

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 December 2018

Public Authority: Wigan Metropolitan Borough Council

Address: Town Hall
Library Street
Wigan
WN1 1YN

Decision (including any steps ordered)

1. The complainant has submitted two requests for recorded information from Wigan Borough Council. The information the complainant seeks relates to a police investigation of a complaint about a dummy CCTV camera at a specified address. Having first refused the complainant's requests in reliance on section 14(1) of the FOIA, on review, the Council determined that the requested information was subject to an application of sections 31(1), 40(2) and 41(1).
2. The Commissioner's decision is that Wigan Metropolitan Borough Council is not entitled to rely on section 31(1)(a) in respect of the complainant's first request. She does however find that the Council is entitled to rely on section 40(2) to withhold that information.
3. The Commissioner has also decided that the Council is entitled to rely on section 40(2) in respect of the second and third elements of that request, and on section 41 to withhold an email which is the subject of the fourth element of that request.
4. The Commissioner requires the public authority to take no further action in this matter.

Request and response

5. On 6 July 2017, the complainant wrote to Wigan Metropolitan Borough Council and requested information in the following terms¹:

"Would you please supply copies of the emails sent from Wigan Council to Wigan Police Station re. requesting Wigan Police to visit the home of [Name and address redacted] to inspect a security camera overlooking the grounds of Billinge Family Church?"

6. The Council responded to the complainant's request on 12 July. The Council refused to provide the complainant with the information he had requested, advising him that:

"I am sorry but we cannot divulge who reported the incident to the Council, due to Data Protection/Confidentiality. I can confirm that our responses were carried out according to our normal procedures based on the information that was given to the Council at the time. The Police confirmed the camera was a dummy unit and the issue was resolved."

7. On 13 July, the complainant wrote again to the Council. In his email, the complainant accepted that he was not entitled to know who made the complaint about the alleged security camera. Nevertheless he referred to another email he had sent to the Council on 6 July in which he asked, "who from Wigan Council sent the emails [to the police]". The complainant made the presumption that, because Wigan Council is a public body, this information is not data protected.

8. On 14 July, the complainant submitted a second request² for information. He asked the Council:

"Can you please tell me the name of the service and the name of the manager to whom I should forward my complaint?"

Can you also tell me the management level of the person who sent the email to the police?

Would you also inform me which part of the Freedom of Information Act you used when you refused to give me the name of the person who sent the email?

¹ Council reference: FOI 5782

² Council reference: FOI 5833

Can you also forward me a copy of the original letter of complaint that was made to Wigan Council, after deleting any personal and/or sensitive information?"

9. The Council responded to both of the complainant's requests on 2 August 2017. The Council advised the complainant that it was refusing to answer his requests in reliance on section 14(1) of the FOIA, on the grounds that the requests are considered to be vexatious.
10. On 4 August, the complainant wrote to the Council to ask it to explain why it concluded his requests are vexatious and to supply the evidence for this.
11. On 8 August, the Council acknowledged the complainant's email of 4 August and it confirmed that his complaint would be escalated to a Senior Officer Review.
12. Having completed its internal review, the Council wrote to the complainant on 28 November 2017 to advise him of its final decision. The Council's reviewer said that she was "not convinced that the threshold for determining requests as vexatious has been met", and she then went on to consider whether the information the complainant had requested could be disclosed to him.
13. In respect of the complainant's first request – FOI 5782, the Council determined that the requested information was exempt from disclosure under "section 31(1)(a-f)" of the FOIA.
14. In respect of the first part of the complainant's second request – FOI 5833, the Council directed the complainant to its complainant's procedure at <http://www.wigan.gov.uk/Council/Contact-us/Council-Complaints.aspx>.
15. The Council refused to provide the information requested by the complainant in the second and third parts of his request in reliance on section 40(2) of the FOIA and it refused to supply a copy of the letter in which the original complaint was made in reliance on section 41(1) of the FOIA.

Scope of the case

16. The complainant contacted the Commissioner on 18 December 2017 to complain about the way his request for information had been handled.
17. Having reviewed the documents provided by the complainant, the Commissioner determined that the focus of her investigation would be to

determine whether the Council has handled the complainant's request in accordance with the FOIA. Specifically, the Commissioner determined that her investigation should be focussed on the Council's application of sections 31(1), 40(2) and 41(1) of the FOIA.

