

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 1 May 2025

Public Authority: Dover District Council
Address: White Cliff's Business Park
Dover
CT16 3PJ

Decision (including any steps ordered)

1. The complainant requested a copy of a report which was considered at a meeting held by the Investigation and Disciplinary Committee (IDC) at Dover District Council (the council).
2. The council refused the request, citing section 40(2) (third party personal information), and section 31 (law enforcement), of FOIA.
3. The Commissioner's decision is that the council is entitled to rely on section 40(2) of FOIA as its basis for withholding all of the requested information.
4. The Commissioner does not require further steps.

Request and response

5. On 12 August 2024, the complainant wrote to the council and requested information in the following terms:

"In the Minutes of the Investigation and Disciplinary Committee held on 05 August, there is reference to a 'Report by the Deputy Monitoring Officer.' Could I see that report please (with necessary personal information redacted)."
6. On 27 August 2024, the council issued a refusal notice, citing section 40(2) of FOIA. The council confirmed that all of the information contained within the report would allow for the identification of an

individual which, if released, would result in a breach of a data protection principle.

7. On 28 August 2024, the complainant requested an internal review, and on 25 September 2024, the council issued its response, maintaining its original position that it was entitled to withhold the requested information under section 40(2) of FOIA. However, the council advised the complainant that it now also considered the exemption at section 31(1)(g) to be engaged, and that section 31(2)(b) was of particular relevance. The council said that improper conduct “is about how people conduct themselves professionally, and for conduct to be considered improper it must be more serious than simply performance. It implies behaviour that is considered unprofessional or unethical.”
8. The council said that it had considered the public interest test and that it had decided that this favoured upholding the exemption at section 31 in this case.

Scope of the case

9. The complainant has said that they accept that personal data should be redacted, and that they only require the “nature” of the complaint and whether it is against a senior public facing official (elected or unelected). They have said that they consider that the council should be able to provide at least some of the information contained within the requested report.
10. The Commissioner will firstly consider whether the council is correct when it says that the exemption at section 40(2) of FOIA is engaged in respect of all of the withheld information.
11. If necessary, the Commissioner will then go on to consider whether the council is correct to say that it is entitled to withhold any of the requested information under the exemption at section 31 of FOIA.

Reasons for decision

Section 40 - personal information

12. Section 40(2) of 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.

13. In this case, the relevant condition is contained in section 40(3A)(a). 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 UK General Data Protection Regulation (UK GDPR).
14. 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 FOIA cannot apply.
15. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

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

“any information relating to an identified or identifiable living individual”.

17. Therefore, the two main elements of personal data are that the information must relate to a living person, and that the person must be identifiable.
18. 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.
19. 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.
20. The Commissioner’s [guidance](#) says that, when deciding whether information is personal data, consideration should be given as to whether a person can be identified, either directly or indirectly, from the relevant information. Where it is not obvious that someone may be identifiable, consideration should be given to all the practical steps and all the means reasonably likely to be used by someone who is motivated to identify the people to whom the information relates. The Commissioner considers that the key question to be asked is whether individuals can be identified from information with a degree of certainty.

21. Item 6 of the published "[Agenda frontsheet](#)" for the [meeting](#) of the council's Investigation and Disciplinary Committee (IDC) on 5 August 2024, confirms that consideration was to be given to a complaint, a report from the Deputy Monitoring Officer, and advice received from a barrister. It is the report that has been requested by the complainant.
22. The information contained within the [public reports pack](#) for the meeting of the IDC, also confirms that, under [Section 100\(A\)\(4\)](#) of the Local Government Act 1972 (LGA 1972), the public was to be excluded from that part of the meeting where the complaint, report, and advice from a barrister, were to be considered. This was on the grounds that it involved the likely disclosure of exempt information as defined in paragraphs 1 and 2 of Part 1 of [Schedule 12A of the LGA 1972](#). The public reports pack went on to say these paragraphs refer to information relating to an individual, information which is likely to reveal the identity of an individual, and information relating to the financial or business affairs of any particular person (including the authority holding the information).
23. The details of the meeting also confirm that, as required by the LGA 1972, consideration was given to the public interest when taking the decision to discuss certain matters as part of a closed session. They also confirm that the IDC concluded that no further action should be taken in response to the complaint that was considered.
24. In this case, the Commissioner is satisfied that individuals would be directly identifiable from parts of the withheld information contained within the requested report. This is primarily in respect of that information which would disclose the names, or job roles, of specific individuals.
25. The Commissioner has gone on to consider whether the release of any of the information would still be personal data if all direct identifying factors (such as names and job titles) were to be removed from the report before disclosure.
26. Having considered the nature and content of the report, the Commissioner considers that it is highly likely that the disclosure of part of the withheld information would allow for the identification of the individual, or individuals, who made the complaint, even with direct identifying factors removed. This is because the Commissioner is satisfied that certain individuals, in particular those known to the complainant, or complainants, would be able to piece together information already known to them with parts of the withheld information in order to identify who made the complaint.

