

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 July 2019

Public Authority: Birmingham City Council

Address: Council House
Victoria Square
Birmingham
B1 1BB

Decision (including any steps ordered)

1. The complainant has requested information concerning a code of conduct investigation.
2. The Commissioner's decision is that Birmingham City Council has correctly applied section 30(2) - investigations and proceedings, section 41(1)(a) - information provided in confidence, and section 40(2) - personal data to some of the information. However none of the exemptions apply to some of the withheld information.
3. The Commissioner has identified that some of the withheld information is not information provided in confidence section 41; or the balance of public interest for section 30(2) favours disclosure; or is not personal data section 40(2).
4. Additionally the Commissioner has found that, on the balance of probabilities, the council have provided all the information within the scope of question [ii] of the request.
5. The Commissioner requires the Birmingham City Council to take the following steps:
 - disclose paragraphs 55,56,92,93 and 94 of the Investigation Report;
 - disclose Annex 2 with the names of all individuals redacted on the basis of section 40(2)

6. 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

7. On 26 April 2018 the complainant wrote to Birmingham City Council ('the council') and requested information in the following terms:

"Please would you let me know in writing if you hold information of the following description:

Information concerning:

- i. the independent investigation into Councillor Waseem Zaffar following his resignation from cabinet;*
- ii. the Independent Standards Committee's consideration of allegations against Councillor Waseem Zaffar.*

Please may I see the information.

If you need further details in order to identify the information requested or a fee is payable please let me know as soon as possible.

If you are of the view that there may be further information of the kind requested but it is held by another public authority please let me know as soon as possible. Please continue with this application as soon as possible.

I believe that the information requested is required in the public interest for the following reasons:

- 1. To uphold public confidence that the council maintains standards of high conduct;*
- 2. To provide assurance that there are fair and thorough investigations into allegations made against councillors;*
- 3. To ensure that money is correctly spent on maintaining standards of conduct.*

8. The council responded on 6 July 2018 and refused to provide the requested information in response to question [i], citing the exception at FOIA Section 41 – Information provided in confidence. The council denied holding any information in scope of question [ii].
9. The complainant requested an internal review, on 16 July 2018, "of the decision to withhold the information."

10. Following an internal review the council wrote to the complainant on 1 August 2018. It upheld its position on question [i] stating *"The panel have considered the public interest in the release of the information and the duty of confidentiality owed to the individuals concerned. It is the panel's view is that disclosure of the investigation report ('the Investigation Report') would represent an invasion of privacy of third parties and breach the duty of confidence the Council owes to those parties."*

11. Following the Commissioner's enquiries the council wrote to the complainant on 3 January 2019 to advise it had amended its position to also include section 40(2) as the reason for withholding the Investigation Report:

"In addition to section 41 (information provided in confidence) of the Freedom of Information Act (FOIA), the Council considers that section 40(2) (personal data) of the FOIA is applicable as the report contains personal data of third parties."

4. Following enquiries from the Commissioner regarding 10 annexes listed in the Investigation Report the council identified further information within the scope of the request.

5. On 22 February 2019 the council advised the complainant that its response had changed. In addition to the exemptions previously cited it added section 30 – investigations and proceedings to the entire Investigation Report.

6. On 1 May 2019, the council advised the Commissioner that it had *"established the existence of a document titled 'Report to Standards Committee' dated 6 February 2018."* The Commissioner notes that this report falls within the scope of question [ii]. The council provided a redacted version of the report to the complainant on 9 May 2019 but didn't cite any exemptions. Following the Commissioner's enquiries the council confirmed that the redactions were based on the exemption at section 40(2).

Scope of the case

12. The complainant contacted the Commissioner on 3 August 2018 to complain about the way his request for information had been handled. Specifically that the council had incorrectly withheld the information stating *"there is clear public interest in knowing what happened. While some of the information may have been provided in confidence, it is difficult to see how the council can regard all the information about*

these inquiries on an important matter as being beyond the reach of the Freedom of Information Act...Perhaps some witnesses could be anonymised if that is appropriate. The idea that the terms of reference, the outcomes of the inquiry, the case for and against, the identities of those who conducted the inquiries (to ensure they were impartial) and the evidence which cleared him of wrongdoing, are all exempt from the Freedom of Information Act is implausible."

