



**IN THE MATTER OF AN APPEAL TO THE FIRST-TIER TRIBUNAL
(INFORMATION RIGHTS)**

EA/2010/0145

BETWEEN:

GWYN THOMAS

Appellant

and

THE INFORMATION COMMISSIONER

Respondent

and

THE AUDITOR GENERAL FOR WALES

Second Respondent

**DECISION OF THE FIRST-TIER TRIBUNAL
(INFORMATION RIGHTS)**

Paper hearing by: Claire Taylor, Tribunal Judge
Darryl Stephenson, Tribunal Member
Nigel Watson, Tribunal Member

On: 4 March 2010
At: Bedford Square, London

Date of Decision: 16 March 2011

Subject Matter

Freedom of Information Act 2000: Absolute exemption: Prohibitions on Disclosure - s.44

Decision of the Tribunal

The Appeal is dismissed.

REASONS FOR DECISION

Background

1. The office of the Auditor General for Wales (AGW) is a public authority within the Freedom of Information Act 2000 (FOIA). He works with his staff, and together they are known as the "Wales Audit Office" (WAO).
2. In July 2009, the WAO produced the "*Corporate Governance Inspection Isle of Anglesey County Council*" ("the Council") report for publication.
3. This stated:

"The...Council has a long history of inappropriate behaviour and conflict... The inspection set out to answer 'Is the Council properly run?' We concluded that the Council has a long history of not being properly run, from its inception in 1996 to the present day. This has had a corrosive effect on the exercise of its functions and leaves it poorly placed to meet future challenges..."

The cumulative effect of this lack of control and sanction over time has been to create a culture that not only tolerates inappropriate behaviour, but is seen by some to reward it. Even though 11 new councillors were elected in May 2008, this culture remains pervasive..."

There is a history of personality politics based around mistrust, suspicion, conflict and personal animosity. Attempting to deal with this saps a huge amount of energy and distracts people..."

The Council does not have an effective framework of accountability..."

Scrutiny and overview committees are ineffective and the Audit Committee's independent assurance role is limited"; and

"Despite the history of problems with standards of conduct and the effect that this has had on the Council's reputation there has been no consistent corporate focus on improving behaviour ... The self-regulation by councillors of their own standards of conduct is weak..."

The Information Request

4. On 14 August 2009 the Appellant wrote to the WAO:

*"The voters of Anglesey DEMAND that the names of the members of Anglesey County Council that have brought the council into DISREPUTE and wasted public money as mentioned in your recent audit BE PUBLISHED FORTHWITH. These people were quite willing to have their names made known when they wanted people to vote for them. So what is the problem now that they have been found out?
..."*
5. On 7 September the WAO responded to the Appellant stating that it held the information and refused to comply with his request, relying upon s.44; s.33; s.36 and s.40(2) FOIA. The WAO's decision was upheld at its internal review on 12 October 2009 and on 19 October 2009 the Appellant complained to the Respondent.

The Decision Notice

6. On 2 August 2010, the Respondent issued Decision Notice FS50282741, in which he concluded that the WAO had properly applied s.44 FOIA in this case, and that no steps were required to be taken.
7. In forming this decision his key findings and reasons were:

a. Scope

- i. Taking into account (1) the purpose of the inspection and (2) the WAO's explanation for the information it held, on the balance of probabilities, the WAO did not hold the requested list of members who it considered to "*have brought the Council into disrepute and wasted public money*".
 1. Purpose: The purpose of their inspection had been to determine whether the Council as a whole was properly run and not to investigate the conduct of individual elected members or hold them to account. The WAO did not form an opinion on the conduct of individual elected members.
 2. Information held: As part of the inspection, elected members were interviewed, but the WAO did not use the information gathered from those interviews to record its view of individual conduct. The Commissioner saw copies of documentation and accepted that it did not identify any WAO views on the conduct of individual named members.
- ii. However, the WAO did hold "fieldwork records" which fell within the broader scope of the request, although they did not contain a definitive list of those elected members who, in WAO's opinion, had engaged in questionable conduct. They referred to some councillors in adverse terms. They were (1) written records of interviews conducted by the WAO with councillors, officers and members of the public; and (2) correspondence submitted to the AGW by interested parties during the investigation.
- iii. The records fell within the broader scope of the request because anyone reading through them could draw a conclusion regarding the elected members who were considered to have contributed to the difficulties faced by the Council - even though they were never identified as such by WAO.
- iv. The Commissioner therefore proceeded to consider whether WAO was correct to refuse to disclose the fieldwork records.

b. S.44(1)(a) FOIA: Prohibition on Disclosure:

- i. The WAO had demonstrated that s.44(1)(a) FOIA was engaged:
 1. Disclosure of the withheld information was prohibited under s.54 of The Public Audit (Wales) Act 2004 (the "PAWA") because that Act prohibits the disclosure of information relating to a particular person obtained by the AGW pursuant to Part 1 of the LGA (c27) in the course of an audit, study, assessment or inspection, unless exceptions apply.
 2. The fieldwork records were obtained pursuant to s.10A of the Local Government Act 1999 (the "LGA").
 3. Exceptions to Prohibition: The exceptions under s.54(2) PAWA did not apply.

- ii. In relation to the exceptions, it was not necessary to consider each exception as many were clearly not relevant. E.g. s.54(2)(a) provides an exception where consent to disclosure is given by the “*person to whom the information relates*”.

The most relevant exceptions were within s.54(2ZA) and s.54(2ZB)¹. The former stated:

“(2ZA) A person who is, or acts on behalf of ... a public authority for the purposes of the Freedom of Information Act 2000, may also disclose such information — (a) in accordance with section 145C(5) or (8) of the Government of Wales Act 1998; or (b) in any other circumstances, except where the disclosure would, or would be likely to, prejudice the effective performance of a function imposed or conferred on the person by or under an enactment.”

