

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 2 November 2017

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

Decision (including any steps ordered)

1. The complainant has requested information concerning an investigation by the council into its assessment and award of Discretionary Housing Payments in light of the judgement of the Sandwell case regarding the way in which councils should administer Discretionary Housing Payments.
2. The Commissioner's decision is that the council has not correctly applied section 31(1)(g) to the withheld information. She has also found that the council was entitled to rely on section 40(2) to withhold some of the requested information to the extent that it is personal data, but that it does not apply to the information in its entirety.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the information listed within the confidential annex.
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 9 February 2017 the complainant requested information of the following description:

"The benefit in question is Discretionary Housing Payments.

Please provide information as follows, taken from a time period between January 2015 and the present date:

1 ...to show the date WBC amended the appropriate policies and procedures to ensure compliance with Hardy V Sandwell case law re: DHP (March 2015)¹.

2 ...to show the date of the last internal and external audit to ensure compliance with 3.9 of the DWP, DHP Guidance Manual and Local Authority Good Practice Guide.

3 ...to show what action the authority has taken / is taking to identify people who have been adversely affected by non-compliant DHP decisions.

4 ...to show the extent to which claimants were incorrectly assessed, including total numbers of people affected.

5 ...to show what the authority has done to recognise and acknowledge its failings / malpractice in order to show that it has learned lessons since the Martin Morton / DASS whistleblow re: proven unlawful charging / unlawful debiting of supported living tenants' bank accounts.

6 ...to show the extent to which the authority has put measures in place to ensure compliance, restore fairness and to ensure this kind of failure does not recur in the future.

7 ...to show what measures the authority has taken to reimburse those people who have been adversely affected re: DHP i.e. details of all action taken to restore each affected person to the position they would have been in, had the correct awards been made.

¹ Hardy, R (on the application of) v Sandwell Metropolitan Borough Council [2015] EWHC 890 (Admin) (30 March 2015) <http://www.bailii.org/ew/cases/EWHC/Admin/2015/890.html>

8 ...to show the figure for the total amount of DHP benefit unfairly withheld from qualifying claimants who would have received payments in DHP benefit had their applications been correctly and fairly assessed in accordance with the law.

9 ...Please also provide the full, unredacted outcome of all internal and external audits taken within the above time period.

Please only redact the above information where necessary, in accordance with the requirements of the Data Protection Act 1998."

6. On 9 March 2017 the council responded. It provided some information within the scope of the request but refused to provide the remainder. It specifically cited section 31(1)(g) with section 31(2)(a) and (b) as the basis for withholding the information at part 9.
7. The complainant requested an internal review on 4 April 2017. Following a chaser sent on 22 May 2017 and an email from the Commissioner on 5 June 2017, the council provided the outcome of its internal review on 14 June 2017. It provided further information or clarification in respect of parts 1 to 8 and maintained its reliance on section 31 in respect of part 9.

Scope of the case

8. The complainant contacted the Commissioner on 29 May 2017 to complain about the way his request for information had been handled. Initially he was concerned that the council had failed to respond to his request for an internal review. Once the council provided the outcome of the internal review, the complainant then further contacted the Commissioner on 15 June 2017 to express his dissatisfaction with it.
9. The Commissioner wrote to the council about this case on 1 August 2017. She invited it to reconsider its position on the case and inform her and the complainant if it wished to apply any additional or alternative exemptions to the requested information. The council then wrote to the complainant on 23 August 2017 informing him that it now also sought to rely on section 40(2) to withhold the information requested at part 9.
10. As the council has provided information in respect of parts 1 to 8, the Commissioner considers scope of the investigation to be to determine whether the council was correct to withhold the information requested at part 9 under either the law enforcement exemptions at section 31(1)(g) with section 31(2)(a) and (b) or the personal data exemption at section 40(2).

Reasons for decision

Section 31 – Law Enforcement

11. The council has stated that section 31(1)(g) with section 31(2)(a) and (b) of the FOIA applies to the information requested at part 9. This information consists of two internal audit reports and one external report on the matter of the council's administration of Discretionary Housing Payments.

12. Section 31 states:

"Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would or would be likely to, prejudice –

g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2)."

13. The sections of 31(2) cited by the council are:

"a) the purpose of ascertaining whether any person has failed to comply with the law.

b) the purpose of ascertaining whether any person is responsible for any conduct which is improper."

