

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 February 2025

Public Authority: Thurrock Council

Address: Civic Offices
New Road
Grays
RM17 6SL

Decision (including any steps ordered)

1. The complainant requested a particular report commissioned by Thurrock Council (the 'Council') into one of its financial investigation services. The Council initially refused to provide the report in its entirety citing sections 41 of FOIA – the exemption for information provided in confidence, and 43 – the exemption for commercial interests. During the course of the Commissioner's investigation, the Council additionally cited sections 31(1)(a) of FOIA – the prevention or detection of crime and 40(2) – personal information. It also revised its position and disclosed the requested report, with redactions under all the above cited FOIA exemptions.
2. The Commissioner's decision is that section 40(2) is engaged. He also finds that sections 31, 41, and 43 of FOIA are not engaged for the reasons set out in this notice.
3. The Commissioner requires the Council to take the following step to ensure compliance with the legislation:
 - Disclose the remainder of the requested report in full minus the information withheld under section 40(2) of FOIA.
4. The Council must take this step within 30 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.

Background

5. The National Investigation Service ('NATIS') is a service at Thurrock Council with staff based across the UK. Its investigations are carried out in partnership with the government and UK law enforcement agencies.
6. NATIS is a Council service that grew out of the Counter Fraud team and was formed in 2018. It now has around one hundred staff across capabilities including investigation, intelligence handling, digital forensics and criminal financial recovery, and has been designed to provide fraud investigation services to local authorities and government departments.
7. NATIS is predominantly focussed on serious financial crime in the public sector. NATIS performs the investigatory work only and NATIS investigation cases are submitted to the Crown Prosecution Service or the Council's legal team for decisions regarding prosecution.
8. NATIS provides the Council with investigation expertise and generates income from external opportunities.
9. There have been several concerns and challenges raised regarding the establishment and governance of NATIS and, in particular, the misconceived view that NATIS was a separate entity to the Council. As a result, in the autumn of 2023, the Council commissioned an independent review of the NATIS service by Mazars, a London based independent audit firm. The Mazars review was completed in March 2024 and the associated report made a number of recommendations. It is this report which the complainant is seeking through his FOIA request.
10. The Commissioner notes that a progress report against the recommendations identified in the independent review was published in July 2024.¹
11. For ease of reference the Commissioner will refer to the requested March 2024 report as 'the Report' and the July 2024 report as the 'Progress Report' from this point forward.

¹<https://democracy.thurrock.gov.uk/documents/s43857/National%20Investigation%20Service%20-%20NATIS%20report.pdf>

Request and response

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

“Please provide a copy of the report commissioned by the council from Mazars into NATIS, which reported back in March 2024.”

13. The Council responded on 1 September 2024. It refused to provide the Report, citing section 41 of FOIA – the exemption for information provided in confidence. The Council provided the following URL² to the publicly available Mazars recommendations and actions taken by NATIS contained within the Audit Committee meeting report. (The information available at this weblink also links to the July 2024 Progress Report.)
14. The complainant requested an internal review on 11 September 2024.
15. Following its internal review, the Council wrote to the complainant on 9 October 2024. It maintained that section 41 of FOIA applied, but now additionally relied on section 43(2) of FOIA – the exemption for commercial interests.

Scope of the case

16. The complainant contacted the Commissioner on 14 October 2024 to complain about the way his request for information had been handled. He submitted detailed grounds of complaint which the Commissioner asked the Council to consider when responding to his investigation.
17. The Council provided its investigation response on 19 November 2024. It now additionally relied on section 31(1)(a) of FOIA – the law enforcement exemption for the prevention or detection of crime.
18. At the Commissioner’s request, the complainant submitted his view (on 25 November 2024), in relation to the Council’s application of section 31(1)(a) of FOIA which was, in summary:

‘The council focuses its arguments on the harm that could arise from disclosure, stating that disclosure could "impact on NATIS’s operational and tactical capabilities to effectively and efficiently carry out investigation of criminal activities." The arguments it makes are very generic, and do not provide specific reasoning as

² <https://democracy.thurrock.gov.uk/ieListDocuments.aspx?CIId=293&MIId=6554&Ver=4>

to why disclosure could have prejudicial effects on its ability to detect crime.'