(Emphasis added.)

- iii. Disclosure of the withheld information would prejudice the audit and inspection functions:
 1. Individuals would be less likely to be open and frank in their views if they believed there was a chance that the information provided during an audit or inspection could be placed into the public domain; and
 2. It “*would exacerbate interpersonal conflict within the Council leading to further failure to secure good corporate governance and best value (the overall Part 1 duty).*” The difficulties faced by the Council had been widely publicised and disclosure would be unlikely to help it address the problems it faces.

The Powers of the Tribunal

8. This appeal is brought under s.57 FOIA. The powers of the Tribunal in determining an appeal under s.57 are set out in s.58 of FOIA, as follows:

“If on an appeal under section 57 the Tribunal considers -

- (a) that the notice against which the appeal is brought is not in accordance with the law, or*
- (b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently,*

the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner, and in any other case the Tribunal shall dismiss the appeal.

On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.”

The Issue for the Tribunal

9. The Tribunal is an independent judicial body that must decide in this case whether the Respondent acted in accordance with the law in concluding that the WAO had correctly applied s.44 FOIA to the Appellant’s request of 14 August 2009. The burden of proof lies with the Appellant, who must satisfy the Tribunal that it is more likely than not that the decision made by the public authority and upheld by the Respondent was wrong. In

¹ We note that we did not consider s.54(2ZB) to be of relevance.

making its decision, the Tribunal may only consider evidence relevant to the issue before it.

The Law

10. Under s.1(1) FOIA a person who has made an information request to a public authority, in this case, the AGW, is entitled to be informed in writing whether it holds the information requested and, if it does, to have it communicated to him. However, there are exceptions to this right. Under s.44(1)(a) FOIA a public authority is not obliged to comply with a request if it is prohibited by another Act from doing so.

Mode of Hearing

11. The Appellant requested that this matter be determined on the papers. The respondents agreed with that request. The Tribunal was satisfied that it could properly determine the issues without an oral hearing.

The Parties' Submissions

(i) The Appellant's Submissions

12. On 10 August 2010 the Appellant lodged a Notice of Application with the Tribunal. He included three articles from the local press. The Tribunal informed him that he had not served what would constitute proper grounds of appeal and he sent a further letter on 31 August 2010. At the case management hearing on 25 November, he confirmed that:

Scope

- a. The Fieldwork records are the scope of the appeal. These are:
 - i. Written records of interviews conducted by the Additional Party's officials with councillors, officers and members of the public, and
 - ii. Correspondence that the Auditor General received during the investigation.

Grounds of Appeal:

- b. The two grounds of his appeal are:
 - i. Statutory bar: The statutory bar was not intended to protect wrongdoing so the records should be disclosed; and
 - ii. S.44 FOIA is not applicable: The LGA does not prohibit disclosure in the circumstances because:
 - i. Consent: The interviewees would have given consent;
 - ii. Prejudice of AGW Functions: Disclosure would not inhibit the AGW's ability to conduct future inspections effectively; and
 - iii. Criminal Investigation: A criminal investigation is likely.
13. The Appellant provided the Tribunal with his submission and responses to the Commissioner's and AGW's replies, and to the witness statement. The Appellant's arguments are summarised below to the extent they are relevant to the issue before the Tribunal. (We have added the headings as a means of considering how his arguments might best be considered to support his grounds of appeal.)

- a. Public Interest: The people require the Council to be properly run, transparent and fair. Disclosure is necessary for the purpose of public interest.
- b. Consent: Interviewees would have given consent for their names to be published since the local population feel they have not had proper governance for years. If the interviewees were not asked whether they would give consent, how could the WAO state that the interviewees would be reluctant to have their evidence made public? They should not be afraid of retribution from colleagues if they spoke the truth.
- c. Prejudice of AGW Functions: The AGW have not shown proof that people would not come forward to give evidence if they knew their names were to be published. Also, this inspection was unique and does not happen often.
- d. Criminal Investigation: He wished to know about money spent by the Council. Disclosure should be made if, as is likely, a criminal investigation may follow because of the wasted resources, inappropriate behaviour and conflict. A precedent has been set by three Westminster MPs facing criminal charges for wasting public money.
- e. Purpose of Inspection: As to the argument that the fieldwork records should not be released because the report did not set out to identify inappropriate behaviour, this was the core thing causing the conflict. Admittedly the WAO investigation was about governance but they found that there was inappropriate behaviour and waste of Council resources and should have sought mandate to widen their investigation and investigate the waste of public money.

(ii) The Respondent's Submissions

14. The Respondent served a response to the Grounds of Appeal, and subsequently lodged submissions and submissions in reply to those provided by the Appellant.
15. He argued that:

The statutory bar was not intended to protect wrongdoing

- a. This first ground is misconceived. The statutory bar applicable in this case is found in the PAWA. The PAWA prohibits disclosure of certain information. It is not the role of the Commissioner (or indeed the Tribunal) to override or read into a provision into a statute, particularly a statutory bar. Certainly, the Commissioner would not condone any 'wrongdoing' by an elected official, however the Commissioner must apply the statutory bar as it stands.

Disclosure is necessary for the public interest

- b. As regards the second ground, s.44(1)(a)FOIA is an absolute exemption which means that there is no public interest test to be applied.

s.44(1)(a) applies

- c. The key questions are (a) Was the information obtained pursuant to s.10A LGA?; and (b) Does PAWA prohibit disclosure?.

Was the information obtained pursuant to s.10A LGA?

- i. (1) PAWA provides:

“(1) This section applies if information relating to a particular body or other person is obtained by the Auditor General for Wales or an auditor, or by a person acting on behalf of the Auditor General for Wales or an auditor –

(a) pursuant to a provision of this Part or Part 1 of the [LGA], or

(b) in the course of an audit, study or inspection under a provision of this Part, section 145C of the Government of Wales Act 1998 (c. 38) or Part 1 of the [LGA].

