

## **Freedom of Information Act 2000 (Section 50)**

### **Decision Notice**

**Date: 7 June 2011**

**Public Authority:** West Yorkshire Police Authority  
**Address:** Ploughland House  
62 George House  
Wakefield  
WF1 1DL

### **Summary**

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The complainant requested a briefing note prepared by West Yorkshire Police for the public authority concerning issues relating to police pensions and injury awards. The public authority disclosed the majority of this briefing note, but redacted some content, citing the exemptions provided by the following sections of the Act: 36(2)(b)(i) (inhibition to the free and frank provision of advice), 36(2)(b)(ii) (inhibition to free and frank exchange of views) and 36(2)(c) (other prejudice to the effective conduct of public affairs). In relation to some of the information redacted, the Commissioner concludes that section 36(2)(b)(i) is engaged and that the public interest favours the maintenance of this exemption. In relation to the remainder of the information redacted, the Commissioner finds that none of the exemptions cited by the public authority are engaged and that it breached sections 1(1)(b) and 10(1) of the Act in refusing to disclose this information. The public authority is now required to disclose the information that the Commissioner has concluded is not exempt.

### **The Commissioner's Role**

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1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

### **The Request**

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2. The complainant requested the following information on 16 June 2010:

*"...the briefing note requested...in the [Human Resources Committee] minutes...[dated] 19/06/09".*

3. The response to this request was dated 13 July 2010 and disclosed the document requested by the complainant, which was titled "*Briefing Note re Impact upon Earnings Review*". Parts of this document were redacted, with the exemptions provided by the following sections of the Act cited in relation to these redactions: 36(2)(b)(i) (inhibition to the free and frank provision of advice), 36(2)(b)(ii) (inhibition to the free and frank exchange of views), 36(2)(c) (other prejudice to the effective conduct of public affairs) and 40(2) (personal information).
4. The complainant responded to this on 21 July 2010 and requested an internal review. The public authority responded to this on 6 September 2010 and advised the complainant that it did not intend to conduct an internal review. Its reasoning was that it did not believe that this would be "*credible*" due to the requirement that section 36 can only be cited where the opinion of a senior official within the public authority is that the exemption is engaged.

## **The Investigation**

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### **Scope of the case**

5. As noted above, the public authority declined to carry out an internal review. Instead, it forwarded the complainant's request for an internal review to the Commissioner's office. In response to this, the Commissioner's office contacted the public authority and advised that section 50 of the Act required a complaint to be made by the applicant for information; it also contacted the complainant to ascertain whether he did wish to pursue a complaint.
6. The complainant responded to this on 30 September 2010 and confirmed that he did wish to pursue a complaint about the citing of section 36, but that he did not wish to complain about the citing of section 40(2). The remainder of this Notice therefore concerns only the citing of section 36.

### **Chronology**

7. The Commissioner's office contacted the public authority initially on 1 October 2010 and asked that it provide a copy of the information withheld from the complainant. The public authority complied on 6 October 2010.

8. The Commissioner's office contacted the public authority again on 23 December 2010 and asked that it respond with further explanation about the citing of section 36. The response from the public authority in which the necessary further explanation was provided was received on 12 January 2011.

