

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 23 March 2017

**Public Authority:** Liverpool City Council  
**Address:** Legal Services  
Room 221  
Municipal Buildings  
Dale Street  
Liverpool  
Merseyside  
L69 2DH

#### Decision (including any steps ordered)

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1. The complainant requested details of a departure agreement with a former employee of the council. The council provided a redacted copy of the agreement however it refused to provide the remainder on the basis that section 40(2) of the FOI Act applies (personal data).
2. The Commissioner's decision is that the council was correct to apply section 40(2) to the withheld information. She has however decided that the council failed to comply with the requirements of section 10(1) (time for response) to the request.
3. The Commissioner does not require the council to take any steps.

## Request and response

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4. On 3 August 2016 the complainant wrote to the council and requested information in the following terms:

*"In 2014 [name redacted] was suspended as [role redacted] at Liverpool City Central Business Improvement District (BID) and from his role at Liverpool City Council.*

*There was no explanation but press reports at the time indicate a departure package was agreed with Liverpool City Council and a confidentiality agreement was signed...*

*[links to media stories redacted]*

*"1) Why did [name redacted] depart his role at Liverpool City Central BID and his role at Liverpool City Council?*

*2) Who at Liverpool City Council authorised the departure package and how much money did [name redacted] receive, or is he due to receive, as part of the package?*

*3) A copy of [name redacted]'s departure agreement, with any exempt information redacted."*

5. The council responded on 28 September 2016. It refused to respond to the first part of the request on the basis that *"This question is not of a type which falls within the remit of Freedom of Information legislation and as such Liverpool City Council has no comment to make on this matter"*. As regards part 2 and 3 of the request it provided the complainant with a redacted copy of an agreement however it applied section 40(2) to the remainder of the document.
6. Following an internal review the council wrote to the complainant on 28 September 2016. It maintained its position.

## Scope of the case

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7. The complainant contacted the Commissioner 8 September 2016 to complain about the way his request for information had been handled. Initially his complaint was that the council had not responded within the 20 working day deadline set by section 10(2) of the Act. Once the council had responded the complainant also complained that the council was not correct to withhold the information.

8. The Commissioner considers that the complaint relates to whether the council was correct to apply section 40(2) to redact the information from the compromise agreement, as well as to address the late response to the request.

## Reasons for decision

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### Part 1 of the request

9. The council refused to comment on part 1 of the request on the basis that *"This question is not of a type which falls within the remit of Freedom of Information legislation and as such Liverpool City Council has no comment to make on this matter."*
10. The Act provides a right for individuals to request 'recorded' information from a public authority. It does not provide a right to ask any question and receive an answer to that question. A public authority is also not under a duty to create information in order to respond to a request. The First-tier Tribunal has however decided in the past that where recorded information is held which can respond to a question then this information should be considered for disclosure.
11. The Commissioner notes that relevant recorded information is held by the council which could have responded to this question. That information is however personal data and potentially subject to the exemption in section 40(2) of the Act. The Commissioner has therefore considered the application of the exemption to this information in addition to considering parts 2 and 3 of the request below.

### Parts 1, 2 and 3 of the request

12. Section 40(2) of the Act states 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."*

13. 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, or...*

14. The Commissioner has considered the most relevant data protection principle, which in this case is the first data protection principle. The first data protection principle states that:

*“Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless—*

*(a) at least one of the conditions in Schedule 2 is met, and*

*(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.”*

15. In his approach to the application of the first data protection principle the Commissioner concentrates in the first instance on whether the disclosure of the information would be ‘fair’. In considering fairness, the Commissioner has taken into account the nature of the information, the reasonable expectations of the data subject, and the potential consequences of disclosure and balanced the rights and freedoms of the data subject with the legitimate interests of the public in the information being disclosed to it.

#### The expectations of the individual

16. The complainant alleged that the individual was suspended prior to leaving his role at the council. The council’s disclosure of a part of an agreement document has confirmed to the complainant both that the individual is no longer an employee of the council and that a departure agreement was reached. The redactions have however ensured that the majority of the terms of the agreement have not been disclosed to the public.

17. The council has said that the individual was not a senior employee of the council. The Commissioner notes however that he was responsible for overseeing a large project in Liverpool City Centre. That role was public facing, and so he would therefore have had some expectation that

details of his work for the council would be made public. He would also have had some expectations that some personal data about him might be disclosed as part of his, and the council's duty to be transparent and accountable for the actions taken by the council.