19. In addition, the complainant submitted four 'The Times' newspaper articles in support of his view set out above, stating:

"...reporting has revealed ... the unit was posing [sic] warranted police officers when its staff were only council staff, which led to the College of Policing ordering them to stop using a police internet domain".

20. There followed further written exchanges in January and early February 2025 between the Council and the complainant, facilitated by the Commissioner. He has not reproduced the detail of those here, given that all parties have had sight both of the views expressed, and the ensuing replies.

21. Following these exchanges, the Council cited section 40(2) of FOIA for the personal information within the Report. It now revised its position and disclosed a redacted version of the Report, maintaining its reliance on all the aforementioned exemptions.

22. The complainant provided his view on the partial disclosure, which was relayed to the Council with his consent. He objected to the withholding of the personal information of any senior officers named in the Report, and also set out his specific concerns about the Council's reliance on the remaining FOIA exemptions, stating:

"Given the large amount of redaction involved, I would still argue the public interest lies in greater transparency, in relation to sections 31, 41 and 43 applied by the council."

23. On 11 February 2025, the Council submitted its view of the complainant's remaining arguments to the Commissioner. Essentially, the Council considered it had already addressed these points. It referred the Commissioner to its earlier responses and publicly available information at the URLs previously provided to the complainant.

24. The Commissioner has considered whether the Council was entitled to withhold parts of the requested Report by virtue of sections 31(1)(a), 40(2), 41(1) and 43(2) of FOIA.

Reasons for decision

25. The Commissioner has reviewed the withheld Report in full. The 'Contents' page has been disclosed and covers the following aspects:

- Executive Summary

- Interviews
 - Evolution of NATIS and the BEIS [Department for Business, Energy and Industrial Strategy] contract
 - Financial review of NATIS
 - Review of Secondments
 - Other items considered
 - Appendices
26. The Commissioner notes that the majority of the redactions have been made under section 43(2) of FOIA, so he will consider this exemption first.
27. The Commissioner has also reviewed the Progress Report which includes Mazars' recommendations, published in July 2024. He has cross referenced the material already in the public domain with that currently being withheld in the Report requested by the complainant.

Section 43 – commercial interests

28. Section 43(2) of FOIA states that information is exempt if its disclosure would, or would be likely to, prejudice the commercial interests of any person, including the public authority holding it.

Is section 43(2) engaged?

29. In order for a prejudice based exemption, such as section 43(2), to be engaged the Commissioner considers that three criteria must be met:
- the actual harm which the public authority 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;
 - the public authority 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,
 - it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie, that disclosure 'would be likely' to result in prejudice or, alternatively, that disclosure 'would' result in prejudice.

30. The Commissioner has defined the meaning of the term 'commercial interests' in his guidance³ on the application of section 43 as follows:

"A commercial interest relates to a legal person's ability to participate competitively in a commercial activity. The underlying aim will usually be to make a profit. However, it could also be to cover costs or to simply remain solvent."

31. Most commercial activity relates to the purchase and sale of goods but it also extends to other fields such as services.
32. The Commissioner's guidance says that there are many circumstances in which a public authority might hold information with the potential to prejudice commercial interests. The actual harm that the public authority alleges would, or would be likely to, occur if the withheld information was disclosed, has to relate to commercial interests.
33. The public authority must demonstrate a clear link between disclosure and the commercial interests of either itself, a third party or both. There must also be a real and significant risk of the prejudice to commercial interests occurring for it to be successfully engaged.
34. The exemption is subject to the public interest test. This means that, even if the exemption is engaged, the Commissioner needs to assess whether it is in the public interest to release the information.

Applicable interests

35. The Council has argued that NATIS, as a service that generates income and provides specialist services to the Council and external stakeholders, requires strong oversight and control to ensure it is delivering against any contracts and is operating in line with regulations and legislation.
36. The Commissioner understands that the future of the NATIS service requires focus on financial sustainability and value for money. It also has comprehensive contractual and financial reporting requirements to the Department for Business and Trade ('DBT').
37. Having reviewed the commercial interest redactions within the requested Report, the Commissioner is satisfied that they relate to a commercial activity.

