

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 29 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 correspondence between a councillor and a senior council officer. 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 section 40(2) is engaged, and that the council was correct to withhold the information. However, in failing to provide its response within the time for compliance, the council has breached the requirement of section 10(1).
3. The Commissioner does not require any steps to be taken.

#### Request and response

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4. On 20 April 2012, the complainant wrote to the council and requested the following information:

*"Please see the following article from the local newspaper 'The Wirral Globe'.*

<http://www.wirralglobe.co.uk/news/966154...>

*Please disclose the letter sent from [redacted name], [redacted*

*position] to [redacted name], [redacted position] referred to in the article."*

5. The council responded on 10 June 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 considered the nature of the information that has been withheld, and perceives that it constitutes a piece of correspondence between a councillor and a senior council officer, which has been copied to 18 other individuals who appear to be senior public officials both within the council and in other public authorities. The substantive matter that the correspondence relates to is the employment of specific council officers, and as such contains biographical information that the Commissioner considers could be directly connected to individuals through other information that may be publically available.

Is any of the information sensitive personal data?

11. Section 2 of the DPA defines sensitive personal as personal data that consists of information about the following:
- an individual's mental or physical health,
  - their political opinions,
  - their sex life,
  - their racial or ethnic origin,
  - their religious beliefs,
  - whether they are a member of a trade union,
  - the commission of alleged commission of an offence by them, or an proceedings for any offence they have committed or are alleged to have committed.
12. The Commissioner considers that a small proportion of the withheld information falls under one of the above categories, and therefore represents sensitive personal data.

Would disclosure breach the data protection principles?

13. 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, and schedule 3 of the DPA for sensitive personal data.
14. 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*

15. 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.
16. In this case the council has confirmed that the correspondence contains information about the employment of both past and present council officers, and that these individuals would not have a reasonable expectation of their personal data being disclosed into the public realm. This is because the withheld information relates to their employment by the council, and includes sensitive personal data relating to individuals' health.
17. The council has further advised the Commissioner that the councillor who submitted the correspondence was aware of the personal data that it contained, and as such marked it as "Strictly Private & Confidential".

*The consequences of disclosure*

18. The council has proposed that the disclosure of the correspondence would have an unjustified adverse effect on the individuals to who it relates. The council considers that this effect would be compounded as a proportion of the individuals are no longer employed by the council, and as such would expect a higher level of privacy in respect of their personal data. The council has informed the Commissioner that the correspondence has been previously disclosed to a local newspaper without the council's knowledge by persons unknown, and that this disclosure resulted in several of the affected individuals submitting complaints to the Commissioner under the DPA.

*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 use of public monies for staff salaries and expenses, to be a legitimate argument for the fairness of disclosure.
20. Notwithstanding this, the Commissioner is aware that the substantive matter that the correspondence refers to is the employment of specific individuals in relatively junior positions. The Commissioner has identified that the correspondence includes details about grade history, current salary, sickness absence, and occupational health involvement, and as such the Commissioner must consider that the information is held by the council for the purposes of managing the employment of its staff. 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. In the circumstances of this case the Commissioner's conclusion is that the disclosure of the requested information would not be fair. This is because it relates to the employment of junior council officers in roles that are not public-facing. The Commissioner considers that this information would be highly likely to be held for the purpose of managing personnel, and that the individuals would have a strong expectation of privacy in respect of their personal data, including that which is sensitive. This has been particularly emphasised to the Commissioner by the understanding that the unauthorised disclosure of the information to the local press has previously led to complaints under the DPA by the individuals affected.

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.
24. Having identified that the section 40(2) is engaged on this basis, the Commissioner has not considered it necessary to investigate the council's position that disclosure of the information would also breach the second principle of the DPA.

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

25. Section 10(1) requires that a public authority must respond to a request within the time for compliance, which is 20 working days following the date of receipt.
26. In this case the Commissioner has identified that the council responded outside 20 working days, and therefore breached the requirements of section 10(1).

## Right of appeal

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27. 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)

28. 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.
29. 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**