Part 1 of the LGA relates to 'best value'. Section 10A(1)(a) (in Part 1 of the LGA) provided:

"The Auditor General for Wales may carry out an inspection of the compliance with the requirements of this Part [Best Value] by a Welsh best value authority."

- ii. The information was obtained pursuant to s.10A LGA - the fieldwork records were obtained during an integral part of the inspection process.
- iii. The Commissioner satisfied himself in paragraph 34 of the Decision Notice that the Council fell within the definition of a 'best value authority' under s.1(3) LGA. The Appellant has not appealed this finding.

Does PAWA prohibit disclosure?

- iv. Section 54(2) PAWA provides:

"The information must not be disclosed except in accordance with any of these –

(a) with the consent of the body or person to whom the information relates;

(b) for the purposes of any functions of the Auditor General for Wales or an auditor under this Part or Part 1 of the [LGA];...

(g) for the purposes of any criminal investigation which is being or may be carried out, whether in the United Kingdom or elsewhere;...

(h) for the purposes of any criminal proceedings which have been or may be initiated, whether in the United Kingdom or elsewhere;

(i) for the purposes of the initiation or bringing to an end of any such investigation or proceedings;

(j) for the purpose of facilitating a determination of whether any such investigation or proceedings should be initiated or brought to an end."

- v. Sections 54(2ZA) and (2ZB) PAWA provide:

"(2ZA) A person who is, or acts on behalf of a person who is, a public authority for the purposes of [FOIA], may also disclose such information –

(a) in accordance with section 145C(5) or (8) of the Government of Wales Act 1998; or

(b) in any other circumstances, except where the disclosure would, or would be likely to, prejudice the effective performance of a function imposed or conferred on the person by an enactment.

"(2ZB) An auditor who does not fall within subsection (2ZA), or a person acting on his behalf, may also disclose such information except where the disclosure would, or would be likely to, prejudice the effective performance of a function imposed or conferred on the auditor by or under an enactment."

- vi. Section 54(3) PAWA provides:

“A person commits an offence if he discloses information in contravention of subsection (2).”

Prejudice of AGW Functions:

- vii. The key question is whether the disclosure of the requested information is, would, or would be likely to, prejudice the effective performance of the AGW’s audit and inspection functions as set out in statute (e.g. s.10A(1)(a) LGA).
- viii. Disclosure of the withheld information would prejudice the audit and inspection functions of the AGW. This is because individuals would be less likely to be open and frank in their views if they believed there to be a chance that information provided during an audit or inspection could be disclosed into the public domain. The Commissioner gave considerable weight to the WAO’s statement that disclosure of the withheld information would mean that:

“interviewees, both those subject to statutory access provisions and those co-operating on a voluntary basis, would be less forthcoming with relevant sensitive information in future inspections if they were to see that such information may be disclosed.”
- ix. The Appellant has adduced no evidence to support his assertions as regards the impact of disclosure on AGW’s ability to conduct future inspections effectively.
- x. By contrast, Mr Alan Morris on behalf of the AGW has given detailed evidence on the impact of disclosure on its ability to conduct future inspections effectively.
- xi. Furthermore, disclosure would also prejudice the audit and inspection functions of the AGW and WAO because the difficulties faced by the Council have been widely publicised and disclosure would be unlikely to help it address the problems it faces and *“would exacerbate interpersonal conflict within the Council leading to further failure to secure good corporate governance and best value (the overall Part 1 duty).”*

The interviewees would have given consent

- d. The Appellant refers the fact that *‘the interviewees would have given consent for their names to be published’*. However, it is not the names of the interviewees are that the Appellant has requested. S.54(2)(a)PAWA states: *“the information must not be disclosed except in accordance with ... the consent of the body or person to whom the information relates”*. (*Emphasis added*). Therefore what would be required to permit disclosure would be the consent of the person to whom the information relates. Information that is adverse comments about the behaviour of elected members would, most likely, come from a third party (i.e. another person), rather than the person named.
- e. The Appellant’s view is unsupported on the facts, particularly given the focus of the report. (*See testimony from Alan Morris below*). In view of this, the Commissioner would submit that there should be no reason why an individual named should or indeed would consent to disclosure to adverse comments about them being put in the public domain in response to a FOIA request.
- f. There is no evidence that the requisite consent would have been forthcoming, such that disclosure in this case, under FOIA, is prohibited under section 44(1)(a) FOIA.

A criminal investigation is likely

- g. Under s.54(2)(g) PAWA it can be seen that the disclosure would have to be made for the purposes of any criminal investigation. A disclosure to the Appellant under FOIA would not be for the purpose of an investigation. If the information were released to the Appellant it may well be that he would try to get a criminal investigation started, but this does not mean that the disclosure would be for the purpose of a criminal investigation. As such, section 54(2)(g) is not applicable.
- h. Based on the witness evidence, there is no evidence to support the Appellant's assertion that the disclosure is necessary for the purposes of a criminal investigation.

Scope of investigation

- i. The Appellant comments about the scope of the AGW's investigation. These comments are not relevant to the issues to be determined by the Tribunal and should be disregarded.

(iii) The Second Respondent's Evidence and Submissions

16. The Tribunal joined the AGW to the proceedings on 26 October 2010 as the Second Respondent. He submitted a reply to the grounds of appeal, a witness statement, submissions and submissions in reply to the Appellant's submissions. The key parts are summarised below. The requested and contextual information was also disclosed, but only to the Tribunal and the Respondent on a confidential basis. The Tribunal panel notes that there is no confidential annex to this decision addressing that closed evidence, as we did not consider it necessary.