³ <https://ico.org.uk/for-organisations/section-43-commercial-interests/>

Nature and likelihood of prejudice occurring, and affected parties

38. In order for the exemption at section 43 of FOIA to be engaged it is necessary to demonstrate that disclosing the information would result in some identifiable commercial prejudice which would, or would be likely to, affect one or more parties.
39. The Commissioner has been guided on the interpretation of the phrase 'would', or 'would be likely to' by a number of Information Tribunal decisions. The Tribunal has been clear that this phrase means that there are two possible limbs upon which a prejudice based exemption can be engaged; ie either prejudice 'would' occur or prejudice 'would be likely to' occur.
40. In this case, the Council told the Commissioner that it was satisfied that disclosure of the information 'would be likely to' prejudice the Council's own commercial interests.
41. Commenting on 'would be likely to prejudice', the Information Tribunal in *John Connor Press Associates Limited v The Information Commissioner (EA/2005/0005)* observed that "the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk" (paragraph 15).
42. Where the lower threshold for engaging the exemption is being relied upon (ie that disclosure would be likely to result in prejudice), the public authority should identify the specific harm envisaged, link it to specific information and explain how disclosure would be likely to cause the ascribed harm.
43. In its internal review result, the Council advised the complainant that disclosure would be likely to prejudice the commercial interests of "NATIS as a department of Thurrock Council".
44. In its submissions to the Commissioner, the Council has explained that:
 - The Council's own commercial interests would be likely to be prejudiced if the information withheld under section 43 was to be disclosed.
 - The requested Report contains commercial interests that relate to the Council's ability to participate competitively in a commercial activity, specifically the sale of NATIS' services to DBT.
 - Disclosing the requested information would damage the Council's commercial interest as it would impact on its ability to participate competitively in any future commercial activities.

- Disclosure would weaken the Council's position to win any other future tenders as it discloses the Council's methodology for delivering proposed services (tackling fraud).
- Disclosure would assist other organisations in making similar tendering offers by copying the Council's proposal for contract delivery.
- Additionally, it is important that public authorities with commercial services can share commercially sensitive information with the Government in the confidence that information will not then enter the public domain and damage their wider commercial interests and opportunities.

45. The Council also explained that the remaining information withheld under section 43(2) of FOIA contains a confidential financial review of the NATIS department, including details of any confirmed workstream or income after the ending of the contract with DBT.

The Commissioner's conclusion

46. The Commissioner has reviewed all the redacted material withheld under section 43 of FOIA. Whilst he accepts that these redactions relate to a commercial interest, he notes that the Progress Report contains details of the key areas considered by the Mazars investigators and provides a summary of progress against those areas.
47. Whilst the Report itself contains more specific details than the Progress Report, the Commissioner considers that this is a case of "putting more meat on the bones" to that published in the Progress Report. As an example, in the Commissioner's view, the financial review section in the Report is very generic and he considers disclosure would not be likely to facilitate any competitors wishing to out-bid NATIS for future commercial opportunities, if indeed this were even feasible considering the nature of the work.
48. The Commissioner has not been able to identify any definitive information relating to the future of NATIS within the Report.
49. With regard to the harm that would be likely to be caused by disclosure, the Commissioner considers it reasonable to believe that it would be likely to be of interest to NATIS' competitors. However, it is not clear to the Commissioner precisely how disclosure of the information, beyond revealing the evolution of the NATIS service and NATIS' general approach, would be likely to result in prejudice to the Council's commercial activities. It is also not clear who such competitors could be given the type of work that is being undertaken.

50. The Commissioner does not consider that the arguments forwarded by the Council sufficiently demonstrate a realistic causal link between the disclosure of the information and the prejudice to its commercial interests. The explanations are couched in general terms and no link is made between the information that has actually been withheld and the prejudice claimed.
51. As the Commissioner does not consider that the Council has demonstrated that disclosure of the withheld information would be likely to prejudice its commercial interests, he has concluded that section 43(2) of FOIA is not engaged for any of the related redactions within the Report. As a result, the Commissioner is not required to consider the associated public interest test.
52. However, the Commissioner notes that parts of the material redacted under section 43(2) of FOIA have also been withheld under sections 31(1)(a) and/or 41(1) of FOIA. Where this applies, he must next consider these exemptions in turn.
53. It follows that any material redacted under section 43(2) alone within the Report must be disclosed as per the step in paragraph 3 of this notice.