## Analysis

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### Exemptions

#### Section 36

9. The public authority cited section 36(2)(b)(i), which provides an exemption for information the disclosure of which would, or would be likely to, inhibit the free and frank provision of advice; and section 36(2)(b)(ii), which provides the same in relation to the free and frank exchange of views for the purposes of deliberation. It has also cited section 36(2)(c), which provides an exemption for information the disclosure of which would, or would be likely to, otherwise prejudice the effective conduct of public affairs. These exemptions can only be cited where the reasonable opinion of a specified qualified person (QP) is that these exemptions are engaged.
10. Consideration of these exemptions is a two-stage process; first, they must be engaged, for which the Commissioner must conclude that the opinion of the QP is objectively reasonable. Secondly, these exemptions are qualified by the public interest, which means that the information must be disclosed if the public interest in the maintenance of the exemptions does not outweigh the public interest in disclosure.
11. In reaching a conclusion as to whether these exemptions are engaged, the Commissioner will address the following:
  - who the QP is for the public authority;
  - whether the QP gave an opinion in respect to the information in question;
  - when the opinion was given;
  - whether the opinion was reasonably arrived at and reasonable in substance.
12. As to the identity of the QP, the public authority has stated that these exemptions were cited based upon the opinion of the Chair. The now archived website [www.foi.gov.uk](http://www.foi.gov.uk), via which the government provided advice on the Act, records that the QP for the public authority is the Chair and, therefore, the Commissioner accepts that the correct individual within the public authority acted as QP.

13. Turning to whether this person gave an opinion on the citing of these exemptions and when this opinion was given, the public authority stated that the QP gave an opinion on the citing of these exemptions on 9 July 2010. As evidence for this, the public authority has supplied to the Commissioner a copy of a submission provided to the QP setting out the reasoning for the suggested citing of this exemption. On the basis of this evidence, the Commissioner concludes that the QP gave an opinion on the citing of these exemptions and that this opinion had been given by the date of the refusal notice.
14. Moving to whether this opinion was reasonably arrived at, the issue here is the process undertaken by the QP when forming their opinion and particularly what was taken into account in this process. If, for example, the QP had reached their opinion on the basis of the toss of a coin, the Commissioner would be likely to conclude that the opinion had not been reasonably arrived at.
15. As referred to above, in this case the QP was provided with a submission setting out the suggested reasoning for the citing of this exemption. A copy of this submission was provided to the Commissioner's office and the Commissioner notes that this sets out the background to the exemption and suggests factors in favour of withholding the information that are, for the most part, relevant to the exemptions cited. Importantly, the QP was also provided with a copy of the information in question. The Commissioner assumes that the QP viewed this information when forming their opinion and, on the basis of this and the content of the submission, the Commissioner finds that the opinion of the QP was reasonably arrived at.
16. As to whether this opinion was reasonable in substance, the public authority has stated that the opinion of the QP was that inhibition and prejudice would be likely to result. The test applied in relation to other exemptions when considering whether prejudice would be likely to result is that the likelihood of prejudice must be real and significant and more than hypothetical or remote. The Commissioner has applied this test here in that he has considered whether it was objectively reasonable for the QP to hold the opinion that disclosure of the information in question would lead to a real and significant likelihood of inhibition. This is in line with the approach taken by the Information Tribunal in the case *John Connor Press Associates Limited v the Information Commissioner* (EA/2005/0005) in which it stated:

*"the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk."* (paragraph 15)

17. The key issue when considering whether this opinion was reasonable in substance is the content of the information in question and whether this supports the reasonableness of the opinion. The submission, which provides the evidence available to the Commissioner about the grounds for the opinion of the QP, identifies four suggested arguments for the citing of these exemptions.
- Disclosure would be likely to prejudice future exchanges of views and the provision of advice between West Yorkshire Police and the public authority by causing inhibition to these processes.
  - Disclosure would be likely to restrict the options available to the public authority and West Yorkshire Police in relation to future *"police injury appeals"*.
  - The public authority had already made available in the public domain a large amount of information relating to the same subject matter as that withheld.
  - The fourth argument related to the provision of *"updates and advice"* to members of the public authority; this appeared to be a similar argument as the first bullet above.
18. In relation to redactions from the first page of the document in question, the Commissioner cannot see how the arguments advanced in the submission could reasonably relate to this information.
19. The Commissioner accepts that the first and fourth bullet points above set out arguments relevant to sections 36(2)(b)(i) and (ii) and that the second bullet point may be relevant to section 36(2)(c). The third bullet point is not relevant to whether these exemptions are engaged.
20. Whilst the availability in the public domain of information relating to the subject matter of the information in question may be relevant to the balance of the public interest, the Commissioner does not believe that the availability of such information has a bearing on the likelihood of inhibition or prejudice as a result of disclosure of the information in question and the public authority has advanced no explanation on this point. The third bullet point above is not, therefore, considered further in relation to whether these exemptions are engaged.
21. Covering first the arguments set out in the first and fourth bullet points, this is essentially that inhibition would be likely to occur to free and frank exchanges and to the provision of advice between the public authority and West Yorkshire Police. The redactions from the first page, however, do not record any exchange of views. The opinion of the QP appears to have been that future participants in free and frank exchanges would be likely to be inhibited through knowledge that the