17. Testimony from Alan Morris, stated:

- a. He is the engagement partner at the WAO, responsible for, amongst other things, all performance work at Councils in Mid and North Wales.
- b. Amongst other things, the AGW is the external auditor of the Welsh Assembly Government and related bodies and undertakes audits and inspections of local government bodies. He has various statutory access rights to information for the purposes of his functions. For local government inspections under the LGA, the rights are provided under the LGA.
- c. While the AGW's statutory access rights are powerful, their use does not, of themselves, necessarily deliver all the information required to undertake a piece of work. Audit and inspection work frequently requires an understanding of the service or organisation under review that cannot be obtained from factual and documentary information alone. An understanding of the reasons why an organisation is or is not delivering value for money or best value requires an assessment of the quality of leadership, management, working relationships and trust. This assessment can only be based upon the views, opinions and judgements of individuals, usually obtained through interviews and focus group discussions.
- d. *"I am accountable to the AGW for the delivery of performance audit and inspection work at a number of public bodies, including the Isle of Anglesey County Council. My responsibilities include making assessments, in co-operation with the Appointed Auditor, of whether councils are complying with the 'best value' requirements placed upon them by the Local Government Act 1999. These assessments can be based on an annual programme of audit and inspection work or, where necessary, a specific inspection in response to particular concerns. In the case of Anglesey, the work of the WAO and the Appointed Auditor identified particular concerns about the corporate governance of the Council, including a*

breakdown of working relationships between some senior managers and councillors. This led to a recommendation from the Appointed Auditor to the AGW to conduct an inspection under Section 10A of the Local Government Act 1999.

- e. The AGW accepted this recommendation and ... it was my role to oversee the planning, delivery and reporting of the inspection on behalf of the AGW. Following an analysis of the issues affecting the Council it was agreed that the inspection would address the question, "Is the Council properly run?" The resulting report of July 2009 noted that "the...Council has a long history of inappropriate behaviour and conflict"... However, the inspection did not set out to identify who in particular engaged in inappropriate behaviour.
- f. The reason for this approach was that the primary purpose of the inspection was to obtain a clear understanding of the reasons behind the Council's failings of corporate governance so as to establish whether the Council was properly run. This would enable the AGW and the Council to identify what action was required to overcome these failings and to enable the Council to fully meet its duties, including the obligation to make arrangements to secure continuous improvement in the way in which its functions are exercised, having regard to a combination of economy, efficiency and effectiveness, under the Local Government Act 1999. It was my opinion, and that of the AGW and the inspection team, that an inspection that was focused on identifying who was to blame for the Council's failings would not serve to help the Council to move on the problems of the past. It was our aim to support the Council in putting its past problems behind it by focusing on the change necessary to achieve improvement in the future. Naming individuals whose behaviour was considered to be inappropriate as it would be more likely to reopen old wounds and lead to further allegations and threats of retribution. This would not help the Council as a whole to move on and focus on delivering effective services to the local community and would therefore have been detrimental to the public interest.
- g. ... The principal sources of evidence were document reviews, interviews, focus group discussions and meeting observations. The inspection team also invited members of the public to contact them if they had evidence or information relevant to the inspection... During the inspection each 'activity', such as an interview or document review, was recorded...[on] a Record of Evidence (RoE) form. These forms contain a summary of the key points of evidence obtained from the activity and any emerging conclusions, judgements or recommendations made on the basis of that evidence which we consider to be required for the purpose of the inspection... Interviewees were offered an opportunity to review the interview notes following the interview ... The RoE forms then formed the evidence base on which the report was based.
- h. At the start of each interview ... the inspectors explained that anything said during the session would be recorded ... used to inform the inspection report. However, the inspectors gave an oral undertaking that any comments made would not be attributed to individuals in the report and that it was the practice of the WAO to keep interview notes and records of evidence confidential. However, the inspectors also caveated this statement by pointing out to interviewees that the WAO was subject to freedom of information legislation and that non disclosure could not therefore be guaranteed if the WAO became obliged to disclose the information pursuant to that legislation. However, the inspectors also explained that the WAO had never previously been required to disclose interview records and that it would resist doing so if disclosure of information of a sensitive nature was requested. The interviews were undertaken with an expectation that individual interview records would not be disclosed and interviewees were not asked for and did not give consent to disclosure. It is my strong view that much of the information subsequently obtained after such reassurances would not have

been forthcoming had we not extended such undertakings to the individuals to whom we spoke.

