the total information held.
25. In the present case, the council has explained that there was no statutory obligation on it to seek external approval before granting the request for early retirement. Therefore, there is nothing to suggest that

any external consultation was necessary, and no grounds to conclude that the information is held: ie that written communication with the District Auditor must have taken place. The Commissioner notes that the Director of Finance was consulted about this part of the request, and he has confirmed that the consultation with the District Auditor was verbal.

26. The Commissioner recognises that the complainant is sceptical that the consultation with the District Auditor could or would have been verbal. However, the Commissioner considers it entirely plausible in all the circumstances that there was an unrecorded verbal exchange only and this is his finding, having taken due consideration of the submissions made. In addition, the First Tier Tribunal<sup>3</sup> has recently confirmed that the Commissioner is entitled to accept the word of a public authority in circumstances where there is no evidence of an inadequate search, reluctance to carry out a search, or any motive to withhold information in its possession.
27. In this case, the Commissioner is satisfied that there is nothing to suggest that the council would be reluctant to admit to holding correspondence between it and the District Auditor, if such correspondence was in fact held by it. Not least as the council has confirmed that information is held in respect of other elements of the request, and has confirmed that consultation with the District Auditor took place. The fact that the complainant is sceptical is not sufficient evidence to cast doubt on the council's submissions, and the Commissioner finds the council's explanation satisfactory.
28. As part C of the request relates only to *"correspondence between the [council's] Director of Finance, and the District Auditor in relation to this particular matter"* (ie, the early retirement of the Chief Executive and the additional pension cost implications), the Commissioner is satisfied that making enquiries to the Director of Finance personally would constitute a sufficiently well-directed search for information which might be held. The Commissioner has therefore concluded that, on the balance of probabilities, the council does not hold any correspondence between the Director of Finance and the District Auditor on the matter.

---

3

<http://www.informationtribunal.gov.uk/DBFiles/Decision/i588/20110914%20Decision%20EA20110144.pdf> at paragraph 12

## **Other matters**

---

29. While there is no statutory timescale under FOIA for the conduct of an internal review, the Commissioner's guidance suggests that it should take no longer than 20 working days or, in exceptional circumstances, no longer than 40 working days. The Commissioner notes that in this case, the complainant requested an internal review on 26 April 2011 and did not receive the outcome of that review until 1 August 2011, a period of 73 working days - substantially longer than the timescale set out in his guidance.



## Right of appeal

---

30. 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)

31. 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.
32. 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 .....**

**Graham Smith  
Deputy Commissioner  
Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**