Section 31 – law enforcement

54. Section 31 of FOIA allows a public authority to withhold information which, if disclosed, could harm its own, or another public authority's ability to enforce the law.
55. Section 31(1)(a) of FOIA states that:

"Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

(a) the prevention or detection of crime"
56. A small amount of information has been withheld solely under section 31(1)(a) of FOIA (specifically some redactions on pages 18, 19, 22 and 26 of the Report). However, section 31 has also been applied in addition to section 43 for some parts of the withheld information (specifically some redactions on pages 8, 9, 12, 13, 18, 19, 23 and 27 of the Report).
57. In its submissions to the Commissioner, the Council argued that:

'NATIS is engaged in criminal investigations with a fraud value of £m [redacted], which include cases focused on serious and organised crime i.e. "criminal activity [that] is planned, coordinated, and committed by people working individually, in

groups or as part of transnational networks” as per the Serious and Organised Crime Strategy 2018 definition. The material reveals, both directly and indirectly, information concerning the investigative capacity of NATIS which could be exploited by fraudsters and/or criminals, as the report details the structure and size of NATIS, its law enforcement techniques and powers, its governance, financial position and confirms its digital forensic capability.’

58. The Council explained that a central part of DBT’s strategy in the instruction of NATIS is to provide a deterrent effect and to prevent further financial crime. The Council provided the Commissioner with an example relating to the laundering of illegally obtained Bounce Back Loans, and the negative impacts disclosure would have on that issue. It argued that disclosure could compromise law enforcement tactics, which it said may hinder NATIS’s ability to prevent and detect crime and enforce the law. It argued that this could be detrimental to the effective operation of investigating activities and, where no deterrent exists, the Council believes it is reasonable to assume it will likely be exploited.
59. The Commissioner has reviewed the information withheld under section 31(1)(a) of FOIA. One redaction (page 26) is the name of a piece of statutory UK legislation. Disclosure of the name of a statutory law cannot prejudice the prevention or detection of crime and is clearly not exempt by virtue of section 31(1)(a). The Commissioner also finds that some parts have already been disclosed as part of the July 2024 Progress Report, so are clearly not exempt either.
60. For the remaining section 31(1)(a) of FOIA redactions within the Report, the Commissioner disagrees that the potential prejudice described by the Council, relates to the interests which section 31(1)(a) of FOIA is designed to protect. He is also not satisfied that the prejudice being claimed is “real, actual or of substance”, nor that there is a causal link between disclosure and the prejudice claimed. One such example can be found on page 8 of the Report which lists the recurring themes arising from Mazars interviews. None of those themes, in the Commissioner’s view, specifically relate to law enforcement.

The Commissioner’s conclusion

61. Given the nature of the information withheld under section 31, the Commissioner is satisfied that its disclosure would not allow interested parties to build up a picture of law enforcement practices, capabilities and tactics.
62. The Commissioner does not accept that the Council has provided sufficiently detailed arguments or compelling evidence in support of section 31(1)(a) of FOIA being engaged. Its arguments are too generic

and have not been applied closely enough to the particular information being withheld under section 31(1)(a).

63. It follows that the Commissioner has found that section 31 of FOIA is not engaged for any of the redacted material within the Report that it has been applied to. He therefore has not gone on to consider the public interest test.
64. It also follows that any material within the Report redacted under section 31(1)(a) alone, or where this exemption has been combined with section 43(2) of FOIA, must be disclosed as per the step in paragraph 3 of this notice.
65. The Commissioner must next consider the Council's application of section 41 of FOIA.

