

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 December 2015

Public Authority: Wirral Metropolitan Borough Council (the Council)

Address: Wallasey Town Hall Brighton Street
Wirral
Merseyside
CH44 8ED

Decision (including any steps ordered)

1. The complainant has requested information relating to an inquiry into the way a group of whistleblowers have been treated by the Council. The Council provided answers to some of the requested information but refused to provide the terms of reference (part a of the request) under section 36(2)(b)(i) and (ii) FOIA.
2. The Commissioner's decision is that the Council has incorrectly applied section 36(2)(b)(i) and (ii) FOIA to part of the request.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - The Council should disclose the information withheld under section 36(2)(b)(i) and (ii) FOIA.
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 pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 6 April 2015 the complainant requested information of the following description:

"The following press report dated 8th January 2015 states that Nick Warren is to "lead an enquiry into the way a group of whistleblowers have been treated by the Council - and decide whether they should receive compensation. Nicholas Warren will carry out the review once the scope and terms of reference of the inquiry has been agreed by Council leader Phil Davies. The move comes after Birkenhead MP Frank Field met with the authority's now retired Chief Executive Graham Burgess in November demanding that a sum of £48,000 in compensation given to an unnamed officer should also be paid to the whistleblowers".

<http://www.wirralglobe.co.uk/news/117112...>

Can I please request the following information :

- a) the terms of reference for the above inquiry
 - b) details of financial/contractual arrangements between Wirral Council and Nicholas/Nick Warren which relate to directly to this inquiry (including any provisions for external legal advise)
 - c) the specific legal provisions under Local Government Act 1972 s101 by which Mr.Warren is potentially able to make decisions about compensation payments by Wirral Council to whistleblowers (according to Frank Field Mr.Warren's "findings will be binding on both parties")
 - d) the specific legal provisions under Local Government Act s101 by which Frank Field MP can "demand" payments be made to whistleblowers by Wirral Council
 - e) the specific legal provisions under Local Government Act s101 by which Frank Field MP can appoint/recommend Nick Warren to undertake this inquiry
 - f) Any declarations relating to the inquiry made by Mr.Warren/Mr.Field relating to prior affiliation (publicly acknowledged by both Mr.Field and Council leader Phil Davies) and/or conflict of interest
 - g) How the findings of the inquiry are to be publicly reported"
6. On 6 May 2015, as the complainant had not received a response, he asked the Council to conduct an internal review.
 7. On 12 May 2015 the Council responded. It explained that it did not hold the information requested at parts c, d, e and g of the request. It refused to provide the information requested at parts a, b and f under section 36(2)(b)(i) and (ii) FOIA.
 8. The complainant requested an internal review, following the response, on 25 June 2015. The Council sent the outcome of its internal review on

16 July 2015. It upheld its original position as it said the internal review was its response of 12 May 2015

Scope of the case

9. The complainant contacted the Commissioner on 23 July 2015 to complain about the way his request for information had been handled.
10. In its response to the Commissioner, the Council confirmed that it was applying section 36(2)(b)(i) and (ii) to part a of the request, it provided a response to b-g of the request to the complainant.
11. The Commissioner has considered whether the Council correctly applied section 36(2)(b)(i) and (ii) to part a request.

Reasons for decision

12. Section 36 FOIA 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-

(2)(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

(2)(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

13. The Council has applied section 36(2)(b)(i) and (ii) FOIA to the withheld information.
14. In determining whether the exemption was correctly engaged by the Council, the Commissioner is required to consider the qualified person’s opinion as well as the reasoning which informed the opinion. Therefore in order to establish that the exemption has been applied correctly the Commissioner must:
 - Establish that an opinion was given;
 - Ascertain who was the qualified person or persons;

- Ascertain when the opinion was given; and
 - Consider whether the opinion was reasonable.
15. The Council explained that the qualified person is the Monitoring Officer. It explained that the qualified person's opinion was provided on 13 April 2015. The qualified person's opinion was that sections 36(2)(b)(i) and (ii) FOIA were applicable in this case to the information requested at parts a and b of the request. It explained that the qualified person had access to all relevant material including the withheld information. The submissions presented to the qualified person and the qualified opinion was not recorded however the Council explained that the qualified person was also the Officer who was paramount in the drawing up of the terms and conditions for the inquiry.
 16. The Council explained that if the withheld information were disclosed then the conduct of discussions by senior officers of the Council concerning issues of appropriate gravity would be fundamentally undermined. It explained that it is clear to the qualified person that such discussions would have been inhibited had those senior officers not believed that those discussions would be kept confidential. The prospect of disclosure of this information would lead to a less candid exchange of views and ideas. The Council still contests that the likelihood of prejudice is significant and weighty. Inhibiting the free and frank exchange of views, may impair the quality of decision making of the Council. It said that this is particularly so in this case due to the sensitivity of the information in question and due to the issues still being live and of a sensitive nature.
 17. The Commissioner notes that the complainant is of the view that the inquiry completed in July 2015. However as the request was made in April 2015, the Commissioner must consider the circumstances at this time. The Commissioner considers that the inquiry was therefore live and ongoing at this time.
 18. The qualified person's opinion is that disclosure would prejudice the free and frank provision of advice and the free and frank exchange of views for the purpose of deliberation under section 36(2)(b)(i) and (ii) FOIA for the reasons given above.
 19. Upon viewing the withheld information, it is the terms of reference provided to the individual appointed to carry out the inquiry from the Council. The Commissioner does not consider that disclosure of this particular information would result in the prejudice claimed based upon the arguments provided. It is the terms upon which the Council engaged Nick Warren to carry out the inquiry. It does not relate to the

provision of advice or the free and frank exchange of views for the purposes of deliberation, it is the Council instructing the terms of reference under which the inquiry should be carried out. Furthermore, the Commissioner considers that the qualified person has taken irrelevant arguments into account when reaching the opinion in this case, for example, in its submissions to the Commissioner, the Council said that "It is clear to the qualified person that such discussions would have been inhibited had those senior officers not believed that those discussions would be kept confidential." There are no 'discussions' contained within the withheld information, it is the terms of reference on which the inquirer was engaged. The Commissioner does not therefore consider that the opinion of the qualified person is a reasonable one as it does not appear to be based upon the specific information which is being withheld.

20. The Commissioner does not therefore consider that section 36(2)(b)(i) or (ii) has been applied correctly in this case.

Right of appeal

21. 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

22. 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.
23. 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
Group Manager
Information Commissioner's Office
Wycliffe House
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Wilmslow
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SK9 5AF