18. The Commissioner has not investigated the way in which the Council responded to the first element of the complainant's second request. This is because the Council provided the complainant with a web address where he could find information which would allow him to make a complaint using the appropriate channel.

Background information

19. The Council has provided the Commissioner with the following information to assist her in understanding the context of this complaint.
20. The request relates to a prolonged dispute between the owners of Billinge Family Church ("the BFC") and a group of local residents, of which the complainant is chairman. The dispute concerns a number of environmental issues which includes the use of security cameras.
21. Residents have complained that Wigan Council has failed to take appropriate enforcement action in matters which the residents have argued are breaches of planning agreements.
22. Between 2014 and August 2016, the Council has directed significant resources to responding to the residents' complaints and attempting to secure a resolution between the residents and the BFC. The Council has investigated the complaints and there have been a number of conversations and exchanges of correspondence which have required the involvement of the Chief Executive and the Restorative Justice Team.
23. Having failed to resolve the on-going dispute through mediation, the Council wrote to the complainant on 17 August 2016, and advised him that it would not be helpful to continue to exchange correspondence relating to alleged incidents which took place over a year ago.
24. In February 2017 the residents visited the Council's Planning Department to complain about surface water flooding from the church car park onto their properties. There were several exchanges of correspondence about the drainage issue between the Council, the complainant and another local resident.
25. The Council advised the residents that it had refused a planning application for an extension of the BFC's car park, but a subsequent

appeal to the Government's Planning Inspectorate had been allowed without imposing any conditions relating to the drainage of the site or car park.

26. From the end of May 2017 the residents began contacting the Council to raise concerns about its role in a visit made by the police to a resident's home to investigate a report of a surveillance camera located in her garden.
27. The Council's response was limited to advising the residents that "we cannot divulge who reported the incident due to Data Protection/Confidentiality", and that the "response was carried out according to our normal procedure based on the information given to the Council at the time".
28. The Council's response prompted requests under the FOIA from the complainant and one other resident. Two of the complainant's requests were refused as vexatious.
29. The complainant responded to the Council on 4 August 2017 to challenge its conclusion and he requested clarification and supporting evidence.
30. The complainant's letter was interpreted by Wigan Council as being a request for an internal review and it was referred on for action.
31. On receiving the Council's acknowledgement of his challenge, the complainant contacted the Council to make clear that he had not requested an internal review and he demanded that it was stopped immediately.
32. The Council recommenced its internal review on 2 November 2017, after the complainant had contacted its Internal Audit department directly. The investigating officer re-examined the Council's earlier decision to issue a refusal under section 14(1) of the FOIA. The Council's review took into account the numerous discussions and correspondence from the complainant and other residents in relation to their complaints about the BFC over a number of years.
33. The Council gave consideration to its attempt to resolve the dispute between the residents and the Church using mediation but concluded there was little more its officers could do following the failure of that mediation.
34. On 20 July 2017 the Council responded to the residents' complaints which had been submitted by the complainant. One of the issues concerned security cameras where the Council advised the complainant that there was nothing further the Council could do and that any further

correspondence from the complainant would not be responded to unless it related to materially different issues.

35. The Council considers that the primary objective of the complainant's subsequent requests was to obtain information which would show what led to the police visiting one of the residents about the camera located in her garden.
36. The Council advised the Commissioner that a previous complaint had been made by residents about the use of a camera mounted drone from the Church. Historically complaints from residents against the Church had been focussed on environmental issues such as the pruning of trees, light and noise pollution, drainage problems associated with the Church's car park extension.
37. The Council considers a consistent theme lies beneath all of the issues raised by the complainant and local residents: their belief the Council has given preferential treatment to the Church at the expense of residents. Notwithstanding this belief, the Council's reviewing officer came to the conclusion that the threshold for refusing the complainant's request as vexatious was not met and therefore the Council considered other exemptions.

Reasons for decision

The complainant's first request

38. The Council has confirmed to the Commissioner that it relied upon the provisions of section 31(1)(a) of the FOIA to withhold a copy of the email sent by the Council to Wigan Police Station in respect of the visit made by the police to the address specified in the complainant's request.
39. Under section 31(1)(a), information is exempt from disclosure if disclosure would, or would be likely to, prejudice the prevention or detection of crime.
40. The Council has explained its application of section 31(1)(a) by referring the Commissioner to her own guidance which states: "Section 31 may be used by any public authority and not just those with law enforcement functions. It can be used by a public authority that has no law enforcement functions to protect the work of one that does".
41. In the Council's opinion, there is a real risk that disclosure of the email could have a detrimental impact on law enforcement and in particular how the Council supports the police in its law enforcement activities.