Section 41 – information provided in confidence

66. Section 41 of FOIA allows a public authority to withhold information that has been provided to it by another person (section 41(1)(a)) and whose publication would be an actionable breach of confidence (section 41(1)(b)).
67. Section 41 is an absolute exemption, so there is no public interest test to be carried out under FOIA. However, the public authority will need to carry out a test to determine whether it would have a public interest defence for the breach of confidence.
68. The test assumes that the public interest in maintaining confidentiality will prevail unless the public interest in disclosure outweighs the public interest in maintaining the confidence.
69. Information will be covered by section 41 if:
 - it was obtained by the authority from any other person,
 - its disclosure would constitute a breach of confidence.
 - a legal person could bring a court action for that breach of confidence, and
 - that court action would be likely to succeed
70. When determining if disclosure would constitute a breach of confidence, the 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.

71. The Council has not cited section 41 of FOIA in isolation for any of the redacted material within the Report. The majority of the information withheld under section 41 of FOIA has either also had section 43(2) of FOIA applied to it, or both sections 31 and 43 of FOIA combined.
72. The Council has applied section 41 of FOIA to some of the redactions on pages 5, 6, 8, 9, 12, 13, 15, 18, 22, 23 and 27 of the Report.
73. In relation to section 41(1)(a) of FOIA, the Council told the Commissioner that:

“The withheld independent investigation report commissioned by Thurrock Council was undertaken by Mazars and shared with the Council. Information within the Report contained confidential material provided by Thurrock Council staff members who are seconded to the Department for Business and Trade (‘DBT’). Disclosing information without their consent would breach the duty of confidence owed to NATIS focused Thurrock Council staff members who have a secondment agreement with DBT and who provided their statements under the expectation of confidentiality. Because NATIS investigative officers are seconded to DBT, information derived from those officers is information derived from a third party, DBT.”

Was the information obtained from any other person?

74. At internal review the Council told the complainant that:

“Under s.41(1)(a) FOIA Information is exempt information if it was obtained by the public authority from any other person. In this case, the Report was provided to the Council by Mazars under the expectation of confidentiality. Disclosing information without consent would breach the duty of confidence owed to Mazars. Therefore, s.41(1)(a) is engaged to protect the confidentiality of the information shared in the report.”

75. The Commissioner accepts that at least some of the information within the Report has been provided to the public authority by another “person”. He is aware that Mazars interviewed various Council officers during its investigation, namely DBT (via Council staff secondments).
76. Having established that some of the withheld information within the Report was obtained from another person, the Commissioner must next consider whether or not its disclosure to the public (otherwise than under FOIA), would constitute a breach of confidence ‘actionable’ by that or any other person.

Would disclosure constitute an actionable claim for breach of confidence?

77. The usual test for section 41 cases is set out in the case of *Coco v Clark* [1969] RPC 41 which sets out three elements which must be present in order that a claim can be made. According to the decision in this case a breach of confidence will be actionable if:

- the information has the necessary quality of confidence;
- the information was imparted in circumstances importing an obligation of confidence; and
- there was an unauthorised use of the information to the detriment of the confider.

78. However, for that claim to be 'actionable' within the meaning of section 41(1)(b) of FOIA, a public authority must establish that an action for breach of confidence would, on the balance of probabilities, succeed.

Does the information have the necessary quality of confidence?

79. In order for information to have the necessary quality of confidence, it must be more than trivial and not otherwise accessible.

80. The complainant does not accept that the quality of confidence applies because, he has argued, those parts of the report where it has been cited are already in the public domain (namely the recommendations in the Progress Report).

81. The Council considers the information to have the necessary quality of confidence in that it is more than trivial and not otherwise accessible. It has not been previously published (other than the recommendations) and therefore is not considered to be in the public domain. Specifically, at internal review, it told the complainant:

- The Report contains sensitive and detailed information about internal NATIS operation, personal statements from the Council staff, and specific incidents of alleged misconduct.
- This information is not trivial and is not publicly available, thus possessing the necessary quality of confidence.
- Thurrock Council staff provided their statements to Mazars under the assurance that the content of their statements would remain confidential.
- Mazars assured the staff that their information would be solely used for the purpose of the investigation and could not be disclosed.