13. The council provided the Commissioner with a table summary of the exemptions cited for the documents in the Annex:

Annex	Subject	Exemption
1	Initial complaint ('the Complaint') about the Councillor's actions	section 40(2) – personal information and section 41 – information provided in confidence
2	Terms of Reference for the Investigating Officer	Partly in the public domain For the remainder: section 30 and section 41
3	Solicitor's letter	section 30 and section 41 section 42 - legal professional privilege
4	Solicitor's letter	section 30, section 41, section 40(2) and section 42
5	Solicitor's letter	section 30, section 41, section 40(2) and section 42
6	Facebook screenshots	In the public domain
7	Press articles	In the public domain
8	Letter to council from Dame Louise Casey	section 30 and section 40(2)
9	Letter from council to Dame Louise Casey	section 30 and section 40(2)
10	The school's uniform policy 2016	In the public domain

14. The council provided the Commissioner with the withheld information, that being the Investigation Report, its annexes and the Report to the Standards Committee. In summary it has cited:
- section 41 for the entire Investigation Report and a number of the annexes;
 - section 30(2)(a)(iii) for the entire Investigation Report and those annexes which are not in the public domain;
 - section 40(2) for information provided by third parties in the Investigation Report and a number of the annexes and the redactions from the Report to the Standards Committee;
 - section 42 for a number of the annexes.
15. The Commissioner considers the scope of the case, in light of the investigation, to be whether the council is correct to withhold information on the basis of section 41, section 40(2), section 30 and section 42 of the FOIA. Furthermore to establish whether it holds any further information in scope of [ii].

Reasons for decision

Section 41 – information provided in confidence

16. Information under consideration for this exemption is:
- the entire Investigation Report;
 - annex 1 - the Complaint;
 - annex 2 – the Terms of Reference; and
 - annexes 3,4,5 – solicitor's letters.
17. Section 41(1) provides that –
- “(a) Information is exempt information if it was obtained by the public authority from any other person (including another public authority); and,

- (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.”
18. To properly engage section 41, disclosure of the requested information must give rise to a possible actionable breach of confidence. This requires the information to have the necessary quality of confidence. The information must therefore be more than trivial and not be otherwise accessible.
19. The information needs to be communicated in circumstances which import an obligation of confidence. This obligation can be implicit or expressed explicitly.

41(1)(a) – was the information obtained from another person?

20. The council advises that it engaged an independent investigating officer to write the Investigation Report order to *"collate information and investigate whether or not there has been a breach of Birmingham City Council's code of conduct for members."*
21. It states that the information contained within the report was provided by the Councillor and other third parties such as the head teacher of the school in question and the City Council's Executive Director for Education.
22. The Commissioner notes that the author of the Investigation Report is a self-employed barrister with a specialism in local government law. The report references that the investigation was carried out based on documents in the public domain, private emails and a number of interviews. The report contains details of the investigation and the author's findings thereof.
23. The Commissioner notes that the author of the report was working on behalf of the council. Therefore, in terms of the FOIA, the report was created by the authority. This means that consideration of the application of exemption applies to the information detailed in the report that was given to the author by other persons.
24. The Commissioners section 41 guidance¹ states that if the requested material contains a mixture of both information created by the authority

¹ <https://ico.org.uk/media/1432163/information-provided-in-confidence-section-41.pdf>

and information given to the authority by another person, then, in most cases, the exemption will only cover the information that has been given to the authority. However, the authority must also consider whether the disclosure of the information it created would reveal the content of the information it obtained from the other person. If it would then the exemption may also cover the material it generated itself.

25. The Commissioner has considered the information contained in the main body of the Investigation Report and annexes 1 to 5. She finds that the majority of it is either information directly obtained from another person or derived from that information. However this does not apply to the sections in the Investigations Report named "*Potential Breaches of the Code*", nor to annex 2, which is named the "*Independent Investigating Officer's Terms of Reference*".
26. The Commissioner therefore finds that the condition under section 41(1)(a) has not been met for the section in the Investigations Report named "*Potential Breaches of the Code*" (paragraphs 55 and 56), and for annex 2 named the "*Independent Investigating Officer's Terms of Reference*". As such the exemption does not apply to this information. However the council have applied additional exemptions for withholding the information which are considered later in this decision notice.
27. The Commissioner is satisfied that the remaining information in the report and annexes was obtained either directly or indirectly from councillors and other third parties, and as such that the condition under section 41(1)(a) has been met.

