

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 27 June 2013

**Public Authority:** North West Leicestershire District Council  
**Address:** Council Offices  
Whitwick Road  
Coalville  
Leicestershire  
LE67 3FJ

#### **Decision (including any steps ordered)**

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1. The complainant has requested a copy of advice given by an official of North West Leicestershire District Council (the "Council") regarding a management restructuring paper that he, the complainant, had submitted while employed at the Council. The Council refused to provide this citing section 36 (Prejudice to the effective conduct of public affairs) as its basis for doing so.
2. The Commissioner's decision is that a small portion of the information is the complainant's own personal data and is exempt from disclosure under the FOIA by virtue of section 40(1). He has decided that the remainder is exempt from disclosure under section 36.
3. No steps are required.

#### **Request and response**

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4. On 21 June 2012, the complainant wrote to the Council and requested information in the following terms:

"In my letter of 21 May 2012, I asked for a copy of all the advice provided by the s151 officer to [named official], including all emails,

notes and reports.<sup>1</sup> This information has not been supplied. Please send me this information by return.”

5. On 21 May 2012 the complainant had asked the Council’s current Chief Financial Officer (s151) about its consideration of a document that he, the complainant, referred to as MROP<sup>2</sup>. He had also asked the Council in that letter to:

“Please provide me with a copy of all advice provided by the s151 office to [named official] including emails, notes and reports.”

6. This was part of an ongoing correspondence between the complainant and the Council regarding an appeal he had lodged concerning his pension rights. However, in correspondence dated 25 June 2012, the Council told the complainant that it was now treating this as a request under the FOIA.
7. The Council responded under the FOIA on 30 July 2012. It refused to provide the requested information and cited the FOIA exemption at section 36 (prejudice to the effective conduct of public affairs) as its basis for doing so.
8. Following an internal review the Council wrote to the complainant on 10 September 2012. It upheld its original position.

### **Scope of the case**

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9. The complainant wrote to the Commissioner on 21 September 2012 to complain about the way this request for information had been handled. This complaint was part of ongoing correspondence with the Commissioner on related FOIA and Data Protection Act (“DPA”) matters. In his letter of complaint, he queried why the Council had dealt with the request under FOIA when, in his view, the information was more likely to be caught by the requirements of the DPA. Unfortunately, the Commissioner did not identify this as a separate complaint under the FOIA until 19 November 2012. There followed a further delay at the
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<sup>1</sup> The Commissioner understands the phrase “s151 officer” as referring to a local authority’s statutory Senior Financial Officer appointed under section 151 of the Local Government Act 1972.

<sup>2</sup> Management Restructure Options Paper submitted to the Council by the complainant in 2010 when he was an employee there.

Commissioner's office. Both parties were not advised that the matter was to be taken forward as a new complaint until 17 January 2013.

10. The Commissioner's investigation has looked at two points:
  - a. whether, or to what extent, the requested information is the complainant's personal data; and
  - b. where some or all of the information is not his personal data, whether the Council is entitled to rely on section 36 of the FOIA as a basis for withholding it.

### **Reasons for decision**

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11. The Council initially appeared to suggest that it had already considered the information requested in this case as part of its consideration of previous requests made by the complainant under either the FOIA or the DPA. However, when pressed on this point, it acknowledged that it had not.
12. Section 40(1) of the FOIA states that information which is the personal data of the requester is absolutely exempt from disclosure to the requester under the FOIA.
13. Personal data is information which relates to an identifiable, living individual and which is biographically significant about them. In considering whether some or all of the requested information is personal data, the Commissioner, who is also designated as the UK's Data Protection Authority, had regard for his own published guidance and considered the nature of the requested information.<sup>3</sup>
14. The Commissioner acknowledges that it is not immediately obvious that the information which has been withheld in this case is the complainant's personal data. It discusses a paper that he had prepared in the course of his duties when he was an employee of the Council. This paper had addressed management restructuring options at the time and costs involved. However, the management restructuring options that he suggested included making his post redundant and the relevant costs to the Council of doing so. In the Commissioner's view, there is a particular section of the withheld information which is the complainant's personal

