

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 1 October 2015

Public Authority: Wirral Metropolitan Borough Council
Address: Town Hall
Brighton Street
Wallasey
Wirral
CH44 8ED

Decision (including any steps ordered)

1. The complainant made a request to Wirral Metropolitan Borough Council ("the Council") for information about emails sent from members of the public to Councillors being diverted to a specific email inbox, following a report in the local press. The Council refused the request by explaining that the information was not held or else was exempt under sections 40(2) (personal information) and/or section 36(2)(b) (free and frank exchange of views / provision of advice) of FOIA.
2. The Commissioner's decision is that some of the requested information is not held and some information is exempt under section 40(2). However, the Commissioner has also found that for the remaining information section 40(2) is not engaged and this information should be disclosed.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - The Council shall disclose to the complainant the information in part 3 of the request.
4. The public authority must take these steps within 35 calendar days of the date of this Decision Notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 6 May 2014 the complainant made a freedom of information request to the Council which read as follows:

Dear Wirral Metropolitan Borough Council,

Please read the following recent article from local newspaper The Wirral Globe:

http://www.wirralglobe.co.uk/news/11188936.UPDATED_Confidential_memo_tells_shocked_Wirral_councillors_their_emails_are_being_read_by_town_hall_bosses/

Following these revelations, public concern has been raised that senior officers of the council may have overstepped their powers under RIPA (Regulation of Investigatory Powers Act 2000) and I would ask you to allay my own particular concerns by answering the following questions in full.

The following email addresses have been anonymised to protect my privacy and to avoid spammers, but will match both addresses for [the complainant] which you will hold on your systems. I would ask that you substitute the correct addresses when answering the points within the FoI request below:

A. ***f*@e***v*****a*****e.co.uk*

B. ***u*.***d**@*t*w****.com*

1. Please provide a full list of the total number and identities of all Wirral councillors who have agreed, either in response to a prior request / suggestion or through their own autonomous actions, to have emails from the above A and B email addresses (and addressed "to" or "c.c." these councillors) diverted to the quoted "specific inbox" within the above article or to another distinct and separate inbox. Please state whether such a list does or doesn't exist and / or whether you do / do not hold it. Please state who does hold it if not yourselves.

2. Please provide a full list of the total number and identities of all councillors who have had emails originating from the above email addresses (and addressed "to" or "c.c." these councillors) diverted to the quoted "specific inbox" or to another distinct and separate inbox WITHOUT the relevant councillors' permission. Please state whether

such a list does or doesn't exist and / or whether you do / do not hold it. Please state the name of the party holding it if not yourselves.

3. Please provide a copy of the information / document(s) identifying the name of the "specific inbox" and also a copy of information / documents detailing and making clear whether it is monitored and read by officers or elected members. Please state whether such documents do or do not exist and / or whether you do / do not hold them. Please state the name of the party holding them if not yourselves.

4. Although I am not making any allegations as regards overstepping RIPA powers, due to the potential seriousness of this matter, please provide a copy of the quoted "confidential note" (correctly and professionally redacted) sent by CEO [a named individual] to councillors. The reason for this aspect of my request is that the note could contain crucial information to implicate / vindicate council officers - which would in turn clarify whether or not this matter needs to be reported to and pursued further by the appropriate regulating authorities.

5. Please provide information / documents detailing the total number of councillors who were "offended" - presumably these will be the ones making, to quote the CEO, "a number of complaints regarding the content, unacceptable tone and high volume of emails sent by [an individual] including a specific concern regarding comments about the Hillsborough memorial service held at Wallasey Town Hall".

This is not a vexatious request as it is clearly:

- not obsessive*
- not a repeat request*
- not designed to cause disruption or annoyance*
- not imposing a significant burden*
- of serious purpose and value*
- not likely to harass or cause distress to council staff*

Wherever DPA issues come into play under Section 40(2) of the FOIA, please redact any potentially identifying information accordingly. However such considerations should not arise when the requested detail is e.g. "total number of councillors".

For your information, I've emailed [a named individual] to ask whether my emails are being filtered and to state that it would have been a courtesy to advise members of the public that these actions were being considered, but have not received a response.

6. The Council failed to respond to the request and this resulted in the Commissioner issuing a decision notice on 9 June 2015 directing the Council to disclose the requested information or else issue a refusal notice in accordance with section 17 of FOIA.
7. The Council subsequently contacted the complainant on 13 July 2015 to confirm that the requested information was held but to say that parts 3, 4 and 5 of the request were exempt under section 40 (personal information) and parts 4 and 5 were additionally exempt under section 36(2)(b) (free and frank exchange of views / provision of advice). Parts 1 and 2 of the request were no longer in dispute.

Scope of the case

8. On 14 July 2015 the complainant contacted the Commissioner to complain about the Council's handling of his request for information and the Commissioner agreed that the scope of his investigation would be to consider whether the Council is entitled to rely on sections 40(2) and 36(2)(b) as a basis for refusing to provide the withheld information.
9. Given the Council's delay in handling the complainant's request the Commissioner also decided to exercise his discretion and consider the complaint without the Council having conducted an internal review.

Reasons for decision

10. Following receipt of the complaint the Commissioner wrote to the Council to ask it a number of questions about its handling of the complainant's request and to ask it to provide a full explanation of its reasons for refusing the complainant's request. Regrettably, the Council's response was inadequate and ignored most of the questions asked by the Commissioner, although it did confirm that for part 5 of the request no information was held, despite previously informing the complainant that the information was exempt under sections 40(2) and 36(2)(b). The Commissioner contacted the Council to give it a further opportunity to properly explain its reasons for refusing the request but failed to receive a response of any kind. The Commissioner finds this especially disappointing given that he has already had to issue a Decision Notice due to the Council's initial failure to respond to the request.