- i. This is the approach taken in all WAO inspection interviews as we believe it encourages interviewees to be frank and open when answering questions whilst preserving a degree of confidentiality. That is important when we are trying to make meaningful recommendations on the manner in which services might be improved. In inspections such as the one in Anglesey, where issues of trust and relationships are of such importance, it is essential that interviewees feel they can be frank without fear of retribution from colleagues or superiors. We do not believe interviewees would be prepared to be as open and frank with us as they are if they believed their comments would be made openly available and attributed to them. This would fundamentally undermine their status and working relationships with one another and consequently our ability to conduct effective audit and inspection work. Any evidence obtained in this way is only used if it can be 'triangulated' from a number of independent sources. To be clear, even though anonymity is maintained, we do not subscribe to publishing recommendations (or other material) in relation to matters that have not been corroborated by more than one person. An uncorroborated approach would lack the checks and balances that ensure any assertions made by the WAO are well founded and accurate and that would undermine WAO's credibility and its ability to pursue its functions.
- j. Information submitted from members of the public was treated in a similar way by the inspection team. The press notice issued inviting members of the public to contact the inspection team with information on how the Council was run stated that: "Those providing views should note that the information they provide may be subject disclosure under access to information legislation. If people want to provide information on a confidential basis, they should make this clear, but also note that such a designation does not necessarily allow exemption from disclosure. In most circumstances, the Wales Audit Office will not disclose personal data to third parties. However, any third party personal information received, such as comments on the abilities of identifiable individuals, will generally need to be provided to those people if they request it." If members of the public are to be encouraged to submit information or views to a WAO inspection, I believe it is important that they feel comfortable in doing so without fear of retaliatory action or press intrusion as a result of disclosure.
- k. Had any evidence of criminality been provided to the inspection team, we would have passed this the appropriate authority for investigation. However, this was not the case in the Anglesey inspection. Where interviewees made allegations against named individuals, this was in relation to behaviours or actions that were considered to be inappropriate or detrimental to good running of the Council.
- l. The information obtained from interviews and correspondence does not embody objective findings as to whether an individual misconducted himself or herself. Rather, they are untested allegations that were used to inform broad conclusions about conduct and behaviour in the Council. The individuals who were criticised were not given an opportunity to respond to those allegations as part of the WAO's inspection. It would therefore be a breach of natural justice for the allegations to be disclosed without the consent of those making the allegations and without giving those named an opportunity to respond.
- m. In addition, the allegations were not robustly tested by the inspection team as this fell outside the scope of the inspection. Nor, at the time of the request, had these allegations been robustly tested by any other process such as a disciplinary process or Local Government Ombudsman investigation. Some of the allegations are fairly serious in nature, as illustrated by the highlighted version of the disputed information provided to the Tribunal...

- n. *Disclosure would be likely to make any further corporate governance inspection of a Welsh public body extremely difficult and ineffective. Indeed, I would go so far as to say that disclosure would be likely to make any further corporate governance inspection of a Welsh local authority so practically difficult, protracted and, consequently expensive that such an inspection could not potentially be done again. Disclosure would therefore inhibit the AGW's aim of supporting improvement in public services where he judges the wider public interest is better served by protecting the confidentiality of individuals who would suffer unnecessary distress and anxiety were the disputed information to be disclosed.*
- o. *Disclosure of the Anglesey County Council fieldwork records would be especially problematic as the inspection did not set out to identify who in particular engaged in inappropriate behaviour. Consequently, the evidence regarding individuals bringing the Council into disrepute is partial and may present an incomplete picture both in relation to that individual alone and that individual when compared to others. It would be unreasonable to name those individuals who happened to be named in interviews, while others might be equally to blame but were not identified. Such disclosure of names without consistent basis would be especially damaging to the trust and co-operation needed for effective audit and inspection, and that would be likely to prejudice the Auditor General's effective performance of functions.*
- p. *... would also emphasise that disclosure would "exacerbate interpersonal conflict within the Council leading to further failure to secure good governance and best value" ... Such exacerbated interpersonal conflict in Anglesey County Council would impair the future co-operation of councillors and officers with auditors and inspectors not only in that Council but also in all other Welsh councils. We have statutory functions to inspect and report on deficiencies and government guidance indicates that this is so that they can be resolved efficiently and effectively in the public interest. If, as a consequence of our work, there is a breakdown in relationships within the Council, we will have failed in our work and it is unlikely persons will be so willing to engage with us if similar issues are faced by other local authorities in the future. That will prejudice the Auditor General's ability to perform his functions." (Emphasis added.)*

18. The Second Respondent provided the Press Release that had been issued. This stated:

- a. *"Auditor General Seeks Public Views On Anglesey Council*
- b. *...The Auditor General, Jeremy Colman, is inviting members of the public to get in touch to share their views about how the Isle of Anglesey County Council is run. Jeremy Colman is interested to hear what people think on matters such as how the Council makes decisions, how it implements those decisions and how the Council deals with complaints. Comments received will be used to help inform the Auditor General's inspection into corporate governance arrangements at the local authority...*
- c. *While the team welcome views from anyone ... Those providing views should note that the information they provide may be subject disclosure under access to information legislation. If people want to provide information on a confidential basis, they should make this clear, but also note that such a designation does not necessarily allow exemption from disclosure. In most circumstances, the Wales Audit Office will not disclose personal data to third parties. However, any third party personal information received, such as comments on the abilities of identifiable individuals, will generally need to be provided to those people if they request it. (Emphasis added)*

19. Submissions included:

a. Nature of Requested Information:

- i. The AGW report incorporated some general criticisms of the conduct of elected members. However it did not include any conclusions to the effect that specific named members had misconducted themselves, and did not refer to individual members by name. As part of the investigation/reporting process, the AGW was himself very careful to avoid reaching any conclusions as to whether specific named members or officers had in fact misconducted themselves. The reason for this is that the aim of the investigatory process was not to 'name and shame' specific individuals but to identify systemic weaknesses in the Council's corporate governance arrangements with a view to working towards improving the robustness and efficacy of those arrangements.
- ii. The names within the fieldwork records are not information that establishes as a matter of objective fact that a particular named member has misconducted himself. Rather it contains what amounts to subjective views expressed by individual elected members, officers and members of the public about particular members. The records effectively embody allegations about individual members. The allegations have not been subject to any form of rigorous or objective testing, for instance in the form of a disciplinary process which meets the requirements of natural justice or a regulatory assessment by the local government ombudsman.
- iii. Notably, on one interpretation, the Appellant's request could be interpreted as requesting what objectively and conclusively shows that individual members have misconducted themselves. On this interpretation, a question would arise as to whether the disputed information within the fieldwork records falls within the scope of the request at all.

b. S.44

- i. Section 44(1)(a) provides for an absolute exemption in respect of information if an enactment (apart from FOIA) specifically prohibits the disclosure of particular information:

'disclosure (otherwise than under [FOIA]) by the public authority holding it - (a) is prohibited by or under any enactment'.

Does the particular enactment prohibit disclosure of the information?