- Mazars conducted the investigation with the understanding that the information would be used solely for the purpose of the investigation and would not be disclosed without their consent.
 - Disclosure of the full Report could lead to significant detriment to the staff members, damage to professional relationships, and personal distress.
 - It could also undermine the willingness of staff to participate in future investigations, thereby affecting the Council's ability to address governance issues effectively.
82. The Commissioner notes the Report itself is not marked as confidential and that it was commissioned by the Council. The Commissioner is therefore sceptical that it was imparted to the Council by Mazars with any obligation of confidence, as once it has been written and submitted it is for the Council to determine its use and audience.
83. The Commissioner has viewed the withheld information and notes large portions of the Report are made up of Mazars' advice, summaries and recommendations. The short sections that detail themes that came out of the interviews are very broad and anonymised and are not directly attributable to individuals. No personal statements or interview extracts are included that identify any individual who took part in the interviews and the Commissioner considers that no-one is identifiable by the content.
84. The Council has said that NATIS focused Council staff members provided their statements to Mazars "under **the assumption** [emphasis added] that the content of their statements would remain confidential". No definitive confidentiality agreement has been provided as evidence and no content is directly attributable to any identifiable individual.
85. The Commissioner accepts that it is likely there was some implied obligation of confidence to the participants and, where the Report contains sections that are derived from comments made in the interviews, this part of the test has been met. However, in relation to the majority of the Report, the Commissioner is not convinced the recommendations, advice and summaries were provided in circumstances importing an obligation of confidence as they are not intrinsically linked to the information derived from those involved in the interviews. Some parts of the Report have been included by way of factual and context information and do not appear to have been derived from the interviews.

Would disclosure be detrimental to the confider?

86. In its submissions to the Commissioner, the Council put forward the following case for detriment to those involved in the Mazars investigation and ensuing Report should the Report be disclosed:

- The Council argued that Mazars may suffer reputational damage if the information were published and its resulting impact on the authors of the letter.
- Disclosure of the Report could lead to significant detriment to NATIS focused Thurrock Council staff members damage to professional relationships, and personal distress. It could also undermine the willingness of staff to participate in future investigations, thereby affecting the ability to address governance issues effectively. If the Report is disclosed to the public, it would constitute an actionable breach of confidence because:
 - i) NATIS focused Thurrock Council staff members provided their statements to Mazars under the assumption that the content of their statements would remain confidential.
 - ii) Disclosure of the Report could lead to significant detriment to the staff members, damage to professional relationships with DBT and personal distress.
 - iii) It could also undermine the willingness of staff to participate in future investigations, thereby affecting the ability to address governance issues effectively.
 - iv) The Report was prepared solely for the use and benefit of Thurrock Council and should not be shared with any other parties (unless required by law or a regulatory authority) without their prior consent in writing, as required by the Mazars terms and conditions of agreement.
 - v) NATIS focused Thurrock Council staff members are subject to the Civil Service Code that states that officers 'must always act in a way that is professional and that deserves and retains the confidence of all those with whom you have dealings'.

The Commissioner's conclusion

87. With regard to Mazars, the Commissioner does not accept that disclosure could lead to reputational damage. Mazars has been commissioned by the Council to undertake the investigation into NATIS and to report its findings and make recommendations. Mazars is not

responsible for the issues that gave rise to the Report being commissioned. The authors of the Report have undertaken this as part of their job roles and are sufficiently senior to expect their names may be associated publicly with the Report.