18. In the case of departure agreements the Commissioner notes that there is a difference between an individual's public life, their role and accountability for the areas in which they work, and their private life. There is a much stronger expectation that details about an individual's private life will be withheld than details of their public life. For the most part, the reason for an individual leaving their employment relates to their private, rather than their public life.
19. This expectation of privacy was affirmed in the Tribunal case of *Trago Mills (South Devon) Limited v Information Commissioner and Teignbridge District Council (EA/2008/0038)*. The Tribunal upheld the Commissioner's decision that disclosure of the details of a severance agreement would be unfair and thus contravene the first data protection principle. The Tribunal stated that:

*"Even without an express confidentiality provision, an individual would have a reasonable expectation that the terms on which his employment came to an end would be treated as confidential. The question we have to consider is, not whether X's severance package was a private transaction (it clearly was), but whether the factors in favour of disclosure should lead us to conclude that, on balance, disclosure would not have represented an unwarranted interference with that right."*

20. The Commissioner also notes that the agreement binds all parties to confidentiality over the information contained within it. Again this would engender an expectation that the withheld information would be withheld from disclosure.
21. Taking the above into consideration, the Commissioner considers that the data subject would have had a reasonable expectation that the withheld information would not enter the public domain.

#### The consequences of disclosure

22. In order to assess the impact of the consequence of disclosure on whether disclosure would be fair, it is necessary to consider whether disclosure of the information would cause unwarranted damage or distress to the data subjects.

23. The Commissioner notes that a disclosure of the agreement could lead to further press coverage despite the passage of time. This would cause unwarranted distress to the individual concerned. The press has previously run stories speculating about the reasons for him leaving the council and has asked him questions about him leaving his post. Even without further media interest the Commissioner considers that disclosure would cause distress, particularly as she has found that disclosure of the information requested would not have been within the individual's expectations.
24. The central consequence of disclosure therefore relates to the loss of privacy for the individual involved. Details of the terms under which he left would be disclosed to the public where the individual does not wish that to occur. A disclosure of the reasons the individual left his role at the council would be an intrusion into his private life.

Balancing the rights and freedoms of the data subject with the legitimate interest of the public in receiving the information

25. The Commissioner notes that where public money is used in part of a departure package this is money which is lost to the public purse. Effectively any payment made to an individual is money which could otherwise have been used by the council for other functions.
26. The public has a legitimate interest in knowing how public money is spent by the council, and departure agreement payments do not further the services being provided to the public by the authority. There is therefore a public interest in public authorities providing information on how much public money is spent on such agreements. The public also has a legitimate interest in knowing whether such payments are appropriate in the circumstances.
27. However this needs to be balanced against the rights of the individual to avoid an unwarranted intrusion into their private life.
28. As both the Commissioner and the Tribunal have made clear in the Trago Mills case previously cited, the legitimate interests of the public in knowing the details why a person left their employment must be weighed against the individual's right to privacy. The Tribunal made clear that such decisions should be made on the expectations of privacy held by 'the reasonably balanced and resilient individual'. The Tribunal concluded that:

*"We do not find that the Council's duty to be transparent and accountable about the expenditure of public money outweighs the requirement to respect the former employee's reasonable expectation*

*of privacy. Accordingly, we conclude that disclosure would have breached the data protection principles."*

Conclusion on the analysis of fairness

29. Taking all of the above into account, the Commissioner concludes that it would be unfair to the individual to disclose the requested information. Disclosure would not have been within the data subject's reasonable expectations and the loss of privacy would be an unwarranted intrusion into his private life. Additionally further press coverage of a matter which occurred a number of years ago may well cause distress to him.
30. The Commissioner acknowledges that the public has a legitimate interest in knowing more about the expenditure of public money, particularly at a time when council resources and finances are stretched. She does not however consider that this outweighs the data subjects strong expectations of privacy and right not to have unwarranted intrusion into their private life. The Commissioner has therefore decided that the council was entitled to withhold the information under section 40(2), by way of section 40(3)(a)(i).
31. As the Commissioner has decided that the disclosure of this information would be unfair, and therefore in breach of the first principle of the DPA, she has not gone on to consider whether there is a Schedule 2 condition for processing the information in question.

Section 10(1)

32. Section 10(1) of the Act states:

*"Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."*

33. The complainant made his request for information on 3 August 2016. The council provided its response on 28 September 2016. This falls outside of the 20 working day period set by section 10(2) of the Act.
34. The Commissioner has therefore decided that the council failed to comply with section 10(2) of the Act.

## Right of appeal

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35. 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)

36. 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.
37. 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**