

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 1 September 2014

**Public Authority:** Wirral Metropolitan Borough Council

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

### Decision (including any steps ordered)

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1. The complainant has requested information from Wirral Metropolitan Borough Council ("the council") about the 'Annual Performance Reviews' of two senior council officers. The council withheld the information 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 applied 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 21 March 2012, the complainant wrote to the council and requested the following:

*"Please disclose the APR dates and the actual APR forms for the past 5 years for the following past employees who are no longer in the employ of WBC*

*[redacted role] – [redacted name]  
[redacted role] - [redacted name]"*

5. The council responded on 29 May 2013 and refused the request citing section 40(2).

### **Scope of the case**

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6. The complainant contacted the Commissioner on 17 July 2013 to contest the council's response.
7. 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**

8. 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..."*

#### Is the withheld information personal data?

9. 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..”*

10. 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, which comprises APR reports spanning a period of five years, and has identified that it specifically relates to two individuals who are senior council officers, and who are directly named by the complainant in his request. The Commissioner has subsequently considered the extent to which the information could be anonymised by removing the personal identifiers of the individuals. However, the information contained within the APR reports is inherently connected to the roles and responsibilities held by the two senior council officers. It is reasonable for the Commissioner to assume that there is likely to be public awareness of those roles and responsibilities, which would result in the APR reports, regardless of any redaction, being directly related to the senior council officers to which they pertain. On this basis, the Commissioner considers the information in its entirety is personal data, and cannot be effectively anonymized.
11. In addition to being the personal data of the two senior council officers who have been directly named in the complainant's request, the Commissioner has also identified that the withheld information contains the personal data of other council officers, including the individual acting as supervisor, and other individuals who are employed as council officers and are referred to within the withheld information.

Would disclosure breach the data protection principles?

12. 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.
13. 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*

14. When considering whether a disclosure of personal data 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.

15. In this case the council has confirmed that the information derives from confidential supervisory sessions that were held between the two senior officers and a supervising officer. As such, the council considers that the two individuals would have held a strong expectation that the information would not be disclosed into the public realm.
16. The Commissioner has reviewed the information, and has specifically identified that it considers the actions of the two senior officers in respect of their public duties. In such situations, the Commissioner accepts that this can enhance the public interest in disclosure even where the individual holds an expectation of privacy.

*The consequences of disclosure*

17. The council has proposed that the disclosure of the information would not represent legitimate processing under the sixth condition of schedule 2 of the DPA, and as such its disclosure would prejudice the rights and freedoms of the two individuals as data subjects.
18. However, the complainant contests that the disclosure of the information would provide assurance to the public that senior council officers are being appropriately managed.

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

19. The council has not advised the Commissioner of any legitimate interests in disclosure that it has identified. However, the Commissioner considers that the need to promote transparency and accountability on the part of the council, and particularly in relation to the public duties of senior officers, to be a legitimate argument for the fairness of disclosure.
20. However, while the information is related to the public duties of the two individuals as senior council officers, the Commissioner has identified that the information relates to the supervision of the two officers by one more senior, and as such the Commissioner must consider that the information is held for the purposes of employment. In reaching this interpretation, the Commissioner has referred to the First Tier Tribunal in the case of *Gibson v Information Commissioner & Craven District Council* (EA/2010/0095), in which the Tribunal accepted that information relating to an individual acting in a professional capacity may be held for

the purposes of human resources management, and as such attract a strong expectation of privacy on the part of the individual.

*Conclusion*

21. 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.
22. However, whilst the information refers to the public duties of two senior council officers, the Commissioner has identified that it pertains to the supervision of employees, and as such would be held for the purposes of employment, with a strong expectation of privacy on the part of the two named individuals. Additional to this, the Commissioner has identified that the withheld information also contains the personal data of other individuals, including the council officer acting as supervisor, and various council officers who appear to fall under the management of the two named council officers.
23. The Commissioner has therefore concluded that disclosing the information would not be fair under the first principle of the DPA, and that the exemption provided by section 40(2) is engaged.

**Section 10(1) – Time for compliance**

24. Section 10(1) requires that a public authority must issue a refusal notice within the time for compliance, which is 20 working days following the date of receipt.
25. In this case the Commissioner has identified that the council issued its refusal notice outside 20 working days, and therefore breached the requirement of section 10(1).

## Right of appeal

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26. 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)

27. 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.
28. 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**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**