- ii. In this case, the relevant Act is the PAWA, which governs the operation of the AGW and WAO. Part II contains provisions relating to the functions of the AGW in respect of local authorities. Chapter 4 of Part II contains general provisions relating to those functions, including s. 54 PAWA.
- iii. Section 54(2) PAWA contains a general prohibition on the disclosure of information obtained by the AGW, or a person acting on his behalf. The general prohibition will apply where the AGW, or a person acting on his behalf has obtained information '*relating to a particular body or other person*' and either:
 1. the information has been obtained '*pursuant to a provision ... of Part I of the LGA (s. 54(1)(a))*'; or
 2. the information has been obtained '*in the course of* an inspection conducted under Part I LGA.
- iv. Part I LGA embodies a number of provisions relating to Welsh best value authorities. Sections 10A-12 of Part I are concerned with inspections of Welsh best value authorities by the AGW (see ss. 10A-12 LGA). Section 10A LGA provides that the AGW: '*may carry out an inspection of the*

compliance with the requirements of this Part by – (a) a Welsh best value authority’.

- v. Section 11 affords WAO inspectors specific rights to require persons to provide it with information for the purposes of the inspection. These rights are additional to the AGW’s implied right under Part I to receive and consider information provided voluntarily from other sources (e.g. from members of the public) as part of the inspection process.
- vi. In summary, s. 54 imposes a general prohibition on the disclosure by the AGW of information relating to a particular person or body in circumstances where that information has been obtained by the AGW in the course of conducting a best value inspection under Part I LGA 1999. Such information could include, for example, information obtained in the course of interviews conducted by the AGW as part of the investigation process and, further, information contained in submissions provided to the AGW by members of the public who want to comment on matters related to the inspection.
- vii. **Exceptions:** There are circumstances in which the general prohibition on disclosure contained in s. 54(2) is not applied. In particular, s. 54(2ZA) makes clear that, where the AGW is responding to a request for information under FOIA, he has a discretion to allow disclosure of the requested information either:
 - ‘in accordance with section 145C(5) or (8) of the Government of Wales Act 1998’(s. 54(2ZA)(a)) or*
 - ‘in any other circumstances, except where the disclosure would, or would be likely to, prejudice the effective performance of a function imposed or conferred on the person by or under an enactment’ (s. 54(2ZA)(b)).*
- viii. Subsection 54(2ZA)(a) does not apply in this case because ss. 145(C)(5) and (8) of the Government of Wales Act 1998 are concerned exclusively with studies commissioned by the AGW in respect of registered social landlords.
- ix. With respect to subsection 54(2ZA)(b), there was no discretion under this subsection to disclose the disputed information to Mr Thomas. This is because disclosure of the disputed information under FOIA would or would have been likely to prejudice the effective performance by the AGW of his functions and particularly his statutory inspection functions.
- x. Disclosure contrary to the principles outlined in s. 54(2) PAWA constitutes a criminal offence under s. 54(3). Thus, if in any particular case the s. 54(2) prohibition applies, not only will the relevant information be absolutely exempt from disclosure under s. 44(1)(a) FOIA, but disclosure of that information would constitute an offence under s. 54(3) PAWA.
- xi. In this appeal s.54 PAWA prohibits disclosure because:
 - 1. At the time of the WAO inspection (March/April 2009), the Council was a Welsh best value authority for the purposes of s. 1 LGA 1999.
 - 2. The WAO inspection was conducted under s. 10A(1)(a) LGA 1999.
 - 3. All of the disputed information amounts to information lawfully obtained by the WAO in the course of the inspection.
 - 4. It necessarily follows that, to the extent that the disputed information relates to a particular person (e.g. a particular Council member), s.

54 prohibits disclosure of that information unless one of the exceptions provided for in s. 54 applies.

5. None of the exceptions provided for in s. 54 applies:
- (a) Consent: no consent has been given by third party individuals to disclose the information that relates specifically to them.
 - (b) The Appellant contends that he has spoken to a 'cross-section of the population' and 'the consensus is the vast majority would have their names published if need be'. Quite apart from the fact that Mr Thomas gives no particulars of the cross-section of the population he claims to have spoken to, the fact remains that there is no evidence that any of the data subjects identified in the fieldwork records consented to the disclosure of their names or other identifying personal data.
 - (c) There is also no evidence that the interviewees themselves consented to the content of the information they provided being disclosed to members of the public under FOIA. The mere fact that the AGW alerted the interviewees to the fact that he could not guarantee that the information would not be disclosed under FOIA does not mean that the interviewees can be taken to have consented to the information they provided being disclosed under FOIA. In any event, the information in the interview records does not merely relate to the interviewees. Critically, it also relates to third party individuals referred to by the interviewees (e.g. Council members who have been criticised by interviewees).
 - (d) AGW Consent: Whilst Mr Thomas has not specifically relied upon s. 54(2ZC), the AGW draws attention to this exception:
 - a. *"(2ZC) A person who does not fall within subsection (2ZA) or (2ZB) may also disclose such information in accordance with consent given by the Auditor General for Wales or an auditor."*
 - (e) This exception is not intended to apply to the AGW/WAO responding to a FOIA request as a public authority (s. 54(2ZC) expressly applies to persons who do not fall within the ambit of s. 54(2ZA) or (2ZB)). However, even if it could be said to apply where disclosure is sought from the AGW/WAO under FOIA, the AGW would have been bound to refuse consent in the instant case in view of the prejudice to his functions which would have been likely to result from the disclosure (see s. 54ZA(3) PAWA which allows the AGW to withhold consent in these circumstances). (The Tribunal notes that it accepts the arguments on "AGW Consent", and do not discuss it further below.)
 - (f) Prejudice to Future Inspections: The exemption under s. 54(2ZA) does not apply because: Mr Morris confirms that at the very least there was a real and significant risk that disclosure would prejudice the AGW's functions and, in particular, his statutory inspection functions.
 - (g) The AGW considers that the Tribunal's judgment in *John Connor Press Associates v IC* (EA/2005/005) contains useful guidance on the meaning of the concept 'would be likely to prejudice', albeit that the concept was being considered by the

Tribunal in the context of applying FOIA exemptions rather than s. 54 PAWA. In John Connor, the Tribunal concluded that 'likely to prejudice' meant that there must be a 'real and significant' risk that the relevant prejudice would occur.