14. The Commissioner's guidance on section 31 states that in order to engage the exemption at section 31(1)(g) a public authority must:

- *"identify the public authority that has been entrusted with a function to fulfil one of the purposes listed in subsection (2);*
- *confirm that the function has been specifically designed to fulfil that purpose, and*
- *explain how the disclosure would prejudice that function"*².

15. In this case, the council has stated that it has been entrusted with the function of internal audit. It informed the Commissioner that section 151 of the Local Government Act 1972 provides that every local authority shall make arrangements for the proper administration of their financial

² <https://ico.org.uk/media/for-organisations/documents/1207/law-enforcement-foi-section-31.pdf>

affairs and must appoint a section 151 officer to be responsible for the proper administration of the Council's financial affairs. The Chief Internal Auditor reports directly to the section 151 officer and the internal audit function operates independently in carrying out its activities.

16. In terms of specific statute under which the council has the function of internal audit, the council explained that regulation 3 of the Accounts and Audit Regulations 2015 (SI 2015/234) provides that a relevant authority must ensure that it has a sound system of internal control which:-

"(a) facilitates the effective exercise of its functions and the achievements of its aims and objectives;

(b) ensures that the financial and operational management of the authority is effective; and

(c) includes effective arrangements for the management of risk."

17. The council states that it's Internal Audit Charter specifies that *"internal audit activity must evaluate the adequacy and effectiveness of controls in responding to risks within the organisation's governance, operations and information systems regarding the :-*

- Safeguarding of the Council's assets and interests from losses of all kinds, including those arising from fraud, irregularity, corruption or bribery; and*
- Compliance with laws, regulations, policies, procedures and contracts."*

18. The council considers that this legislation confers on the council the functions of making arrangements for the proper administration of its finances and having a sound system of internal control. It argues that this entitled Internal Audit to investigate the specific purpose of whether the council has failed to comply with the law in relation to the March 2015 Sandwell Judgement on Discretionary Housing Payments.

19. The Commissioner has considered the council's position in light of the guidance referred to above which requires that a public authority has been entrusted with a function that has been specifically designed to fulfil a purpose listed in subsection 2, which in this case is the purpose of ascertaining whether any person has failed to comply with the law. The Commissioner accepts that the council has audit functions conferred on it by legislation.

20. However, the key to section 31(2)(a) and (b) is that the public authority must have a function for the purpose of ascertaining. To 'ascertain' is to

make certain or prove. In this context it means that the public authority with the function must have the power to determine the matter in hand with some certainty. The public authority must not only be responsible for the investigation but it must also have the authority to make a formal decision as to whether that person has complied with the law. This could include taking direct action itself such as revoking licences or imposing fines, or it could involve taking a formal decision to prosecute an offender. For example, in FS50382936³, British Waterways engaged section 31(2)(a) as its enforcement team had the power to take action against boaters who breached mooring conditions including prosecution and revoking licences. The Commissioner determined that British Waterways had a function to determine whether boaters had complied with the law, and ultimately accepted that disclosure of information relating to licences would prejudice that function.

21. Another example of determining whether a public authority has a function for the purpose of ascertaining whether a person has failed to comply with the law is in the First Tier Tribunal case *Foreign and Commonwealth Office v Information Commissioner* (EA/2011/011 21 September 2011)⁴. The Foreign and Commonwealth Office (the FCO) argued that the leak of an Ambassador's letter could have been a breach of the Official Secrets Act, and that it had responsibility to find out who was responsible for the leak. It suggested that disclosure of information about the internal investigation would make it harder to track down the culprits in this case and in future cases. The Tribunal rejected this argument; it found that the term "... *ascertain*" connotes some element of determination ..." (paragraph 33). Therefore, although the FCO's investigation may have identified a suspect, the matter would then have to have been passed to the appropriate authority to determine whether that suspect had failed to comply with the law. The exemption was not engaged because the FCO did not have a function to officially determine guilt.