27. Furthermore, the Commissioner considers that senior officers will also be indirectly identifiable from the information contained within the report.
28. The Commissioner has found that whilst the council does not appear to publish information about the functions of the IDC, there are a number of other councils that do. The Commissioner understands from such information that in 2015, the introduction of new regulations led to a change in the process followed by councils when investigating matters that relate to the conduct and capability of their most senior officers. IDCs form part of the new process, and take the preliminary steps to assess the nature of any issues that have arisen and decide where further action is warranted.
29. The number of senior officers that are employed by a council is very small, in most cases being less than five employees. In light of this, and having considered the distinctive roles that each senior officer within a council holds, it is the Commissioner's view that the disclosure of any of the withheld information would identify and reveal something about all of the senior officers employed by the council. This is because it would confirm whether each senior officer was, or was not, the focus of, or linked in some way to, the complaint considered by the IDC, and its outcome.
30. It is therefore the Commissioner's view that even if information that would directly identify individuals, such as any names and job titles were to be removed, there is a more than hypothetical risk of individuals being identified as a result of the disclosure of the information contained within the requested report. The Commissioner is also satisfied that disclosure of the information would reveal something about these individuals; who made the complaint, the nature of that complaint, and also whether that complaint in any way relates to an officer, or officers, at the council, and if so, how it relates to them.
31. As the Commissioner considers that this information would both identify and relate to individuals, he is satisfied that it meets the definition of personal data at section 3(2) of the DPA.
32. Whilst the Commissioner has determined that all of the withheld information is personal data, this finding, in itself, does not automatically exclude such information from disclosure under FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
33. The Commissioner considers the most relevant DP principle in this case would be principle (a).

Would disclosure contravene principle (a)?

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

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

35. 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.

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

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

37. 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”¹.

38. In considering the application of Article 6(1)(f) of the UK GDPR in the context of a request for information under 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;

¹ 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 UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK 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”.

- iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

39. 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

- 40. In considering any legitimate interest(s) in the disclosure of the requested information under 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.
- 41. 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.
- 42. The council has said that it does not consider there to be any legitimate interest in the disclosure of the requested information. However, its response appears to be restricted to consideration of the legitimate interests of only the complainant, and does not consider the potential for any broader legitimate interest in the disclosure of the requested information.
- 43. It is the Commissioner's view that there is a legitimate interest in openness and transparency and a general understanding of the processes and procedures that are followed by a public authority, which has a responsibility to uphold certain standards. He considers that this is particularly important in this case, given that any matters considered by the IDC are likely to relate in some way to a senior officer, or officers, within the council.
- 44. The Commissioner therefore considers that the complainant is pursuing a legitimate interest, and that disclosure of the requested information is necessary to meet that legitimate interest.

Is disclosure necessary?

- 45. '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 FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.

46. The Commissioner is satisfied in this case that there are no less intrusive means of achieving the legitimate aims identified in paragraph 43 above.

Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms

47. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
48. In considering this balancing test, the Commissioner has taken into account the following factors:
- the potential harm or distress that disclosure may cause;
 - whether the information is already in the public domain;
 - whether the information is already known to some individuals;
 - whether the individual expressed concern to the disclosure; and
 - the reasonable expectations of the individual.
49. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
50. The Commissioner considers that individuals who submit complaints to the council should be able to do so without fear that their identity will then be disclosed to the "world at large". This is regardless of whether their complaint is found to have merit.
51. In this case, given the nature of the concerns that were raised (that it relates to an issue that was considered by the IDC), it is the Commissioner's view that the individual, or individuals, who made the complaint would have expected their identity to be treated in confidence by the council.

