

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 9 October 2023

**Public Authority:** Lancaster City Council  
**Address:** Town Hall  
Dalton Square  
Lancaster  
LA1 1PJ

#### **Decision (including any steps ordered)**

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1. The complainant requested information in respect of Lancaster City Council's (the 'Council') decision not to conduct a Code of Conduct investigation against a named Councillor of Tatham Parish Council. The Council refused the request on the basis of section 31(1)(g) of FOIA. The Commissioner's decision is that the Council was entitled to rely on this exemption to refuse the request. The Commissioner does not require any steps.

#### **Request and response**

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2. On 24 February 2023, the complainant wrote to the Council and requested the following information:  
  
"I am requesting the information regarding the rationale and reasons not to conduct an investigation into a Code of Conduct complaint against [name redacted] Tatham Parish Council. The complaint was lodged on 26 September 2022.

- Copies of emails between the Monitoring officer / Deputy Monitoring Officer and the Independent Person and Chair of the Personnel Committee regarding this case.
  - Copies of any notes taken during verbal discussions between the Monitoring officer / Deputy Monitoring officer and the Independent Person and Chair of the Personnel Committee regarding this case.
  - Copy of the final decision report on the complaint detailing the reasons not to conduct an investigation.
  - Any ancillary documentation that supported the final decision.”
3. The Council responded to the request on 20 March 2023. It refused the request citing section 31(1)(g) (law enforcement) FOIA on the basis that disclosure would prejudice the exercise of its functions for the purpose of ascertaining whether any person is responsible for any conduct which is improper.
  4. Following an internal review, the Council wrote to the complainant on 6 April 2023. It upheld its original response.

### **Scope of the case**

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5. The complainant contacted the Commissioner on 14 July 2023 to complain about the way their request for information had been handled. The complainant considers that the exemption specified is obscure and does not apply in this case.
6. The complainant has alleged that the process of this refusal was against the Effective Code of Complaint handling issued by the Local Government Ombudsman in October 2020 and questioned the quality of the investigation stating that it was conducted under a veil of secrecy which is out of alignment of the Localism Act 2011.
7. The scope of the Commissioner’s investigation is to consider whether the Council was entitled to rely on section 31(1)(g) to refuse the request. His remit does not extend to a consideration of the quality of the investigation itself.

## Reasons for decision

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### Section 31 – law enforcement

8. Section 31 provides a prejudice-based exemption which protects a variety of law enforcement interests.
9. The Council has cited section 31(1)(g) which states that:

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

(g) the exercise of any public authority of its functions for any of the purposes specified in subsection (2).
10. The purpose it has cited in subsection (2) is:

(b) the purpose of ascertaining whether any person is responsible for any conduct which is improper.
11. For the exemption to be engaged, the Commissioner requires the function identified by the public authority in relation to section 31(1)(g) to be a function which is specifically entrusted to that public authority to fulfil.
12. The Council has the power to promote and maintain high standards of conduct as specified in section 27 of the Localism Act 2011. This includes adopting a code of conduct as detailed in section 28 of the Localism Act 2011 and enforcing the same. Section 28 of the Localism Act provides that the Council must have in place:
  - (a) arrangements under which allegations can be investigated and
  - (b) arrangements under which decisions on allegations can be made.
13. The Commissioner is satisfied that this is a relevant function which falls under sections 31(1)(g) for the purposes of 31(2)(b) FOIA, and is one which is specifically entrusted to the Council as a local authority to fulfil.

### Is the exemption engaged?

14. In order for the exemption to be engaged, the following criteria must be met:
  - first, the actual harm which the Council alleges would, or would be likely to occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption (in

this case, ascertaining whether any person is responsible for any conduct which is improper);