- (h) The Appellant asserted that the AGW has provided no proof that interviewees would, in future, be reluctant to come forward if the records were to be published. The AGW relies on the evidence given by Mr Morris on this issue which is both authoritative and credible, particularly in view of: (a) Mr Morris's knowledge and experience and, further, (b) the fact that his evidence accords with common sense.
- (i) For the avoidance of doubt, the AGW may have adopted a different position had the information in the interview notes contained relatively trivial, neutral or non-sensitive information. However, the nature of the allegations made and views expressed in the notes do not remotely approximate to such information.
- (j) If the content of the records were disclosed to the public, this would in all likelihood damage trust and confidence in the confidentiality and integrity of the AGW's investigation procedures generally; lead to a decline in cooperativeness on the part of potential interviewees and, hence, compromise the effectiveness of future investigations, including on corporate governance issues. This is particularly given (a) the information contained in the records was obtained on the basis that it would be dealt with in confidence by the AGW and, further, (b) the highly sensitive (and personalised) nature of the information actually contained in the records.
- (k) Criminal Investigation: S.54(2)(g) provides for an exception to the general prohibition on disclosure in circumstances where disclosure is 'for the purposes of any criminal investigation which is being or may be carried out, whether in the United Kingdom or elsewhere'. Mr Thomas is not in a position to rely on this exception:
 - (l) The term 'criminal investigation' is not defined in s. 54(2)(g). However, on a purposive construction of s. 54(2)(g) it is clear that that provision must be taken to be directed at disclosures to relevant investigatory authorities (e.g. police authorities, the Crown Prosecution Service) for the purposes of actual or prospective criminal investigations. A disclosure to a member of the public under FOIA would not amount to such a disclosure.
- (m) Further and in any event, in the instant case, there is no evidence before the Tribunal that a criminal investigation either is being carried out or is prospectively going to be carried out, such that the disputed information may fall to be disclosed under s. 54(2)(g).
- (n) The fact that Mr Thomas may be of the view that a criminal investigation should be commenced is not sufficient to engage s. 54(2)(g).
- (o) The MPs' expenses cases do not set any precedent relevant to the instant case for the reasons set out in the AGW's submissions.

- (p) Information falling within s. 44(1)(a) FOIA must be treated as being absolutely exempt from disclosure. It follows that Mr Thomas' appeal against the Commissioner's decision on the application of s. 44 cannot succeed.
- (q) Purpose of Inspection: The Tribunal has no jurisdiction to decide the question of whether the AGW ought to have approached the investigation differently.

The Task of the Tribunal

- 20. The Tribunal's remit is governed by section 58 Freedom of Information Act 2000 (FOIA). This requires the Tribunal to consider whether the decision made by the Commissioner is in accordance with the law or whether he should have exercised any discretion he had differently. The Tribunal may receive evidence that was not before the Commissioner, and may make different findings of fact from the Commissioner.

The Questions for the Tribunal

- 21. The questions before the Tribunal are those set out in the Appellant's grounds of appeal. (*See Para. 12(b) above*).
- 22. If we accept the grounds, we must consider the application of the s.40(2) FOIA, relating to the exemption for personal data.

Ground 1: Statutory Bar

- 23. The Appellant asserts that the statutory bar was not intended to protect wrongdoing so the records should be disclosed.

Our Findings

- 24. In this case, the remit of the Tribunal is essentially to consider whether, under a proper construction of s.44 FOIA, the requested information is exempt from disclosure. The question of whether members of Council have done something wrong is beyond our ambit. In considering s.44 FOIA, we also need to construe s. 54 PAWA, and in doing so we must consider the exceptions as set out in the provision and cannot go beyond this approach to consider what is not stated within that Act.
- 25. Accordingly we find this ground to be without basis.

Ground 2: s.44 FOIA is not applicable

- 26. The Appellant asserts that the LGA does not prohibit disclosure because exceptions apply relating to (1) Consent; (2) FOIA request where disclosure would not prejudice AGW Functions; and (3) Criminal Investigation.
- 27. The parties' submissions are summarised above.

Our Findings

- 28. Section 44(1)(a) FOIA provides for an absolute exemption in respect of information requested where other legislation specifically prohibits the disclosure of the information.
- 29. In this appeal, the Appellant has not contested that the requested information falls within the general prohibition of s.54 PAWA. Instead, he claims that exceptions within s.54 apply.

Nevertheless, since the Appellant is not legally represented we have considered whether he could have argued that s.54 PAWA was not applicable.

30. We have concluded that he could not and that we accept the Respondents' submissions on this point. In particular we accept that (a) the requested information within the fieldwork records was been obtained pursuant to s.10A LGA - '*in the course of*' an inspection conducted under Part I LGA 1999 of a '*Welsh best value*' authority.
31. We therefore consider below whether the exceptions prevent the prohibition from applying.

A. Consent:

32. S.54(2) PAWA provides: "*The information must not be disclosed except in accordance with any of these – (a) with the consent of the body or person to whom the information relates.*"
33. We accept (1) that the relevant consent needed under this provision is that of the members who are said to have brought the Council into disrepute, and not of the other people who provided their names; (2) there is no evidence that they have provided such consent, and it is highly unlikely (though not totally inconceivable) that they would. Therefore, we accept that this exception does not apply.
34. We note that from our construction of s.54(2)(a), the parties addressing whether the requisite consent would have been forthcoming, does not seem to have been relevant. It seems that the AGW or WAO are not required to find out whether the members would be willing to consent, but rather, if they have not, the exception does not apply. Accordingly, save in a peculiar situation where the body or person would want the information disclosed but the AGW would not, it is hard to conceive of situations when this exception would ever be able to apply. This seems regrettable inasmuch as it does not support the underlying purpose of the FOIA.