41(1)(b) – would disclosure constitute an 'actionable' breach of confidence?

28. When determining if disclosure would constitute a breach of confidence, a public authority will usually need to consider:
 - whether the information has the quality of confidence
 - whether it was imparted in circumstances importing an obligation of confidence; and
 - whether disclosure would be an unauthorised use of the information to the detriment of the confider.

Does the information have the necessary quality of confidence?

29. Information will have the necessary quality of confidence if it is more than trivial and is not otherwise accessible.
30. The council states:

- *Information was gathered on a confidential basis to investigate these allegations and reported back to the Council's Monitoring Officer on a restricted basis";*
- *it "contends that the contents of the investigation report is more than trivial as it is of importance to the confider and should therefore not be considered trivial"; and that*
- *"The report is not otherwise accessible and has been shared only with a handful of individuals and therefore has the necessary quality of confidence.*

31. The council also referred the Commissioner to *Michael Thompson v IC & Cheshire East Council (Freedom of Information Act 2000) [2016] UKFTT 2016_0044 (GRC)*², the Tribunal re-iterated that information in relation to Code of Conduct complaints is more than trivial and the process should be undertaken in confidence

32. The Commissioner agrees that individuals concerned would attach significant importance to information confided as part of such an investigation. She notes that the council has confirmed that the report information is not otherwise accessible other than to a small number of individuals. Given these two factors the Commissioner is satisfied that the information has the necessary quality of confidence.

Was the information imparted in circumstances importing an obligation of confidence?

33. There are essentially two circumstances in which an obligation of confidence may apply:

- The confider has attached explicit conditions to any subsequent use or disclosure of the information (for example in the form of a contractual term or the wording of a letter); or
- The confider hasn't set any explicit conditions, but the restrictions on use are obvious or implicit from the circumstances. For example, a client in therapy wouldn't need to

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<http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i1896/Thompson,Michael%20EA-2016-0044%20AMENDED%20DECISION.PDF>

tell their counsellor not to divulge the contents of their sessions to others, it is simply understood by both parties that those are the rules.

34. Explicit conditions are most commonly used in connection with commercial information. In her guidance on section 41 the Commissioner outlines that if an authority is unsure whether any implicit obligation of confidence exists, then it may find it helpful to apply the 'reasonable person' test used by Judge Megarry in *Coco v A N Clark (Engineers) Limited [1968] FSR 415*.
35. Judge Megarry advocated that; *'...if the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised, that upon reasonable grounds the information was being given to him in confidence then this should suffice to impose upon him the equitable obligation of confidence'*.
36. The council states *"taking into account the purpose for which the report would be used and the circumstances in which the Council shared the report with parties to the investigation, an obligation of confidence exists. There is also an explicit obligation of confidence in relation to the subject member of the investigation and his solicitors."*
37. Bearing in mind the reasonable person test, the Commissioner is persuaded that the information provided by third parties, other than solicitors, would have an implicit obligation of confidence.
38. Furthermore she accepts that there is an explicit obligation of confidence for information originating from the subject members solicitors.

Would disclosing the information be an unauthorised use of the information to the detriment of the confider?

39. The Commissioner's published guidance on section 41(1) establishes that case law now suggests that any invasion of privacy resulting from a disclosure of private and personal information can be viewed as a form of detriment in its own right.
40. The council asserted: *"Much of the information contained within the investigation report is information that is the personal data of third parties. The Council believes that disclosure of this information would in itself be a detriment to the confider. In addition, the Council strongly believes that disclosure of the report would initiate a legal person to bring an action for breach of confidence against the Council and that they would be likely to succeed."*

41. The Commissioner considers that the contributors to the report provided information of a personal and sensitive nature. Its release may well cause those individuals a degree of strain, damage or distress. It is therefore not necessary for there to be any detriment to the confiders in terms of tangible loss, for this information to be protected by the law of confidence. As such the Commissioner has not considered this issue further.
42. The Commissioner has therefore found that the condition under section 41(1)(b) has also been met: the information in question has the necessary quality of confidence; it was imparted in circumstances importing an obligation confidence and disclosing it would be an unauthorised use of the information to the detriment of the confider.
43. Section 41 of the FOIA is an absolute exemption and therefore not subject to the public interest test contained at section 2 of FOIA. However, the common law duty of confidence contains an inherent public interest test. This test assumes that information should be withheld unless the public interest in disclosure outweighs the public interest in maintaining the duty of confidence (and is the reverse of that normally applied under the FOIA).