- record of previous free and frank exchanges was disclosed in this case. In the absence of the content redacted from the first page recording any exchange of views, the Commissioner is not clear how such inhibition could be reasonably regarded as a likely result of disclosure.
22. As to whether inhibition relevant to section 36(2)(b)(i) would be likely to result through disclosure, whilst the Commissioner would accept that the entirety of the document in question records the provision of advice, it is not clear how the content in question could be fairly characterised as free and frank. Similarly to above in connection with section 36(2)(b)(ii), the QP appears to be of the opinion that knowledge of disclosure in this case would inhibit the provision of free and frank advice in future. In order for the Commissioner to accept this argument was reasonable, an important factor would be that the content in question was itself free and frank. In the event the content in question appears to report facts; no commentary is provided with these facts. Neither does this content include expressions of opinion, or any other content that could conceivably be impacted upon by a chilling effect.
23. The Commissioner has noted above that the argument set out at the second bullet point may be relevant to section 36(2)(c). This would be because it sets out prejudice that it is not covered by sections 36(2)(b)(i) and (ii). In *McIntyre v The Information Commissioner & the Ministry of Defence* (EA.2007/068) the Tribunal commented on the intention behind the exemption at s36(2)(c). It said (at paragraph 25) that *"this category of exemption is intended to apply to those cases where it would be necessary in the interest of good government to withhold information, but which are not covered by another exemption, and where disclosure would prejudice the public authority's ability to offer an effective public service or to meet its wider objectives or purposes due to the disruption caused by the disclosure or the diversion of resources in managing the impact of the disclosure"*. The Commissioner does not believe that the argument from the public authority can be regarded as reasonable. Whilst it is asserted that disclosure could close off options for the public authority, how this result would be likely to come about is not clear to the Commissioner. He does not accept that arguing this outcome and likely prejudice to the conduct of public affairs is reasonable. Neither does the Commissioner believe that it is clear from the redacted content from the first page of the document in question how this prejudice could come about.
24. For these reasons, the conclusion of the Commissioner is that the opinion of the QP in relation to the content redacted from the first page of this document was not objectively reasonable. The exemptions



provided by sections 36(2)(b)(i), (ii) and (2)(c) are not, therefore, engaged in relation to this information.

25. Turning to the redactions from the second page of the briefing note in question, the Commissioner has focused initially on section 36(2)(b)(i) and has considered whether this content could be fairly characterised as free and frank and whether the author of this would have expected it to remain confidential. If it is the case that this advice could be described as free and frank and disclosure would be counter to the expectation of the author, it may be reasonable to argue that disclosure would be likely to inhibit the provision of similarly free and frank advice in future.
26. The content in question concerns representations made by individual officers about injury awards and pensions. Whilst these representations are not attributable to individuals, the Commissioner regards the fact of this information relating to individuals as significant as it provides grounds on which to believe that the author of this information would have expected that this would have been held in confidence. Part of the content redacted from the second page could also be described as advice based on the opinion of the author of the note.
27. The Commissioner would accept, based on the content of this information, that this could be described as at least somewhat free and frank. As to whether it was reasonable for the QP to hold the opinion that disclosure of this would be likely to lead to inhibition to the provision of advice in future, an important issue here is whether the author of this note would have expected that it would be held in confidence. On this point the public authority has stated that this document was intended to be "*outside the public arena*", suggesting that the expectation of the author would have been that the confidentiality of this information would have been maintained.
28. The conclusion of the Commissioner is that, on the basis of the content of the redactions from the second page of the briefing note and what it is reasonable to assume would have been the expectation of the author about the confidentiality of this, it was reasonable for the QP to hold the opinion that disclosure would be likely to inhibit the provision of free and frank advice in future. The exemption provided by section 36(2)(b)(i) is, therefore, engaged in relation to the second page redactions.