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[http://www.ico.gov.uk/for\\_organisations/data\\_protection/the\\_guide/key\\_definitions.aspx](http://www.ico.gov.uk/for_organisations/data_protection/the_guide/key_definitions.aspx)

data because it pertains to suggested payments to him personally (rather than, for example, to his team budget while employed at the Council). Full details of the information to which the foregoing comments refer is set out in a Confidential Annex to his Notice.

15. The Commissioner is satisfied that the information described in the Confidential Annex to this Notice is the complainant's personal data. As such, it is exempt from disclosure to him under section 40(1) of the FOIA. More comment on this is also set out in the Other Matters section of this Notice.

### **Section 36 – Effective conduct of public affairs**

16. This Notice will now consider the requested information which is not the complainant's personal data. The Council has cited the exemptions provided by subsections 36(2)(b)(i), (2)(b)(ii) and (2)(c) as a basis for withholding this information. These subsections apply where disclosure of the requested information would, or would be likely to, have the following results:

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 for the purposes of deliberation.

36(2)(c) – other prejudice to the effective conduct of public affairs.

17. Consideration of these exemptions is a two-stage process. First, the exemptions must be engaged and, secondly, these exemptions are qualified by the public interest. This 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.
18. Covering first whether these exemptions are engaged, the exemptions provided by section 36 can be cited only on the basis of the reasonable opinion of a specified qualified person (QP). Reaching a conclusion as to whether these exemptions are engaged involves establishing whether an individual authorised to act as QP has given an opinion and whether, if such an opinion was given, that opinion was reasonable. If these conditions are met, the exemption is engaged.
19. The Council has stated that its Monitoring Officer acted as QP in relation to the complainant's request. The Commissioner is satisfied that this person is the QP for the purposes of the FOIA. The status of the Monitoring Officer as the qualified person for local authorities is set out

in an archived webpage of the Department for Constitutional Affairs (now the Ministry of Justice).<sup>4</sup>

20. As to whether the Monitoring Officer gave an opinion on the citing of these exemptions, the Council has provided evidence of this in the form of a statement by the Monitoring Officer made in respect of the information requested in this case. The Council initially referred to a statement made to the Commissioner in a previous FOIA case but, following a query from the Commissioner, it confirmed that the QP had given their opinion separately in relation to the information at issue in this case. The Commissioner is satisfied that the QP viewed the information and gave an opinion that these exemptions were engaged shortly prior to 30 July 2012 (when the Council issued its refusal notice in this case).
21. The Commissioner accepts, therefore, that these exemptions were cited on the basis of the opinion of an authorised QP.
22. The next step is to consider whether the opinion of the QP was reasonable. In forming a conclusion on this point the Commissioner has considered the explanation given by the QP and the content of the information in question. He also considers whether the opinion that disclosure of the information in question would be likely to result in inhibition or prejudice is in accordance with reason and not irrational or absurd. The opinion must be a reasonable opinion but does not have to be the only reasonable opinion that could be held in order to engage these exemptions.
23. Concerning section 36(2)(b)(i), which relates to inhibition to the free and frank provision of advice, the Commissioner notes that the information could fairly be described as free and frank advice given at a senior level regarding proposals about the restructure of management at the Council. The QP's opinion specifically describes the likely inhibition to the free and frank provision of advice that would arise following disclosure of this information. The QP has therefore made a link between the information itself and the prejudicial outcome described in the exemption.
24. Concerning section 36(2)(b)(ii), which relates to inhibition to the free and frank exchange of views for the purpose of deliberation, the

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<http://webarchive.nationalarchives.gov.uk/20100512160448/http://www.foi.gov.uk/guidance/exguide/sec36/annex-d.htm#part2>

Commissioner notes that the withheld information could also be fairly described as a free and frank view for the purpose of deliberation on the question of restructuring of management at the Council. The QP's opinion also refers to the likely inhibition of the free and frank exchange of views that would arise following disclosure of this information. The QP has therefore also made a link between the information itself and the prejudicial outcome described in the exemption.

