

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

### **Decision notice**

**Date:** 14 February 2012

**Public Authority:** Wigan Metropolitan Borough Council

**Address:** Town Hall  
Library Street  
Wigan  
WN1 1YN

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

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1. The complainant requested information relating to a company which undertakes particular roles at Leigh Sports Village. Wigan Metropolitan Borough Council ('the Council') provided some information and stated that other information was not held. During the course of the Commissioner's investigation the Council disclosed some additional information relevant to the request. The Commissioner's decision is that the Council holds no additional information within the scope of the request, other than that which has been provided to the complainant. However, the Commissioner finds that the Council breached section 10 of the FOIA in failing to provide the information disclosed during his investigation within the statutory time period. The Commissioner requires no further steps to be taken.

#### **Request and response**

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2. On 8 August 2011, the complainant wrote to the council and requested information in the following terms:

"...I would like to be provided with the following under Freedom of Information legislation:

1. Copies of the procurement process for establishing a management and operations company to operate the Council's asset at Leigh Sports Village, which I believe is required under the LGA and the Council's own Contract Procedure Rules. If no OJEU (or similar)

procurement process was entered into, then I would like to have the documents that set out why the council considered this was unnecessary;

2. Copies of the declarations of interest required under Policy D3.1 et seq. of the Council's Financial Procedure Rules within the Council's constitution, relating to the Council employing its retiring Chief Executive as Chairman of LSV Ltd;
  3. Details of how the above appointment came to be made in terms of: advertising for candidates and job description; and details of what publications the appointment was advertised in along with its job description and specification, having regard to the requirement for best value and to securing a candidate with previous experience at facilities and operations management;
  4. Details of how the positions of Chief Executive, Operations Director and Finance Director at LSV Ltd were advertised, as set out in (3), above;
  5. Details of LSV Ltd's procurement process for services on the site, including the provision of on-site security, in terms of how best value was obtained for the tax payer. In addition I would like confirmation or otherwise as to whether the principal(s) or other officers of the security services company actually engaged had any personal relationships or friendships with any LSV or other council officials.
  6. A copy of the Management Agreement, lease or whatever form the contract may take between the Council and LSV Ltd that outlines the company's roles and responsibilities in managing the Sports Village and terms of appointment, along with the plan that shows the area of the company's responsibility
  7. Details of the salaries of LSV Ltd staff that have and are being borne by the Council including details of the AGMA pension schemes in operation; and
  8. Details of the annual income generated by the LSV Ltd through fixtures and ancillary events at the Sports Village that will service to offset the cost to the Council."
3. The Council acknowledged receipt of the request on 16 August 2011. It said that it would respond as soon as possible and no later than 30 August 2011. Despite further reminders from the complainant and the Commissioner, no response to the request was provided.

4. The Commissioner issued a decision notice on 9 February 2012<sup>1</sup> which required the Council to provide a substantive response to the request within 35 calendar days. The Council complied with the decision notice and responded on 15 March 2012. It provided some information relevant to the request and stated other information was not held.

### **Scope of the case**

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5. The complainant contacted the Commissioner on 16 April 2012 to complain about the way his request for information had been handled. In view of the significant delays throughout the handling of this request, the Commissioner exercised his discretion and accepted the complaint without an internal review having been carried out.
6. In his complaint to the Commissioner, the complainant referred to a further letter he had sent to the Council on 5 April 2012. This letter raised queries and concerns about the original request for information and also contained new requests for information.
7. The Commissioner wrote to the complainant to advise that he would be unable to investigate matters relating to new requests for information contained in his letter of 5 April 2012. The Commissioner asked the complainant to confirm his understanding was correct in that his complaint about the request of 3 August 2011 related to whether the Council held any additional information relating to parts 1, 2 3, 5 and 7 of the request. The complainant confirmed that the Commissioner's understanding of his complaint was correct and he was content with the scope of the investigation.
8. During the course of the Commissioner's investigation, the Council located additional recorded information relevant to part 1 of the request and disclosed this to the complainant.
9. The scope of the Commissioner's investigation in this case is therefore to determine whether any further information relating to parts 1, 2, 3, 5 and 7 of the request of 3 August 2011 was held by the Council at the time of the request (other than that disclosed prior to and during his investigation), and if so, whether this information should be disclosed.

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<sup>1</sup> [http://www.ico.gov.uk/~media/documents/decisionnotices/2012/fs\\_50420283.ashx](http://www.ico.gov.uk/~media/documents/decisionnotices/2012/fs_50420283.ashx)

## Reasons for decision

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### Background

10. Leigh Sports Village Limited ('LSVL'), was set up by the Council as a controlled company in accordance with the Local Authorities Companies Order 1995. LSV was established as the management company for Leigh Sports Village, a mixed use complex providing sport and leisure facilities, which opened in 2008. LSVL is a wholly owned subsidiary of the Council and the Council is the sole shareholder.
11. The request in this case broadly relates to information about how LSVL was set up, how its officers were appointed and where its funding comes from.