88. The Commissioner does not agree that the Council has made compelling arguments with regard to those interviewed as he considers participants would have been informed that key themes would be reported. Further, having viewed the Report, he notes that the views arising from the interviews are presented as 'overall findings' with key recurring themes listed. In addition, the majority of those themes appear in the Progress Report having been converted into recommendations.
89. The Commissioner believes that those interviewed provided their comments in circumstances importing an implied obligation of confidence, but they were aware that key themes would be included in the Report and that this Report would be sent to the Council's senior leadership team that commissioned it.
90. If there was likely to be any detriment to the participants, the Commissioner considers this would have occurred at the point the Report was sent to the Council and only if it was possible to attribute any of the 'themes' to identifiable individuals. As the Council has not suggested this is the case, the Commissioner does not consider that disclosure of the Report more widely (ie to the general public), would lead to any detriment to the participants.
91. The complainant has provided arguments relating to transparency, openness and scrutiny. Given the issues considered by the Report, and despite the Council's public interest arguments, the Commissioner's view is that there is a strong and compelling public interest in this matter.
92. In the Commissioner's view, the Council has failed to establish that the prospect of detriment is either likely or substantial.
93. Therefore, the Commissioner is not persuaded that disclosure of the information redacted under section 41 of FOIA would cause any reputational damage or risk of retribution. He has seen nothing in the withheld information that would lead to such a conclusion.
94. The Commissioner is therefore of the view that publishing the information would not be an actionable breach of confidence. Consequently section 41(1) of FOIA is not engaged in respect of any information withheld under this exemption.
95. The Council must disclose all the information withheld under section 41 of FOIA as per paragraph 3 of this notice.

96. Lastly, there is a small amount of information within the Report which has been redacted under section 40(2) of FOIA only, that the Commissioner will now consider.

Section 40 - personal information

97. 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.
98. 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').
99. 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.
100. 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?

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

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

102. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
103. 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.
104. 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.
105. Two names and full contact details have been redacted under section 40(2) of FOIA, together with a signature. Both roles/job titles have already been disclosed, together with their departments, email

suffixes/domain part and telephone prefixes. The withheld names and complete email addresses of the officers quite obviously are information that both relates to and identifies the individuals concerned. A designated telephone number is also data that clearly relates to a living individual insofar as it is a number for contacting an individual.

106. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.

107. The fact that information constitutes the personal data of two identifiable living individuals does not automatically exclude it from disclosure under FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.

108. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

109. 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".

110. 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.

111. 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

112. 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"⁴.

⁴ 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".

113. 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;
- iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

114. 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

115. 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.

116. 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.

117. The complainant has argued that disclosure of the names of any senior officers within the report should be disclosed as those individuals would have a "reasonable expectation of transparency".

118. The Council also recognised a legitimate interest in transparency and accountability.

119. The Commissioner accepts that there is a legitimate interest in transparency and accountability of individuals in senior roles. He must

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".

next consider whether disclosure is 'necessary' to meet that legitimate interest.

Is disclosure necessary?

120. '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.

121. The Council argued that:

"Based on this legitimate interest assessment, it is concluded that disclosing the personal data of the authors of the Report is not necessary in this case. The legitimate interests of transparency and accountability can be met through alternative means that protect individual privacy, such as providing a redacted version of Mazars Report."

122. The Commissioner does not consider that the publication of the withheld details would add anything of significance to the information that has already been disclosed. However, he notes that there are no alternative means by which the complainant can secure the actual information he is seeking.

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

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

124. It is necessary to balance the legitimate interests in disclosure against the data subjects' interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subjects 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.

125. 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 individuals expressed concern to the disclosure; and
- the reasonable expectations of the individuals.

126. 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(s) in their professional role(s) or to them as individuals, and the purpose for which they provided their personal data.

127. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to those individuals.

128. The Commissioner notes that the roles of both parties at Mazars, which is not itself subject to FOIA, have been disclosed. This demonstrates the level of seniority afforded to producing the Report, ie that one party was a Partner and the other a manager.

129. It is also noted that both Mazars' officers have objected to having their personal details disclosed and have declined to give their consent.

130. The Commissioner considers that little can be gained from disclosure of the names of the parties themselves. In his view, the more important factor is their seniority as a reflection of the importance of the content of the Report. He can see no intrinsic value in also disclosing the actual names and full contact information of those concerned. Furthermore, it is noted they have objected to such a disclosure and would therefore have no reasonable expectation that disclosure will be made to the world under FOIA.

The Commissioner's conclusion

131. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.

132. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that he does not need to go on to separately consider whether disclosure would be fair or transparent.

133. It follows that the Commissioner finds that the Council was entitled to rely on section 40(2) of FOIA to withhold this information.

Right of appeal

134. 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

135. 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.

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

Carol Scott
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
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Cheshire
SK9 5AF