25. Section 36(2)(c) applies where the public authority believes that harm to the effective conduct of public affairs would be likely to result through disclosure which is not covered by the other subsections of section 36, or any of the other exemptions provided by part II of the FOIA. However, the QP did not address this in their opinion nor is it obvious from the withheld information how such harm might arise. The Commissioner has therefore disregarded the citing of section 36(2)(c) and focussed on sections 36(2)(b)(i) and (ii).
26. Having considered the information in question and the factors set out by the QP when giving their opinion, the Commissioner accepts the QP's opinion in relation to sections 36(2)(b)(i) and (ii) is reasonable.
27. The next step is to consider the balance of the public interest. The role of the Commissioner here is to consider whether the public interest in disclosure outweighs the concerns identified by the QP. When assessing the balance of the public interest in relation to section 36, the Commissioner will give due weight to the reasonable opinion of the QP, but will also consider the severity, extent and frequency of the inhibition and prejudice that he has accepted would be likely to result through disclosure.
28. As to the frequency of inhibition, the Commissioner accepts that the provision of advice from officials to the senior executive team at the Council (including the Chief Executive) plays an important role in the functioning of the Council. It follows, therefore, that such advice is provided frequently. Given the difficult economic conditions that prevail nationally at present, the Commissioner recognises that the Council may need to revisit its management structure or the continuation of various roles within its structure on a reasonably regular basis.
29. On the issue of the severity and extent of the inhibition, the Commissioner accepts that it is important that officials do not feel inhibited by possible disclosure of any advice they give or views they exchange with regard to restructuring of the Council's management or other similarly sensitive issues. Given this, the Commissioner finds that the inhibition arising from disclosure would be sufficiently severe that it contributes significant weight in favour of maintenance of the exemptions.

30. Turning to those factors that favour disclosure of the information the Council recognised a public interest in transparency and in the enhancement of public debate. However, it did not consider that disclosure would serve those interests in this case.
31. The complainant's arguments focus on his compelling private interest in resolving his pension concerns. He is concerned about errors which he believes he has identified in some information the Council has disclosed to him and seeks to see the extent of other errors which may have informed the Council's decisions in relation to his pension. He does not agree that the Council should have treated his request under the FOIA and it should, instead have had regard to his DPA information access rights.
32. Further comment on this point is addressed in the Confidential Annex to this Notice.
33. In light of the above, the Commissioner has concluded that there is insufficient public interest in disclosure and that the public interest favours maintaining the exemptions at sections 36(2)(b)(i) and (ii). In reaching this view, the Commissioner has regard for the limited public interest in making the requested information publically available under the FOIA. He recognises that the complainant has a compelling private interest in learning more about how the Council analysed a paper that he submitted while in its employ. However, this does not add weight to the public interest in disclosure. By contrast, the Commissioner recognises that there is a competing and more compelling public interest in avoiding inhibition to free and frank discussion and deliberation on financial matters which affect the Council.

## **Other matters**

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34. As noted above, the information requested by the complainant includes his personal data. The information in question is set out in a Confidential Annex to this Notice. The Council explained that it had not considered the document in which the personal data is contained when responding to previous subject access requests made by the complainant under section 7 of the DPA. The Commissioner recommends that the Council now consider whether it is obliged to provide to the requester with the personal data set out in the Confidential Annex in accordance with its obligations under section 7 of the DPA.

## 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: 0116 249 4253

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

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

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 .....**

**Alexander Ganotis**  
**Group Manager – Complaints Resolution**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**