52. The Commissioner therefore considers that disclosing details about the individual or individuals who made the complaint would not be within their reasonable expectations. Furthermore, given that their identity would be known to the world at large, the Commissioner considers that the disclosure of the withheld information which would identify them is likely to cause them harm and distress.
53. With regard to the withheld information which, if disclosed would reveal the identity of senior officers within the council, the Commissioner considers that it is important that councils are as open and transparent as possible about their activities and decisions in order to build public trust and confidence. In order to do this, the public must be reassured that concerns which are raised that are linked in some way to the conduct or capability of the council's most senior officers, who are responsible for policy decisions and expenditure of the public purse, are properly dealt with.
54. The Commissioner considers that where individuals are acting in public and more senior roles, they should be subject to a higher degree of scrutiny about their activities and the decisions that they make. Given this, it is the Commissioner's view that such individuals should have a reasonable expectation that if questions are raised about an issue that in some way relates to their conduct or capability, there is a higher likelihood that this information will be made public. However, this does not mean that senior officers within a public authority should expect that all personal information held about them by their employer will be disclosed to the public.
55. In the circumstances of this case, the Commissioner considers that any council officers who can be identified from the withheld information would have a very firm and reasonable expectation that their personal information would remain private between themselves and their employer, the council, and would not be made available to "the world at large" in response to an information request. This is particularly given that the IDC decided that no action should be taken in response to the complaint, and the matter was considered to be closed.
56. The Commissioner is aware that there are posts on a local community Facebook page which discuss, speculate and comment about the purpose of the IDC meeting, and who it might have involved. There are also critical and negative comments posted more generally about the activities, or conduct, of a number of senior officers at the council.
57. The Commissioner recognises that individuals have the right to express opinions, and concerns, and also raise questions and complaints about the performance of the council; indeed, this provides for further accountability. The Commissioner also considers that more senior

employees of the council should have an expectation that their policy decisions, conduct and capability may sometimes be the subject of discussion and criticism amongst the local community.

58. Having considered the content of the discussions that have already been posted on the local community Facebook page, the Commissioner considers that it is highly likely that the release of the withheld information, whatever, and whoever, it relates to, will start new discussions, questions, criticism and speculation. The Commissioner has already accepted that public debate can lead to greater accountability. However, in the circumstances of this particular case, he considers that there is a real risk that disclosure of the withheld information will lead to a council officer, or council officers, being subjected to public scrutiny, attention, and potential criticism in a way which they would not have expected, particularly in light of the IDC's conclusions and the fact that the complaint had been closed. The Commissioner considers that given this, the disclosure of the withheld information has the potential to cause considerable harm and distress to any council officer who may be identifiable from the withheld information.
59. The Commissioner considers that the details published by the council that confirm that a complaint was made, that the IDC meeting took place to consider the complaint, and that no further action was considered necessary, go some way in meeting the legitimate interest in transparency of the council's procedures and policies in this case.
60. Furthermore, the Commissioner understands that it is a requirement that all IDCs are "politically balanced" in terms of membership in order to ensure fairness of the process for all parties concerned. The Commissioner considers that this should provide some reassurance to the public that where discussions take place "behind closed doors", there are measures in place to ensure that the standards expected remain, and that the decisions that are reached by the IDC are fair and proportionate.
61. The Commissioner considers that there will, in most instances, be some weighty arguments to support the legitimate interest in the disclosure of information where a senior officer, or senior officers, within a public authority are the subject of an investigation and misconduct, or similar, has been evidenced. However, in this case, no action was considered to be necessary in response to the complaint. Furthermore, there is no evidence to indicate that a fair and proper process was not followed when the IDC reached that conclusion.

62. The Commissioner considers that the potential harm to an individual, or individuals, in terms of the intrusion to their privacy, and damage and distress caused as a result of the disclosure of the requested information, to carry significant weight in the circumstances of this case.
63. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the fundamental rights and freedoms of any individuals who can be identified from the withheld information. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the withheld information would not be lawful.
64. Given the above conclusion that disclosure of the requested information would be unlawful, the Commissioner does not need to go on to separately consider whether disclosure would be fair or transparent.
65. As the Commissioner has found that the council is entitled to rely on the exemption at section 40(2) to withhold all of the information relevant to the request, he does not consider it necessary to consider the council's reliance on section 31 of FOIA in relation to any of the withheld information.

Right of appeal

66. 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
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

67. 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.
68. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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