Public interest in disclosing the information

44. The complainant outlines that the Councillor *"remains on the council and has recently been promoted back into the cabinet. No information has been provided about the reviews into his conduct...Most if not all of the information should be made public on such a serious matter which has required Government intervention"*
45. The council acknowledges that *"The issues investigated by the Investigating Officer were not only serious but were ones that would be of considerable interest to the public such as allegations that Councillor Zaffar potentially breached the City Council's Code of Conduct for Members."*

Public interest in withholding the information

46. The council states that the *"real impact of disclosing private, personal information will be an infringement of the confider's privacy, and there is a strong public interest in protecting the privacy of individuals. This public interest is further underpinned by the Article 8 right to privacy, and the fact that the courts are obliged to interpret the law of confidence in a manner that respects that right."*

Balance of the public interest

47. The Commissioner considers that there is a high level of public interest in this case taking account of the issue which triggered the initial complaint about the Councillor, the subsequent independent investigation, and the reporting of the case in the national press.
48. The Commissioner has also given due consideration to the reverse focus of the public interest test in its application to section 41, being that information should be withheld unless the public interest in disclosure outweighs the public interest in maintaining the duty of confidence.
49. Having read the document, she finds that the council's public interest argument in protecting the privacy of confider's information holds true for: the Investigation Report paragraphs 1 to 54 and 57 to 91 and annexes 1,3,4 and 5. However the Investigation Report's conclusion (paragraphs 92, 93, 94) of the findings section does not disclose confider information and furthermore it would partially address the public interest in the outcome of the investigation.
50. The Commissioner therefore finds that the balance of public interest favours maintaining this exemption for all information, except for paragraphs 92, 93, 94 of the Investigation Report.
51. As the Commissioner has found that the exemption is engaged for: paragraphs 1 to 54 and 57 to 91 of the Investigation Report; and annexes 1, 3, 4 and 5, she has not needed to consider the other exemptions cited by the council for withholding this information.
52. However the Commissioner finds that exemption at section 41(1)(a) is not engaged for paragraphs 55, 56, 92, 93, 94 of the Investigation Report; and annex 2 – the Terms of Reference. Therefore the Commissioner has gone on to consider the additional exemptions cited by the council for withholding this information.

Section 30 – Investigations and proceedings conducted by public authorities

53. The Commissioner has considered the application of section 30 to paragraphs 55, 56, 92, 93, 94 of the Investigation Report and annexes 2, 8 and 9.
54. Information under consideration for this exemption is:
 - Paragraphs 55,56,92,93,94 of the Investigation Report;
 - annex 2 – the Terms of Reference;
 - annex 8 - letter to the council from Dame Louise Casey; and

- annex 9 - letter from council to Dame Louise Casey.
55. Section 30(2)(a)(iii) and (iv) state –
- (2) Information held by a public authority is exempt information if –
 - (a) it was obtained or recorded by the authority for the purposes of its functions relating to –
 - (iii) investigations (other than investigations falling within subsection (1)(a) or (b)) which are conducted by the authority for any of the purposes specified in section 31(2) and either by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under any enactment, or
 - (iv) civil proceedings which are brought by or on behalf of the authority and arise out of such investigations, and
 - (b) it relates to the obtaining of information from confidential sources.”
56. The council cites section 30(2)(a)(iii) and (iv) for the purpose under section 31(2)(b)
57. Section 31(2)(b) is for the purpose of ascertaining whether any person is responsible for any conduct which is improper.
58. Section 30 is a 'class based' exemption and as such it is not necessary to show that disclosure of the withheld information would or would likely result in any prejudice. It is enough that the information sought by the request should fall within the particular class of information described by the exemption.
59. In her guidance on Section 31³ the Information Commissioner states that improper conduct relates to how people conduct themselves professionally. For conduct to be improper it must be more serious than simply poor performance. It implies behaviour that is unethical.