### Section 1 – General right of access

12. Section 1 of the FOIA provides that any person making a request for information to a public authority is entitled (a) to be informed in writing by the public authority whether it holds information of the description specified in the request and (b) if that is the case to have that information communicated to him.
13. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request, the Commissioner will consider the complainant's evidence and arguments. He will also consider the actions taken by the authority to ascertain information falling within the scope of the request and he will consider if the authority is able to explain why further information was not held. For clarity, the Commissioner is not expected to prove categorically whether additional information was held. He is only required to make a judgement on whether the information was held "on the balance of probabilities"<sup>2</sup>. Therefore, the Commissioner will consider both:
  - the scope, quality, thoroughness and results of the searches and
  - other explanations offered as to why further information is not held.

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<sup>2</sup> This approach is supported by the Information Tribunal's findings in *Linda Bromley and Others / Environment Agency* (31 August 2007) EA/2006/0072

## **Part 1 of the request**

14. This request relates to details of any procurement process about the setting up of LSVL or if no procurement process was undertaken, information about the reasons why the Council considered no procurement process was necessary. In its initial response to the request of 15 March 2012, the Council simply stated that LSVL was set up as a controlled company, and therefore contract procedure rules were not applicable. However, in light of the wording of the request and the clarification provided by the complainant on 5 April 2012, it is clear that the request was intended to cover information about the decision to set up LSVL as a controlled company (and thus avoid the need for any formal procurement process).
15. The Council advised the Commissioner that its decision to set up as LSVL as a controlled company was not considered to be a significant decision. As such there is not a significant audit trail relating to the decision making process and this is reflected in the amount of information held relevant to the request.
16. The Council confirmed that searches carried out on all files relating to LSVL which were held by its Head of Legal & Risk. During the course of the Commissioner's investigation, additional searches were carried out of these files, and in relation to files held within the Council's property division, which included retrieval of information held within an offsite storage facility. The additional information which the Council located relevant to the request was disclosed to the complainant. This included various cabinet meeting minutes and other reports and documents about the establishment of LSVL.

## **Parts 2 and 3 of the request**

17. These requests broadly relate to a former Chief Executive of the Council and his involvement with LSVL, including copies of any declarations of interest and details as to how the appointment was made.
18. The Council's initial response to these requests of 15 March 2012 simply stated that *[name of former Chief Executive]* was not employed by the Council or LSVL so no declarations were required and no information was held about the appointment.
19. In his letter to the Council of 5 April 2012 the complainant suggested that the response from the Council was based on the current situation. He asked whether *[name of former Chief Executive]* had ever been employed by LSVL. He also referred to evidence he had obtained from Companies House that *[name of former Chief Executive]* was Chairman of LSVL (a public appointment which required advertising). The

complainant pointed out that he understood that staff employed by LSVL staff were eligible for the Greater Manchester Pension Fund (which he believed was a benefit entitlement only for local government employees). The complainant stated that this strongly suggested that *[name of former Chief Executive]*'s employment contract and that of other LSVL staff must be through the Council.

20. The Council advised the Commissioner that *[name of former Chief Executive]* is the appointed Director (Chairman) of LSVL and not "employed" by the Council or LSVL. At its Annual General Meeting in May of each year, the Council discuss and agrees appointments to various outside bodies for the Municipal Year. As company shareholder of LSVL, at the AGM the Council makes the appointment of Director (Chairman) of LSVL. The Council confirmed that it did not send out invitations for nominations or advertise appointments to these outside bodies. Senior Council Officers and Councillors discuss nominations verbally based on whether individuals have any expertise in a particular field. Where there are more nominations than vacancies, at its AGM are required to vote on the appointment. In view of this the Council stated it did not hold information relating to advertising for candidates and a job description/specifications for the post.
21. In the case of the appointment of Chair of the Board of Directors of LSVL, the Council stated that *[name of former Chief Executive]* (a self-employed consultant) was nominated and appointed to the position based on his previous experience and expertise. Whilst he was Chief Executive of the Council he was closely involved in the project to develop Leigh Sports Village. As such, he was considered the most suitable candidate for the position. The Council confirmed that Chair of the Board of LSVL is paid a retainer for carrying out the role by Wigan Metropolitan Development Company (Investment) Limited and receives no remuneration from LSVL (or the Council itself).
22. In terms of declarations of interest, as the Chair of the Board of LSVL is not an employee of the Council, he would not be required to make any declarations of interest to the Council and as such it does not hold any relevant information. The Council advised that any declarations of interest required in relation to *[name of former Chief Executive]*'s activities as Chair of the Board of LSVL would be dealt with in the company's Memorandum and Articles of Association which is a publicly available document.

## **Part 5 of the request**

23. This request relates to details of LSVL's procurement process for site services as well as information about relationships between employees of the security company employed by LSVL and LSVL and Council

officials. The Council provided information about LSVL's procurement process in its initial response of 15 March 2012. The outstanding issue with this request relates to whether the Council holds any information about whether the principal(s) or other officers of the security services company had any personal relationships or friendships with any LSVL employee or Council officials. In its initial response to Council simply stated that "there are no personal relationships with the principals or other officers of the security company".