### **The public interest**

29. In relation to the information in connection with which the Commissioner has concluded that section 36(2)(b)(i) is engaged, it is necessary to go on to consider the balance of the public interest. It was

the opinion of the QP that disclosure in this case would be likely to inhibit the free and frank provision of advice. In accepting that the opinion of the QP was reasonable, the Commissioner has accepted that disclosure of the information in question would be likely to inhibit this process. The role of the Commissioner here is to consider whether these concerns outweigh the public interest in disclosure.

30. In the case of *Guardian & Brooke v The Information Commissioner & the BBC* (EA/2006/0011 & EA/2006/0013), the Information Tribunal acknowledged that the application of the public interest test to the section 36 exemption "*involved a particular conundrum*", noting that, although it is not for the Commissioner to form his own view on the likelihood of prejudice under this section (because this is given as a reasonable opinion by a qualified person), in considering the public interest "*it is impossible to make the required judgement without forming a view on the likelihood of inhibition or prejudice*" (paragraph 88).
31. In the Tribunal's view, the reasonable opinion is limited to the *degree of likelihood* that inhibition or prejudice would occur, on the balance of probabilities. It therefore argued that the reasonable opinion, "*does not necessarily imply any particular view as to the severity or extent of such inhibition [or prejudice] or the frequency with which it will or may occur, save that it will not be so trivial, minor or occasional as to be insignificant*" (paragraph 91). This means that, whilst the Commissioner should give due weight to the reasonable opinion of the qualified person when assessing the public interest, he can and should consider the severity, extent and frequency of prejudice or inhibition to the subject of the effective conduct of public affairs.
32. Covering first those factors that favour maintenance of the exemption, the role of the public authority is described on its website as follows:

*"The key statutory duty for a police authority is to secure the maintenance of an efficient and effective police force in its area and hold the Chief Constable to account for the delivery of policing services."* (<http://www.wypa.org.uk/section-item.asp?sid=4&iid=5>)
33. Clearly, in order for the public authority to carry out this role, free and frank communication between it and West Yorkshire Police will be required. This will include the provision of advice between the public authority and the police force.
34. Therefore, the Commissioner accepts that the process of West Yorkshire Police advising the public authority will take place frequently and will be central to the role of the public authority. This suggests that



any disruption to this process would be likely to take place frequently and, due to the importance of this process to the operation of the public authority, be of considerable severity and extent. Having accepted that inhibition to the free and frank provision of advice would be likely to result through disclosure, the Commissioner must also accept that the public interest in avoiding this inhibition is a factor of significant weight in favour of maintenance of the exemption, given the likelihood of the frequency of this inhibition being high, and the impact of this inhibition upon the public authority being of considerable severity and extent.