³ https://ico.org.uk/media/action-weve-taken/decision-notices/2011/672478/fs_50382936.pdf

⁴

[http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i576/\[2011\] UKFTT EA 20110011 \(GRC\) 2011-09-21.pdf](http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i576/[2011] UKFTT EA 20110011 (GRC) 2011-09-21.pdf)

22. The Commissioner considers that this case draws parallels with the FCO Tribunal case in that the council may be entitled to conduct internal investigations on the matter of compliance with internal policies or case law. However, similarly to the FCO, it is not clear that the council has any power to take any definitive action, and in all likelihood, if an internal audit investigation was to discover that a person had failed to comply with the law, the matter would be referred to the police or other relevant authority with the power to take action.
23. The council has not provided any evidence to the Commissioner to demonstrate that the Accounts and Audit Regulations 2015 or the Local Government Act 1972 confers on the council a function with the power to make a formal decision as to whether the council, or any other person, has failed to comply with the law. In particular, the Commissioner has not been made aware of any part of the legislation cited which gives the council the power to take any direct action as a result of any internal audit investigation.
24. The Commissioner finds that the council does not have a function for the purpose of ascertaining whether any person has failed to comply with the law, or for the purpose of ascertaining whether any person is responsible for any conduct which it improper. As such, she finds that the council has failed to engage section 31 in respect of the withheld information.
25. She has therefore gone on to consider the council's application of section 40(2) to the withheld information.

Section 40(2) – personal data

26. Section 40(2) of the FOIA states that information is exempt from disclosure if it constitutes the personal data of a third party and, by virtue of section 40(3)(a)(i), its disclosure under the FOIA would breach any of the data protection principles of the Data Protection Act 1998 ("DPA").
27. In order to rely on the exemption provided by section 40(2) the requested information must therefore constitute personal data as defined by the DPA. Section 1 of the DPA defines personal data as follows:

"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."

28. If the Commissioner is satisfied that the information is personal data, she must then go on to establish whether the disclosure of that data would breach any of the data protection principles contained within the DPA. The Commissioner notes that in this case the council has advised that the disclosure of the information that has been withheld would breach the first principle of the DPA.

Is the withheld information personal data?

29. As outlined above, the withheld information in this case consists of 2 internal audit reports, and an external report on the matter of Discretionary Housing Payments.
30. The council first applied section 40(2) to the withheld information during the course of the Commissioner's investigation. It maintains that there is extensive personal data in the two internal audit reports, primarily that of the whistle blower, but also the managers working in the team which administers Discretionary Housing Payments. It also states that there is some personal data within the external review by LA Directories Limited (LADL).
31. The Commissioner has considered the withheld information and finds that it contains details of the whistle blower's concerns, comments and actions taken. It also contains details of actions taken and comments made by members of staff within the Transaction Centre, which has responsibility for administering Housing Benefit. Some of the information also includes details of specific Discretionary Housing Payment claimants. Finally the Commissioner notes that there is also some information relating to the investigator, including their contact details and details of actions taken in the investigation.
32. The Commissioner agrees with the council that individuals referred to in paragraph 31 are identifiable from information within the withheld documents, and that it is personal data about them respectively. However, the Commissioner does not find that the reports in their totality could be considered to be personal data. She has considered each report separately, and has found large sections of the May 2016 and October 2016 Reports that contain no personal data as they are ancillary information to the complaint and report. This includes, but is not limited to a background to Discretionary Housing Payments, the guidance available on the subject and the recommendations made for assessing in the future. The Commissioner has listed the sections of the report that contain no personal data in a confidential annex to this notice.

33. In particular, the Commissioner finds that the LADL report of 30 March 2017 contains no personal data with the exception of the name of the assessor at LADL and the email address of a different LADL employee.
34. The Commissioner has therefore gone on to consider whether disclosure of the personal data within the requested information would constitute a breach of the DPA.

Would the disclosure breach the first data protection principle?

35. The council states that the disclosure of the withheld information would breach the first data protection principle of the DPA.
36. The first 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."

37. In deciding whether the disclosure of the information provided by the applicants would be unfair, the Commissioner has taken the following into account:
 - The nature of the information;
 - The reasonable expectations of the applicants with regards to the processing of their personal data; and
 - The consequences of disclosure to the applicants.
 - The balance of any legitimate interests in the information with the rights and freedoms of the data subject

Nature of the information

38. The information relates primarily to the work life of the council employees and their conduct in relation to the application of policies and case law in considering applications for Discretionary Housing Payments. There are also council employees about whom the personal data relates to them carrying out their role as investigator. There are some individuals about whom the personal data relates to their home life, and this is limited to claimants whose cases were reviewed as part of the investigation. In addition to this, there is the limited personal data of the two LADL employees which relates to their work life in terms of the fact that it identifies them as employees of LADL.

