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to Mr John Brace
By email only

date 4 February 2016

your ref FOI 988927
my ref
service Legal and Member Services

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Dear Mr Brace,

Your request of 10 January 2016 under the Freedom of Information Act 2000

I write in response to your request under the Freedom of Information Act 2000 (FOIA) dated 10 January 2016. You referred to a decision issued by the Information Commissioner on 7 January 2016 FS50594521. You referred specifically to paragraph 28 of that decision, which said that "the Government Internal Audit Agency ('GIAA') and the NW GDT were reviewing the comments made by Wirral Borough Council to the findings in the report and that DCLG needed to agree the final report with the GIAA and discuss next steps with the Department for Business Innovation & Skills". You asked the Council to disclose to you under FOIA:

- (a) the observations/comments Wirral Council has made on the report's accuracy and clarity and details of the discussion between interested parties referred to in paragraph 28 of the decision notice above,
- (b) a copy of a formal right of reply to the report by Wirral Council if this now exists

and

- (c) any communications received by Wirral Council from the GIAA (Government Internal Audit Agency)/NW GDT/DCLG/BIS in relation to this matter between the date of this request and the 3rd January 2015.

I confirm that the Council holds information within the scope of your request. It is not necessarily the case that there was a "formal right of reply" as such in this case, but I have not excluded any information from consideration on that basis. I have collated and

considered all of the information held by the Council relating to correspondence between the parties you list, on the matter you have asked about and in the specified date range.

That information is being withheld under section 36(2) FOIA, which provides in relevant part that:

(2) 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—

... (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.

In particular, the Council relies upon subsection 2(b)(ii) above, though the other subsections are also likely to be applicable. As the Council's Monitoring Officer, I am the Qualified Person for the purposes of section 36 and I have reviewed the information and consider the exemption to be engaged.

It is my reasonable opinion that Section 36(2) is engaged here for essentially the same reasons as given by the Information Commissioner in decision FS50594521 to which you refer. Exactly the same considerations apply in this instance. This is because, although the Council has provided input and comments on the draft report you refer to, the process is continuing. The Council has seen no final version of this report as yet, and expects there to be further dialogue before any final version is produced. This constitutes an exchange of views for the purposes of deliberation. As the Information Commissioner has explained, this process needs to be free, frank and confidential. Otherwise, the integrity of the investigatory and reporting process would be prejudiced, and there would be a chilling effect on further contributions to this report and in other similar exercises in future.

Section 36(2) is therefore engaged – in particular subsection (2)(b)(ii), but alternatively also subsections 2(b)(i) and (2)(c).

The public interest test

Section 36(2) of FOIA is a qualified exemption. I have therefore gone on to consider the public interest balance under section 2(2) of FOIA. The Council's view is that, in all the circumstances, the balance favours maintaining the exemption rather than disclosing the information held.

Again, this is for the same reasons as those given in decision notice FS50594521 to which you refer. Exactly the same considerations apply in this instance. I refer you in particular to paragraphs 35-39 of that decision. At paragraph 36, for example, the Information Commissioner said this:

"As stated above, the report has not yet been finalised. Discussions have not been concluded and concerns have not yet been addressed. Therefore the Commissioner has given significant weight to the public interest in maintaining a safe space."

At paragraph 39, he said this:

considered the likely extent, frequency and severity of any impact of disclosure on the free and frank provision of advice and exchange of views for

the purposes of deliberation. He has given weight to the fact that the deliberation process is still ongoing. The Commissioner has concluded that in the circumstances of this case the public interest in maintaining the exemption outweighs the public interest in disclosure of the requested information and therefore the exemption at section 36(2)(b) has been applied correctly."

The Council's conclusion is that the same analysis applies here. There is strong public interest in ensuring that ongoing exchanges of views – both in this instance and other investigations and reporting exercises – can be free and frank, without premature public intrusion into the confidential safe space which is needed. There is strong public interest in ensuring that draft comments are not publicly disclosed before or shortly after final versions are published, as that will tend to undermine the integrity of the final report.

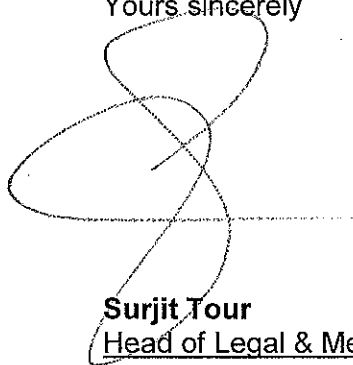
As against that, the Council does recognise the public interest in transparency about this investigation and reporting process. It considers, however, that this will be served once the report is finalised, and that the public interest in disclosure at this time is comfortably outweighed by the importance of preventing the types of prejudicial consequences outlined above.

The Council also acknowledges the frustration you have expressed at the length of time taken for this process to conclude, as referred to in decision notice FS50594521. I emphasise, however, that this matter is outside of the Council's hands. It does not decisively affect the public interest balance in the circumstances of this case.

For the reasons I have explained above, the Council refuses your request of 10 January 2016. Section 36(2)(b) and/or (c) of FOIA is engaged and, in all the circumstances, the public interest in maintaining the exemption outweighs the public interest in the disclosure of the information held by the Council.

You have a right to request an internal review of this refusal. To do so, please contact Informationmanager@wirral.gov.uk

Yours sincerely



Surjit Tour
Head of Legal & Member Services
and Monitoring Officer