24. The Council confirmed to the Commissioner that searches of all files relating to Leigh Sports Village were conducted and no recorded information was held detailing any personal relationships between the parties in question. In a letter to the complainant dated 22 October 2012, the Council explained that in his previous role as Chief Executive of the Council and in his role as Chair of LSVL, *[name of former Chief Executive]* had dealings with the Principal of the security company which was appointed by the developer of Leigh Sports Village. When LSVL took over the management of the site, they also took over the contract with the security firm. The Council advised that the relationship between *[name of former Chief Executive]* and the principal of the security company was a purely business relationship which resulted from the involvement of both individuals in the Leigh Sports Village project.
25. The Council advised that it does not hold any form of register of officers' declarations of interest. Although its constitution provides for officers to notify of any conflict of interest, the process is operated in a relatively informal basis in that an officer would simply notify their manager of any potential conflict of interest.

### **Part 7 of the request**

26. This request relates to details of the salaries of LSVL staff including details of the pension schemes in operation.
27. In its initial response of 15 March 2012 the Council stated that it did not hold this information as it did not pay any salaries of LSVL staff. In his letter to the Council of 5 April 2012 the complainant provided evidence to support his view that the Council contributes/pays the salaries of LSVL employees, including the fact that LSVL employees were eligible for membership of the Council's pension scheme (the Greater Manchester Pensions Fund 'GMPF'). The complainant is of the views that as LSVL employees are eligible for the GMPF, this indicates they are Council employees and therefore the Council pays their salaries. The complainant is also of the view that Council has been subscribing to the salaries of LSVL employees through loans made to LSVL, as shown in its annual accounts



28. The Council advised the Commissioner that LSVL had 'Admitted Body Status' in relation to the GMPF. However, it maintained that the salaries of any staff employed by LSVL were not paid by the Council and as such it did not hold information their salaries. The Council later expanded on this point and advised that the Chair of the Board LSVL did not receive any remuneration from LSVL and is paid a retainer for the role by Wigan Metropolitan Development Company (Investment) Limited. The rest of the Board of LSVL comprised 3 Council Officers and 1 Councillor and the Council advised that these individuals did not receive any remuneration for carrying out these roles. The Council advised that the remaining staff of LSVL were recruited through normal recruitment procedures and were not employed or paid by the Council.
29. The Commissioner understands that admitted body status provisions were introduced in the Local Government Pension Scheme in 1999 to allow contractors who take on local authority functions or service to offer staff who transfer from the local authority to the contractor to continue to be eligible for the pension scheme. In essence, this means that an employee of LSVL may be a member of the GMPF even though the Council does not pay their salary. He does not, therefore, accept the complainant's assertion that the fact that LSVL staff may be entitled to join the GMPF means that their salaries are paid by the Council.

### **Part 8 of the request**

30. This request is for details of the annual income generated by LSVL. In its initial response to the request the Council stated that "no annual income generated is offset against any Council costs".
31. The Council confirmed to the Commissioner that, as the sole shareholder of LSVL, it is entitled to receive a dividend of its profits. The Council explained that the reason no dividend had been received to date was due to the fact that LSVL had not yet made a profit. In view of this the Council did not hold any information relating to the annual income generated by LSVL that would offset the cost to the Council.

### **Summary**

32. Based on the information provided by the Council the Commissioner is satisfied that it has carried out adequate searches of all places and records where the information would be held. There is no evidence of any inadequate search or grounds for believing there is a motive to withhold information. The Commissioner's view is that the Council's explanations as to why it does not hold some of the requested information are reasonable in the circumstances. The Commissioner is therefore satisfied that, on the balance of probabilities, the Council does



not hold any further recorded information relating to the request other than that which has been disclosed.

### **Procedural requirements**

33. During the Commissioner's investigation the Council located and released additional information relevant to the request. In failing to provide this information within 20 working days of the request, the Council breached section 10(1) of the FOIA.

### **Other matters**

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#### **Engagement with the Commissioner**

34. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:
35. During the course of his investigation, the Commissioner has encountered considerable delay on account of the Council's failure to meet the timescales for response set out in his letters. Furthermore, the Commissioner has met with resistance in his attempts to understand the searches which the Council undertook to identify information relevant to the request and to obtain other explanations as to why information was not held. The delays and resistance were such that the Commissioner was forced to issue an Information Notice on 18 September 2012 in order to obtain details relevant to his investigation. Following late compliance with the Information Notice and as a result of a meeting the Commissioner held with the Council to discuss the complaint, the Council located additional relevant information, which it disclosed to the complainant.
36. Accordingly the Commissioner does not consider the Council's approach to this case to be sufficiently co-operative, or within the spirit of the Act. As such he will be monitoring the Council's future engagement with the ICO and would expect to see improvements in this regard.

## Right of appeal

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37. 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)

38. 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.
39. 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**