³ <https://ico.org.uk/media/for-organisations/documents/1207/law-enforcement-foi-section-31.pdf>

60. The Commissioner would generally expect there to be a formal code of conduct that members of a profession are expected to adhere to and a recognised definition of improper conduct. In many cases such a code is likely to be supported by statute though this is not a prerequisite. It will be necessary, on a case by case basis, to identify the relevant definition and which elements of any code of conduct it applies to. This exemption will apply if disclosure would prejudice a public authority's ability to ascertain whether elements of the code falling within the stated definition of improper conduct have been breached.
61. The council states that *"the requirements of section 30(2)(a)(iii) are met as the information requested was obtained and recorded for the purposes of its functions relating to investigations carried out under the Localism Act 2011 in order to ascertain whether a Member is responsible for any conduct which is improper."*
62. The council states that it has a duty to promote and maintain high standards of conduct by virtue of the Localism Act 2011 which provides:

section 27:

"(1) A relevant authority must promote and maintain high standards of conduct by members and co-opted members of the authority.

(2) In discharging its duty under subsection (1), a relevant authority must, in particular, adopt a code dealing with the conduct that is expected of members and co-opted members of the authority when they are acting in that capacity."

section 28:

"(4) A failure to comply with a relevant authority's code of conduct is not to be dealt with otherwise than in accordance with arrangements made under subsection (6);

(6) A relevant authority other than a parish council must have in place

(a) arrangements under which allegations can be investigated,

(b) arrangements under which decisions on allegation can be made."

63. The Commissioner notes the "*Code of Conduct for Members and General Guidance*⁴", which "*details of the ways in which Birmingham City Council's Councillors and co-opted committee members must behave*" is published on the council's website. The document also provides the complaints process.
64. The Commissioner has considered the submissions made by the council in support of its application of 30(2)(a). The Commissioner is satisfied that the information formed part of the council's investigation into the conduct of a Councillor. The Commissioner is also satisfied that it was for the purpose specified in section 31(2)(b) for which the council has a statutory function to maintain high standards set out in the Localism Act 2011.
65. The Commissioner must now consider the balance of the public interest arguments specifically in regard to paragraphs 55, 56, 92, 93, 94 of the Investigation Report and annexes 2, 8 and 9.

Public interest in disclosing the information

66. The council advised that it had considered the public interest argument that disclosure would better inform public understanding regarding how the investigation was undertaken and thus promote transparency.
67. In his information request, the complainant outlined public interest arguments for disclosure:
- *To uphold public confidence that the council maintains standards of high conduct;*
 - *To provide assurance that there are fair and thorough investigations into allegations made against councillors;*
 - *To ensure that money is correctly spent on maintaining standards of conduct.*
68. In reference to media coverage, the complainant also stated to the Commissioner "*there is clear public interest in knowing what happened*".

Public interest in withholding the information

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https://www.birmingham.gov.uk/downloads/file/782/code_of_conduct_for_members_and_general_guidance

69. The council states that the *"investigation has been widely publicised in local and national media and there is sufficient information in the public domain to better inform the public, such as Councillor Zaffar's public statements on the matter"*
70. The council advised that it had given *an undertaking to Councillor Zaffar and his solicitors that the investigation would be undertaken in the strictest of confidence.*
71. The council stated that release of the information would undermine the confidence in its investigations process for Code of Conduct complaints due to:
 - the release of investigation procedures;
 - deterring potential whistle-blowers and witnesses from coming forward for future investigations; and
 - a resulting lack of candour from those involved in investigations

Balance of the public interest arguments

72. The Commissioner considers that there is a strong public interest in accountability and transparency on the part of public authorities. She also accepts that there is public interest in scrutinising the investigative processes of a public authority in order to be confident that the public authority is discharging its statutory functions effectively.
73. The Commissioner accepts that the release of some information may deter potential whistle-blowers and witnesses and also inhibit candour during investigations. The weight attributed to this argument is reduced by the fact that the investigation had concluded and therefore the argument can only apply to whether or not it is a significant issue in terms of future investigations.
74. The Commissioner has considered the council's argument that the investigation has been widely publicised and therefore sufficient information has been put into public domain. However she finds that it is not possible to determine what 'sufficient' information is, nor how it would be tested against the public interest arguments for transparency.
75. Regarding the council's assurances to the Councillor's solicitors that the investigation would be undertaken in confidence. The Commissioner believes that confidential information has already been considered in terms of the section 41 exemption.