Section 40(2) – Personal information

11. Section 40(2) provides that information is exempt if it is the personal data of someone other than the applicant and disclosure would meet one of two conditions. In this case the first condition is relevant which is that disclosure would contravene one of the data protection principles.
12. In considering whether section 40(2) is engaged the first thing to decide is whether the information is personal data. Personal data is defined in the Data Protection Act as:

"personal data" means 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 intentions of the data controller or any other person in respect of the individual;

13. The Council has said that the information in parts 3 and 4 of the request is exempt under section 40(2). The information in part 3 of the request is the name of an email account to which emails were diverted to as outlined in the complainant's request. This information is not personal data. It would not be possible to link the information to any individual in any way. The email address has a generic title and no individual is named. Confirming when and how the account is monitored by officers or elected members could also be answered without disclosing the names of any individual. Therefore the Commissioner is satisfied that section 40(2) does not apply to this part of the request.
14. For part 4 of the request, the information is an email sent to Councillor's advising them that emails from certain individuals may be diverted to the email account mentioned in part 3 of the request. Unlike part 3 of the request the Commissioner would accept that this information is personal data given that it identifies the then Chief Executive and contains information about a third party within the email. Having satisfied himself that this information is personal data the Commissioner has gone on to consider whether disclosure would contravene any of the data protection principles.
15. The Council has said that disclosure would contravene the first data protection principle which requires that data be processed fairly and lawfully and in particular shall not be processed unless one of the

condition in schedule 2 of the Data Protection Act is satisfied. The Commissioner had asked the Council to explain why disclosure would be unfair but as noted above, it failed to respond.

16. In assessing whether disclosure would be unfair and thus constitute a breach of the first principle the ICO takes into account a number of factors such as:
 - Does the information relate to the individual's public life (i.e. their work as a public official or employee) or their private life (i.e. their home, family, social life)?
 - What reasonable expectations does the individual have about what will happen to their personal data?
 - Has the individual named been asked whether they are willing to consent to the disclosure of their personal data?
17. The Council has provided little detail to support its case that the information is exempt. It did say, however, that in its view disclosure would prejudice the rights and legitimate interests of the individuals concerned and there was a strong likelihood that their personal data will be processed in breach of the first data protection principle. It went on to say that it believed that disclosure would have an unjustified adverse effect on the data subjects and would not meet any of the conditions in schedule 2 of the DPA 1998, for instance the sixth condition.
18. Normally the Commissioner would require a public authority to provide a more thorough case for applying an exemption and where it fails to do so he would consider ordering disclosure. However, the Commissioner is mindful that as the regulator of the DPA 1998 he must be careful not to order disclosure of information where it amounts to the personal data of third parties. It would be unfair to individuals if their rights and freedoms as data subjects were impinged because a public authority had failed to make a proper case that the information was exempt. The Commissioner has considered the withheld information and he is satisfied that as it relates primarily to a third party, not a member of the Council or its staff, that person would have a reasonable expectation that information about them would not be disclosed. Having reviewed the information it is very unlikely that consent will have been obtained to disclose the information and moreover disclosure would be likely to cause distress. For these reasons, the Commissioner is satisfied that disclosure would be unfair.
19. However, notwithstanding individuals' expectations of privacy or any harm that could be caused, there may be occasions when it is still fair to confirm or deny if information is held if there is a public interest in doing so. In this case the Commissioner has reached the view that any public

interest in disclosure has already been met by the fact that the Council has confirmed that certain emails to Councillors have been diverted. The information would add very little to what has already been made public in the press report referred to by the complainant in his request, which included an official statement from the Council on why it was deemed necessary to take this action. Therefore, the Commissioner is satisfied that disclosure would contravene the first data protection principle and consequently section 40 is engaged.

Section 36(2)(b) – free and frank provision of advice / exchange of views

20. The section 36 exemption has also been applied to part 4 of the request. However, the Commissioner has not considered this exemption as he is satisfied that the information is exempt on the basis of section 40(2).

Section 1 – information not held

21. In response to the complainant's request the Council had told the complainant that the information in part 5 of the request was also exempt on the basis of section 40(2) and section 36(2)(b). However, when responding to the Commissioner's enquiries it clarified that the information in part 5 of the request was not held because any concerns expressed by Councillors were only made verbally and no recorded information was held.
22. In scenarios where there is some dispute between the amount of information located by a public authority and the amount of information that a complainant believes may be held, the ICO, following the lead of a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities. In other words, in order to determine such complaints the ICO must decide whether on the balance of probabilities a public authority holds any information which falls within the scope of the request (or was held at the time of the request).
23. The Commissioner has considered the Council's arguments as to why the requested information is not held and he is satisfied that it is reasonable to conclude that because complaints were only made verbally, it does not hold any recorded information. The Commissioner would have preferred for the Council to have provided evidence to show that it took steps to search for any relevant information to confirm that this was indeed the case but he is nevertheless prepared to accept that the requested information is not held in a recorded form. Without any evidence to the contrary, and making his decision on the balance of probabilities, the Commissioner must find that the requested information is not held.

Right of appeal

24. 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

25. 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.
26. 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

**Pamela Clements
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