2. Prejudice to AGW Functions

35. Under s. 54(2ZA)(b), the AGW in responding to an information request under FOIA, may allow disclosure unless it '*would, or would be likely to, prejudice the effective performance of a function imposed or conferred on the person by or under an enactment*'.
36. The Second Respondent asserts that the witness evidence shows that disclosure would prejudice the AGW's functions and, in particular, his statutory inspection functions. They consider '*would be likely to prejudice*' to mean there must be a '*real and significant*' risk.
37. The Appellant argues that AGW have not shown proof that people would not come forward to give evidence if they knew their names were to be published. Again, we note that it is not a question here of the interviewees' names being disclosed (unless they are the members who are said to have brought the Council into disrepute). Besides from the burden of proof resting with the Appellant, the Second Respondent has provided witness evidence and argument which we explore below.
38. The Appellant also states that this inspection was unique and does not happen often. We do not accept as compelling that the best value inspections are unique, although the way in which this particular inspection was called for (as a result of a previous audit), was probably unusual.
39. The Second Respondent argues that the witness testimony based on his experience supports the view that if the content of the records were disclosed to the public, this would in all likelihood
- a. (1) damage trust and confidence in the confidentiality and integrity of the AGW's investigation procedures generally; lead to a decline in cooperativeness on the part of potential interviewees and, hence, compromise the effectiveness of future investigations, including on corporate governance issues. This is particularly given (a) the information contained in the records was obtained on the basis that it

would be dealt with in confidence by the AGW and, further, (b) the highly sensitive (and personalised) nature of the information actually contained in the records.

40. The Second Respondent asserts that this argument is supported by a) Mr Morris's knowledge and experience and (b) the fact that his evidence accords with common sense.
41. Essentially, we are asked to accept Mr Morris' testimony that:
- a. Disclosure would be likely to make any further corporate governance inspection of a Welsh local authority so practically difficult, protracted and, consequently expensive that such an inspection could not potentially be done again;
 - b. The interviews were undertaken with an expectation that individual interview records would not be disclosed. It is his strong view that much of the information subsequently obtained after such reassurances would not have been forthcoming had we not extended such undertakings to the individuals to whom we spoke;
 - c. It would be unreasonable to name those individuals who happened to be named in interviews, while others might be equally to blame but were not identified. Such inconsistent disclosure would damage the trust and co-operation needed for effective audit and inspection, and that would be likely to prejudice the AGW's effective performance of functions.
 - d. In inspections, it is essential that interviewees feel they can be frank without fear of retribution from colleagues or superiors. We do not believe interviewees would be prepared to be as open and frank with us as they are if they believed their comments would be made openly available and attributed to them. This would fundamentally undermine their status and working relationships with one another and consequently our ability to conduct effective audit and inspection work.
42. We do not accept the information obtained in the fieldwork records was procured on the basis of complete confidentiality. This is because of the passages from the press release copied above, and the caveats made by Mr Morris that the WAO was subject to freedom of information legislation and that non-disclosure could not therefore be guaranteed, albeit that disclosure of information of a sensitive nature would be resisted and disclosure had not been required at that point. Further, the press notice to the public stated that any third party personal information received, such as comments on the abilities of identifiable individuals, will generally need to be provided to those people if they request it.
43. We accept that a full and frank provision of information by interviewees supports the AGW in carrying out his function of inspections. We consider it possible that members of the public and indeed staff may be more than willing for anything they state to be made public. We do not think that knowledge of potential disclosure would encourage them to come forward, whereas there is a possibility that it could inhibit or deter certain individuals, particularly staff. They might be less likely to be forthcoming in their interviews if they were concerned that any information from them may be placed in the public arena rather than simply for expert auditors to consider and assess. On balance, we accept the witness evidence that disclosure would be likely to prejudice the performance of the AGW function to carry out its functions. This is particularly because the Appellant has not put forward strong arguments to counteract it.
44. The Respondent also argued that disclosure would prejudice the audit and inspection functions of the AGW and WAO because the difficulties faced by the Council have been widely publicised and disclosure would be unlikely to help it address the problems it faces. It was argued that it "*would exacerbate interpersonal conflict within the Council leading to further failure to secure good corporate governance and best value (the overall Part 1 duty).*"
45. Whilst we recognise that exacerbating tensions within the Council may be counterproductive, even if disclosure would do this, we do not accept that the minimising such conflict is part of the auditing and inspection functions. Its role is to audit the corporate governance in place.

46. As regards the Appellant's arguments that an exception relating to criminal investigations is applicable, such as s.54(2)(g)(j) PAWA set out above, we accept and adopt the Second Respondent's reasoning set out in sub-paragraphs 19b(k) to (p). We accept the evidence that the WAO would have passed on any evidence of criminality been provided to the inspection team, to the appropriate authority for investigation, and that they came across no such material. We have seen nothing that indicates that we should not accept this evidence.
47. To conclude, we accept that s.44 FOIA applies. In view of it being an absolute exemption, the Appellant's reference to what is in the public interest is not relevant to prevent the prohibition against disclosure. Accordingly, it is unnecessary to consider the applicability of s.40 FOIA.
48. As to the Appellant's comments as to what should have been within the scope of the AGW inspection, this is beyond the scope of our remit.
49. Our decision is unanimous.

Claire Taylor
Tribunal Judge

16 March 2011