This is because individuals and organisations may be discouraged from raising concerns with the Council if they believe that the details may be made publically available.

42. It is the Council's opinion that the release of the email would be likely to prejudice the prevention or detection of crime. It says the release of information that the Council provides to the police would restrict the sharing of appropriate information sharing between the Council and the police
43. To substantiate its position, the Council has referred the Commissioner to the "years of animosity" between the residents and the BFC and its belief that this request is an attempt to identify the originator of the complaint to the authority and that the author would have a reasonable expectation that this is not disclosed.
44. The Council acknowledges that the originator of the complaint might be of interest to the residents but asserts that the public interest in releasing the information is not sufficient to merit the release of the requested email.

The Commissioner's considerations

45. The Commissioner has examined the email which the Council has withheld from the complainant in reliance in section 31(1)(a).
46. The Commissioner accepts that the email contains information relating to the possibility of the commission of crime and she notes that the email is intended to be forwarded to the police.
47. However, the Commissioner finds no evidence which suggests that a crime would be, or would likely be prevented or detected through the email's disclosure and therefore she has concluded that the exemption provided by section 31(1)(a) is not engaged. The Commissioner has not gone on to consider the public interest arguments advanced by the Council in support of its application of that exemption.
48. In the Commissioner's opinion, the withheld email has insufficient content to properly engage the section 31(1)(a) exemption: There is certainly nothing in the email which justifies the Council's position that there is a real risk that its disclosure could have a detrimental impact on law enforcement. Indeed the Council's position is somewhat undermined by the apparent fact that the complainant and other local residents know the police visited the property specified in the request following the Council's forwarding the originator's concerns.

49. Notwithstanding that decision, the Commissioner as the regulator of the Data Protection Act, has considered whether the Council is entitled to rely on section 40(2) of the FOIA.
50. Section 40(2) provides an exemption to disclosure in respect of personal data of persons, other than the applicant, where disclosure would contravene any of the data protection principles and where none of the conditions in Schedule 2 of the Data Protection Act 1998 ("the DPA") can be met.
51. In order to engage section 40(2) of the FOIA, the withheld information must satisfy the definition of personal data provided by section 1(1) of the DPA. Therefore personal data must be:

"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."
52. Here, the Commissioner readily accepts that the withheld email is foremost the personal data its originator and secondly the personal data of those persons involved in referring the email to the police.
53. In the Commissioner's opinion the disclosure of the email to the complainant under the FOIA would breach the first data protection principle contained in Schedule 1 of the DPA.
54. The first data protection principle states –

"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."
55. In this case, the withheld email contains a complaint made to the Council. In submitting this complaint the email's originator did so in their private capacity with a legitimate expectation that the complaint would be treated in confidence and would not be released to anyone; not least to the wider general public. It is for this reason that the Commissioner considers disclosure of the withheld email would be unfair and would contravene the first data protection principle.
56. The Commissioner considers that there is no condition in Schedule 2 of the DPA which would allow the withheld email to be released to the world in a response to a request made under the FOIA, nor can the she

find any lawful basis which would permit the release of this information to the world.

57. The Commissioner is mindful of the contents of the withheld email and in particular to the allegation of a potential crime. She agrees with the Council's assertions that it would not be in the public interest to disclose information which may discourage others to raise similar concerns.
58. The adversarial relationship between the complainant, the residents group and the BFC is such that identifying the source of the complaint would likely further inflame this longstanding dispute.
59. The Commissioner's decision is that the Council is entitled to withhold the withheld email in reliance on Section 40(2) of the FOIA.