76. The Investigation Report paragraphs 55 and 56 outline the allegations that were considered; paragraphs 92, 93 and 94 provide the conclusions. Annex 2 - the Terms of Reference, comprises of: information in the public domain; a list of potential breaches of the Code of Conduct to be investigated; the scope of the investigation and topics of interest; and parties to the investigation. It is the Commissioners view that release of this information would not be overly detrimental to, nor undermine confidence in, the investigations process for Code of Conduct complaints. On the other hand the information would go some way towards satisfying the public interest in ensuring that a fair and thorough investigation had been undertaken.
77. The majority of annex 8, the letter to the council from Dame Louise Casey, appears to be reported in the press and therefore is at least partly in the public domain. However annex 9, which is the response from the council remains private. Having considered the information, the Commissioner does not find that their full disclosure will any better inform the public interest into the investigation and its outcome.
78. In light of the above, the Commissioner has concluded that the public interest in maintaining the exemption at section 30 outweighs the public interest in disclosure for annex 8 and annex 9.
79. However the Commissioner concludes that the public interest in disclosure outweighs the public interest in maintaining section 30 for the Investigation Report paragraphs 55, 56, 92, 93, and 94 and for Annex 2.
80. The council have not claimed any further exemptions for Annex 2, however the Commissioner has identified that it includes the names of individuals involved in investigation. Therefore the Commissioner's decision is that the council should redact the names of individuals from Annex 2 and then disclose the remaining information.
81. The council have also cited the exemption at section 40(2) for the Investigation Report which the Commissioner will now consider in terms of paragraphs 55, 56, 92, 93, and 94.

Section 40 personal information

82. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.

83. In this case the relevant condition is contained in section 40(3A)(a)⁵. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').
84. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of the FOIA cannot apply.
85. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

86. Section 3(2) of the DPA defines personal data as:

"any information relating to an identified or identifiable living individual".

87. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
88. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
89. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus. The Commissioner considers that the information in the Investigations Report is clearly linked to the Councillor being information about allegations connected to him.
90. In relation to its use of the exemption in the Investigation Report, the council stated *"The report names individuals who have provided information to the Investigating Officer. The Council believes disclosure*

⁵ As amended by Schedule 19 Paragraph 58(3) DPA.

of personal data relating to employees of the Council and third parties would contravene the first data protection principle" The Commissioner requested further details on which parts of the report the council is applying section 40(2) and received the same response. The Commissioner therefore considers the council is limiting the use of the exemption to the naming of individuals in the report and not to the report in its entirety in relation to the Councillor.

91. The Commissioner has reviewed the Investigation Report paragraphs 55, 56, 92, 93, and 94. She finds that it does not contain "*names of individuals who have provided information to the Investigating officer.*" The information therefore does not relate to the purposes for which the council have cited the exemption at section 40(2).
92. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information does not relate to the "*report names of individuals who have provided information to the Investigating officer.*" She therefore is satisfied that this information neither relates to nor identifies the individuals concerned. As such this information does not fall within the definition of 'personal data' in section 3(2) of the DPA.
93. The Commissioner therefore finds that the exemption at section 40(2) is not engaged for the Investigation Report paragraphs 55, 56, 92, 93, and 94. The council should therefore disclose this information.
94. The council have also cited the exemption at 40(2) for the redactions made to the Report to the Standards Committee. The Commissioner has reviewed the report and concurs with the council's position that the redacted information identifies employees of the council and third parties who provided input into the investigation.
95. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the redacted information in the Report to the Standards Committee relates to individuals who provided information into the investigation. She is satisfied that this information both relates to and identifies those individuals concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
96. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
97. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

98. Article 5(1)(a) of the GDPR states that:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".

99. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.

100. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

Lawful processing: Article 6(1)(f) of the GDPR

101. Article 6(1) of the GDPR specifies the requirements for lawful processing by providing that *"processing shall be lawful only if and to the extent that at least one of the"* lawful bases for processing listed in the Article applies.

102. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

"processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child"⁶.

⁶ Article 6(1) goes on to state that:-

"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:-

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

103. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the FOIA, it is necessary to consider the following three-part test:-

- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
- ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
- iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

104. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

105. In considering any legitimate interest(s) in the disclosure of the requested information under the FOIA, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.

106. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

107. The complainant has stated "*Perhaps some witnesses could be anonymised if that is appropriate. The idea that the terms of reference, the outcomes of the inquiry, the case for and against, the identities of those who conducted the inquiries (to ensure they were impartial) and the evidence which cleared him of wrongdoing, are all exempt from the Freedom of Information Act is implausible.*"

108. The council has stated that it "*believes there is a legitimate interest in disclosing the information in order to show transparency and accountability in the process of investigating members' conduct.*"

109. The Commissioner concludes that the legitimate interest being pursued is in relation to the transparency of the enquiry and therefore relates only to the redacted details of the officials conducting the enquiry.

Is disclosure necessary?

110. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.

111. The Commissioner notes that the key officials that have been anonymised in the report are the council's monitoring officer, the chair of the standards committee and the author of the Investigation Report.

112. The Commissioner considers that the naming of the council's monitoring officer and the chair of the standards committee are not required as the identification of their roles is sufficient to meet the stated legitimate interest.

113. The Commissioner considers that although the author of the report was an independent person employed by the council, it is the council officers who are ultimately responsible and accountable for the process of the investigation. As such the Commissioner does not consider it necessary to disclose the name of author of the Investigation Report for the purposes of transparency.

114. The Commissioner has therefore found that the exemption at section 40(2) is engaged for the withheld information in the Report to the Standards Committee.

115. The Commissioner has found that exemption at section 40(2) is not engaged for the Investigation Report paragraphs 55, 56, 92, 93, and 94. The council should therefore disclose this information.

Section 1 – general right of access to information held by public authorities

116. Section 1(1) of the FOIA states that:

"Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him."

117. Where there is a dispute between the information located by a public authority and the information a complainant believes should be held, the Commissioner, follows the lead of a number of First-Tier Tribunal (Information Rights) decisions in applying the civil standard of the balance of probabilities.

118. The Commissioner will consider the public authority's reasons for stating that it does not hold the information in question, as well as the extent and reasonableness of any search conducted. The Commissioner will also consider any arguments put forward by the complainant.

The complainant's position

119. On 6 July 2018, in the initial response to question [ii], the council stated that no information was held in scope of this part of the request. The council maintained its position in the internal review. On 1 May 2019, during the course of the Commissioner's investigation, the council advised it had found one document in scope of [ii] being the document titled 'Report to Standards Committee'.

120. In light of the late identification of the report, the complainant requires assurances that all information in scope of the request has been identified by the council.

The council's position

121. The Commissioner asked why the document had not been located until the latter stages of the complaint investigation. The council explained it had been identified during conversations with the Councillor's solicitor regarding this complaint.

122. The council explained that its initial searches had been on corporate systems, however the document, which it states is a private report, was held on the hard-drive of the Monitoring Officer's council owned laptop, and that this was not initially searched.

123. The council advised that it is *"taking measures and putting in processes to ensure that when requests for information in relation to Members are received, we have created a checklist so all relevant areas where*

information is readily available is searched extensively before responding to a request for information is putting in processes."

124. The council advised that *"all Councillor conduct matters are referred to the Monitoring Officer in the first instance, so documents are likely to be in his/her email account, and saved on the Legal Services' case management system, which is separate to the Committee Services system. However, none of these searches retrieved the document for part ii) of the request."*

125. It stated that although searches were not initially conducted within the hard-drive of the Monitoring Officer's Council owned laptop, these have now been completed.

126. The council confirmed that any information falling in scope of [ii] would be held in electronic form. It advised that no information in scope of [ii] had been deleted or destroyed.

The Commissioner's position

127. The council's procedures for the identification of information and responding to requests has clearly been lacking in this case. No doubt, leading inevitably to the suspicion of whether or not all relevant information has been identified.

128. However taking account of the council's latter searches for information and assurances that nothing has been deleted or destroyed, the Commissioner has no evidence to the contrary that anything further is held.

129. The Commissioner therefore finds, on the balance of probabilities, that no further information is held in scope of [ii].

Procedural matters

Section 10(1) of the FOIA – Time for compliance with request

130. Section 10 (1) of the FOIA states that a public authority must respond to a request promptly and *"no later than the twentieth working day following receipt"*.

131. The complainant made his request for information on 26 April 2018. The council released the final piece of information in scope of the request to the complainant on 9 May 2019. The Commissioner therefore finds that the council has breached section 10(1) of the FOIA by failing to respond to the request within 20 working days. However, as the response was issued no steps are required.

Right of appeal

132. 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

133. 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.

134. 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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