39. The Commissioner accepts that in usual circumstances, the question of whether the information is about an individual's home or work life will shape their reasonable expectations in terms of the use of that personal data.

Reasonable expectations

40. The council has stated to the Commissioner that the council employees named in the reports would have an expectation that their personal data would not be disclosed to a member of the public. The council has not provided any reasons as to why this would be their expectation. However, the Commissioner understands that these reports were conducted by the council on the basis of a confidential report made by a whistle blower to the council's Monitoring Officer in accordance with the council's Whistleblowing Reporting Procedure. Due to the nature of whistleblowing, the Commissioner accepts that it is reasonable for the whistle blower in this case to have an expectation of privacy, and that their personal data in respect of the confidential complaint would not be disclosed to the world at large. With regard to the other council employees whose personal data is contained within the report, again, on the basis that the investigations and reports were conducted as a result of a confidential whistleblowing complaint, it is reasonable to assume that as witnesses, they had an expectation that such information would not be disclosed to the world at large.
41. The Commissioner notes that the Internal Audit Reports also contain information relating to third parties (claimants and representatives) who are not council employees and who in all likelihood are not aware that their personal information is contained within the report. It is clear to the Commissioner that these individuals would have no expectation what so ever that their personal data in relation to Discretionary Housing Payments would be disclosed to the world at large.
42. The Commissioner is not convinced that disclosing the names of employees and claimants within the report will contribute to the understanding of the issues and this would not outweigh the unwarranted distress which may be caused to individuals by disclosing information that they provided with no expectation of disclosure.
43. Turning to the LADL employees, the council has said nothing regarding their reasonable expectations, but has stated that an action plan has been drawn up in accordance with the recommendations, and is currently underway. The Commissioner has therefore considered the information available to her in assessing whether the two individuals had a reasonable expectation that their name and email address would be disclosed to the world at large. The Commissioner looked up the company online and discovered that the name of the individual whose

email address is included in the report is listed as Company Director, and their email address is also available. In view of this person's seniority, the Commissioner expects that this individual would not have a reasonable expectation that her personal data in the form of their email address would be withheld and excluded from disclosure. As such, she finds that section 40(2) does not apply to this information.

44. However, with regard to the other individual, there does not appear to be any information available on the company's website which identifies him or her. As such, the Commissioner is not able to assume that the person would reasonably expect information about them in the context of the report to be disclosed.
45. The Commissioner has gone on to consider the consequences of disclosure for the individuals who she finds has no reasonable expectation of disclosure, namely the individuals referred to in the May 2016 and October 2016 Reports and the name of the remaining individual in the LADL Report.

Consequences of disclosure

46. The council has argued that there would be adverse consequences from disclosure of the personal data, particularly as at the time of the request and review an external investigation was ongoing concerning the employees in respect of the whistleblowing allegations. The council states that disclosure of the personal data within the reports would be unfair and unwarranted by reason of the prejudice to the rights and freedoms of the individuals.
47. The council advised that whilst the external investigation was completed during the course of the Commissioner's investigation, the recommendations from the report are due to be considered at a meeting in October 2017. The council maintains that disclosure of the requested information would prejudice the implementation of the recommendations arising from the external investigation report.

The balance of any legitimate interests in the information with the rights and freedoms of the data subject

48. The council considers that the complainant is pursuing a legitimate interest. In balancing that interest against the rights and freedoms of the data subjects, it finds that the information it has already provided the complainant with in relation to the investigations into the council's assessment and award of Discretionary Housing Payment means that the disclosure is not necessary.
49. The council also considers that as disclosure would be outside the reasonable expectations of the individuals concerned, it would be

unwarranted and unfair, and would prejudice the rights and freedoms of the individuals.

Conclusions

50. The Commissioner accepts that personal data shared and generated in the course of a confidential whistleblowing complaint is likely to have the impact of giving the individuals concerned the expectation that their personal data in this context will not be more widely shared. In particular they would not have an expectation that it would be disclosed to the world at large.
51. The Commissioner therefore finds that section 40(2) applies to the personal data contained within specified sections of the May 2016 Report and the October 2016 Report, and that the council was correct to withhold that personal data. The Commissioner also finds that section 40(2) applies to the name of the employee of LADL, but not to the remainder of the LADL Report 30 March 2017, including the email address of the company director.

Right of appeal

52. 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

53. 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.
54. 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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