Elements 2 and 3 of the complainant's second request

60. The Council has informed the Commissioner that it has withheld the name of a member of its staff who occupies a position at service manager level.
61. The Council fully accepts that the identity of its employee relates to that person's public life, but it asserts that it is not the Council's policy to release the identity of employees at this officer's grade and the officer's role does not require them to represent the Council in respect of its policies or business practices. Consequently, the Council argues that this employee will have a reasonable expectation that their personal information will not be disclosed.
62. The Council has not asked its employee whether he or she would consent to the disclosure of his or her name to the complainant. The Council argues that it would not be fair to its employee to disclose his or her name as this would constitute a breach of the first data protection principle.
63. The Council has informed the Commissioner that it has concerns about the possible effect on its officer should their identity be disclosed to the complainant, particularly given the historic adversarial relations between the BFC and local residents.
64. In applying section 40(2) to the identity of its employee, the Council says it has considered the balance between its employee's rights and freedoms and the legitimate interest in disclosure to the public and the private interests of the requester.
65. The Council determined that disclosure would prejudice its employee's reasonable expectation that he or she would not be identified, and that this outweighs any gain the complainant or to the general public.

66. The Commissioner agrees with the Council's arguments and in this case she supports the Council's withholding of the identity of the employee who reported the complaint to the police. In the context of the case, and in consideration of the information available to her, the Commissioner can find no necessary and legitimate reason why the withheld identity would be of any practical benefit to the complainant or to the wider public in general.
67. The Commissioner's decision is that the Council is entitled to rely on section 40(2) of the FOIA to withhold the identity of its officer.

Section 41 – information provided in confidence

Element 4 of the complainant's second request

"Can you also forward me a copy of the original letter of complaint that was made to Wigan Council, after deleting any personal and/or sensitive information?"

68. The Council has confirmed that the requested letter is in fact an email. The Council has further confirmed that it has applied section 41(1)(a) to the requested email.
69. Section 41(1) provides that –
- “(a) Information is exempt information if it was obtained by the public authority from any other person (including another public authority),
- and,
- (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.”
70. For section 41(1)(a) to be met, the withheld information must have been provided to the public authority by a third party. In this case, the Council has confirmed the identity of the person who wrote the original email which contains a complaint.
71. For section 41(1)(b) to be met, disclosure of the withheld information must constitute an actionable breach of confidence. The Commissioner considers that the following characteristics are required for an actionable breach to exist:
- The withheld information has importance to the confider which should not be considered trivial;

- The information was communicated in circumstances importing an obligation of confidence; and
 - Unauthorised disclosure of the information would cause a specific detriment to the party which provided it or any other party.
72. In respect of the withheld email, the Council asserts that its writer holds the belief that his/her correspondence would be dealt with as a formal complaint and he would have a reasonable expectation that he/she would not be identified. The Council argues that its position is justified given the history of disputes between the parties involved.
73. The Council's drew the Commissioner's attention to the concerns raised by the writer in his/her email. Having examined that email, the Commissioner agrees with the Council that those concerns relate to a potentially sensitive matter which is certainly more than trivial. She accepts therefore that the contents of the email imply an obligation of confidence.
74. The Commissioner finds that the requirements of the section 41 exemption are met.
75. Section 41 is an absolute exemption and is not subject to consideration of the public interest test under the FOIA. There is however a recognised defence to an actionable breach of confidence which requires the public interest to be considered. The Commissioner has therefore set out below those factors which she considers to be relevant to the potential disclosure of the requested information.
76. The Commissioner will always give necessary weight to the public interest where disclosure of information provides accountability and transparency for decisions taken by public authorities as this helps to maintain confidence and trust in those authorities.
77. In this case the withheld email raises a concern for the Council's attention and action: As such, the email relates to a decision or action which the Council took after receiving it. The fact that the complainant is aware of the writer's complaint significantly diminishes the weight the Commissioner would give to the disclosure of the email.
78. In this case it is clear to the Commissioner that disclosure of the requested email would significantly infringe the writer's privacy. Furthermore, it would open the Council to the risk that other individuals would be discouraged from confiding or from raising concerns if their private correspondence was disclosed to the public.
79. The Commissioner cannot ignore the confidential nature of the withheld email. She considers that greater weight must be given to maintaining

its writer's confidence in circumstances which do not require the email to be made public.

80. The Commissioner agrees with the Council that the history of disputes between the BFC and local residents is such that disclosing a redacted version of the email would not serve the public interest.
81. The Commissioner's decision is that Wigan Metropolitan Borough Council is entitled to rely on section 41 of the FOIA to withhold the email requested by the complainant.

Right of appeal

82. 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
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

83. 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.
84. 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
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