35. Turning to those factors that favour disclosure, the Commissioner has taken into account here the general public interest in improving the transparency and openness of the public authority. Consideration has also been given to what factors apply in relation to the specific information in question and, to this end, brief research has been carried out for evidence of any particular public interest relating to the issue of police injury awards and pensions to which the information relates.
36. Whilst this research did not locate any evidence of public interest closely related to the subject covered in the information, the Commissioner believes that it is the case that the issue of police remuneration and compensation for injuries sustained on duty is of public interest. This public interest relates to both the general public interest in public sector remuneration and whether this is at an appropriate level, and particularly in the circumstances when and the level at which police officers may be compensated for injury. The Commissioner considers this to be a valid public interest factor in favour of disclosure of some weight.
37. Whilst the Commissioner has recognised public interest in favour of disclosure on the basis of the content of the information, combined with the general public interest in improving the transparency and openness of the public authority, he must also recognise the importance of the public interest in enabling the public authority to carry out its role effectively. In this case, the view of the Commissioner is that the public interest in avoiding the inhibition (that he has accepted the QP was reasonable to believe would be likely to result) tips the balance of the public interest in favour of maintenance of the exemption. His conclusion is, therefore, that the public interest in the maintenance of the exemption provided by section 36(2)(b)(i) outweighs the public interest in disclosure.
38. Due to this finding on the balance of the public interest in relation to section 36(2)(b)(i), it has not been necessary to go on to also consider

sections 36(2)(b)(ii) and 36(2)(c) in relation to the redactions from the second page.

## **Procedural Requirements**

### **Sections 1 and 10**

39. In failing to disclose within 20 working days of receipt of the request the information which the Commissioner now concludes was not exempt by virtue of any of sections 36(2)(b)(i), (ii) or 36(2)(c), the public authority did not comply with the requirements of sections 1(1)(b) or 10(1).

## **The Decision**

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40. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act in that it applied the exemption provided by section 36(2)(b)(i) correctly to some of the withheld information. However, the Commissioner also finds that none of the exemptions cited applied to the remainder of the withheld information and that, in failing to disclose this, the public authority breached the requirements of sections 1(1)(b) and 10(1).

## **Steps Required**

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41. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
- disclose to the complainant the information redacted from the first page of the briefing note.
42. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

## **Failure to comply**

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43. Failure to comply with the steps described above 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.

## Other matters

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44. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern. As noted above at paragraph 4, the public authority declined to carry out an internal review in this case as it did not believe that this would be "*credible*" due to the seniority of the QP. The position of the public authority appears to be that it would not be conceivably possible for a less senior member of staff to overturn the decision of the Chair that the information should be withheld.
45. The view of the Commissioner is that it should be possible to carry out a credible internal review where section 36 has been cited. Consideration of the balance of the public interest should be separate to the opinion of the QP; therefore, an internal review that considers whether the correct conclusion was reached as to the balance of the public interest need not comment on the QP's opinion. This approach is in line with the following guidance published by the Commissioner:

[http://www.ico.gov.uk/upload/documents/library/freedom\\_of\\_information/detailed\\_specialist\\_guides/section\\_36\\_practicalities\\_v1.pdf](http://www.ico.gov.uk/upload/documents/library/freedom_of_information/detailed_specialist_guides/section_36_practicalities_v1.pdf)

## Right of Appeal

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46. 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,  
Arnhem House,  
31, Waterloo Way,  
LEICESTER,  
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: [informationtribunal@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk).

Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

47. 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.
48. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

**Dated the 7<sup>th</sup> day of June 2011**

**Signed .....**

**Steve Wood**  
**Head of Policy Delivery**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**

## Legal Annex

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### **Section 1(1) provides that -**

"Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him."

### **Section 10(1) provides that –**

"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."

### **Section 36(1) provides that –**

"This section applies to-

- (a) information which is held by a government department or by the National Assembly for Wales and is not exempt information by virtue of section 35, and
- (b) information which is held by any other public authority.

### **Section 36(2) provides that –**

"Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-

- (a) would, or would be likely to, prejudice-
  - (i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or
  - (ii) the work of the Executive Committee of the Northern Ireland Assembly, or
  - (iii) the work of the executive committee of the National Assembly for Wales,
- (b) would, or would be likely to, inhibit-

- (i) the free and frank provision of advice, or
- (ii) the free and frank exchange of views for the purposes of deliberation, or
- (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.”