- secondly, the Council must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice, which is alleged must be real, actual or of substance; and,
  - thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the Council is met – i.e., disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice.
15. In relation to the lower threshold (would be likely), the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility. Rather, there must be a real and significant risk. The Commissioner considers that the higher threshold places a stronger evidential burden on a public authority to discharge. The chances of the prejudice occurring should be more probable than not.
16. Consideration of the exemption at section 31 is a two-stage process. Even if the exemption is engaged, the information should be disclosed unless the public interest in maintaining the exemption outweighs the public interest in disclosure.
17. The Commissioner has considered whether the Council has demonstrated a causal link between disclosure of the withheld information and the prejudice that section 31 and the relevant subsections are designed to protect against. In the Commissioner's view, disclosure must at least be capable of harming the purpose or function in some way, i.e., having a damaging or detrimental effect on it.
18. The Council has argued that disclosure of the requested information would be likely to prejudice its ability to carry out its statutory function specified in paragraph 21 of this notice on the following grounds as it may:
- inhibit disclosure by third parties of relevant information
  - inhibit the frank discussion and investigation of officers
  - prevent the accused member from engaging in the investigation process for fear of disclosure

- undermine the powers of the standards committee to disclose the outcome of a standards investigation as a sanction (such as censure or reporting its findings to full council).
19. The Commissioner has considered the arguments put forward by the Council. Whilst he is mindful that the council's arguments are not detailed, he considers that this type of disclosure would be likely to undermine the ability of the Council to undertake Members Code of Conduct investigations in the future. Information generated during a preliminary investigation is sensitive and its disclosure could set a precedent of release which could affect future Code of Conduct investigations.
  20. Additionally, the Commissioner considers that disclosure of this type of information whether current or historic could compromise the right of Councillors to have a fair hearing, and the rights of the complainant for a resolution, therefore undermining the whole process.
  21. The Commissioner is therefore satisfied that the causal relationship between the disclosure of the information and the prejudice claimed is real, actual or of substance.
  22. In respect of the level of likelihood, the Council has confirmed that it is relying on the lower limb of 'would be likely' to prejudice law enforcement.
  23. The Commissioner's decision is that the exemption in section 31(1)(g) is engaged by the withheld information.
  24. Section 31 is a qualified exemption. The Commissioner must now consider whether, in all the circumstances of the case, the public interest in maintaining the exemption at section 31(1)(g) of FOIA, outweighs the public interest in disclosure of the information.

### **Public interest test**

#### Factors in favour of disclosure

25. The Council acknowledged that disclosure would allow transparency and accountability regarding its decision making and allow the public to scrutinise its decisions.

#### Factors in favour of maintaining the exemption

26. The Council has argued that there is a public interest in ensuring that third parties are prepared to give relevant information in respect of an investigation of this nature.

27. The Council has further argued that investigating officers need to be able to have a free and frank discussion regarding the investigation to be able to reach a reasoned decision.
28. The Council has also argued that there is a public interest in the accused Member engaging in the investigation process without fear that the details would be disclosed.
29. The Council also considers that there is a public interest in ensuring that the powers of the standards committee to disclose the outcome of a standards investigation as a sanction are not undermined.

### **The Commissioner's conclusion**

30. In carrying out the statutory balancing exercise in this case, the Commissioner considers that appropriate weight must be afforded to the public interest inherent in the exemption – that is, the public interest in avoiding likely prejudice to law enforcement matters.
31. In that respect, the Commissioner recognises that there is a strong public interest in protecting the law enforcement duties of local government and avoiding prejudice to the purpose of ascertaining whether any person is responsible for any conduct which is improper, as set out in section 31(1)(g) by virtue of section 31(2)(b). Clearly it is not in the public interest to disclose information which may compromise the ability of local government to accomplish this function as stipulated under section 28 of the Localism Act 2011.
32. Whilst the Commissioner also recognises the need to ensure transparency and accountability on the part of local councils, he finds that there is a stronger public interest in ensuring the continued strength and effectiveness of Members Code of Conduct investigations. He recognises that if disclosure of the withheld information is likely to cause prejudice to the Members Code of Conduct investigation process by inducing a potential reluctance on the part of the various parties to provide information upon which the effective investigation process relies, this would not be in the public interest.
33. In all the circumstances of this case, the Commissioner considers that the public interest in maintaining the exemption outweighs the public interest in disclosing the information. It follows that the Council was entitled to rely on sections 31(1)(g) by virtue of section 31(2)(b) FOIA to refuse to disclose the withheld information.

## Right of appeal

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34. 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: 0203 936 8963

Fax: 0870 739 5836

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

35. 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.
36. 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 .....**

**Catherine Dickenson**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**