

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

### **Decision notice**

**Date:** 7 November 2019

**Public Authority:** Cardiff Council  
**Address:** [foi@cardiff.gov.uk](mailto:foi@cardiff.gov.uk)

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

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1. The complainant has requested copies of minutes for the Wales Interpretation and Translation Service for the public sector (WITS) for a specified time period. Cardiff Council provided redacted copies of the minutes and cited section 40(2) and section 43(2) of the FOIA in respect of the redacted information.
2. The Commissioner's decision is that Cardiff Council was not entitled to rely on either section 40(2) or section 43(2) in respect of the information it has redacted in the minutes.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - provide a copy of the full, unredacted minutes to the complainant.
4. 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**

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5. On 29 June 2018, the complainant wrote to Cardiff Council and requested the following information:

*"I would be grateful if you could furnish me with copies of all WITS minutes from 1<sup>st</sup> November 2017 to date, including June 2018."*

6. The Council responded on 24 July 2018. It disclosed a redacted copy of the minutes and informed the complainant that it considered section 40(2) and section 42(2) were engaged in respect of the redacted information.
7. The complainant queried why names of attendees were redacted as he had previously received unredacted copies.
8. On 9 August 2018 the Council informed the complainant that it was Council policy that all names of Council officers below Operations Manager are removed from information request documents.
9. The complainant queried the relevance of this policy as he stated that most of the officers attending would be NHS or other non-Cardiff Council officers. He further added that WITS is not a Council organisation.
10. The Council responded on 10 August 2018 confirming that non-Council employees have been similarly exempted under section 40(2) of the FOIA.

### **Scope of the case**

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11. The complainant contacted the Commissioner on 13 August 2018 to complain about the way his request for information had been handled.
12. He provided some background information explaining that the Welsh Interpreter and Translation Service – WITS is a free standing public entity that is financed by public bodies that use its services. Amongst its services are sign language interpreters provided for deaf people who need to communicate with NHS staff or police officers.
13. As WITS is not a statutory established organisation, it was hosted by Gwent Police until January 2017 when Cardiff City Council took over the role. The complainant was writing on behalf of Cardiff and District Deaf Peoples' Support Group which acts as advocates for the Deaf community in the area and the activities of WITS are of obvious interest.
14. The complainant further added that the names of senior officers of the Board should not be redacted, and neither should the subjects the Board discusses. The complainant further confirmed that he accepts that personal details such as names of those subject to disciplinary proceedings are redacted.

15. During the course of her investigation, the Commissioner asked the Council to provide arguments in support of section 40(2) in respect of non-Cardiff Council employees. The Council attempted to contact each of the data subjects individually and confirmed the following:

- 19 individuals agreed for their name and employer details to be disclosed.
- 4 individuals refused consent for either their names or employer to be disclosed.
- 2 individuals were not available at that time.
- 1 individual has referred the request to their Data Protection officer for advice.
- 10 individuals were not contactable as they have either moved to other positions or employers or the Council did not have their contact details.

The Council provided an amended document disclosing all names and employer details with the exception of the four individuals who refused consent.

16. The Commissioner considers that the scope of her investigation is to determine whether the Council was entitled to rely on section 40(2) in respect of the remaining four individuals and section 43(3) of the FOIA to withhold the redacted information.

## **Reasons for decision**

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### **Section 40 – personal information**

17. 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(3) or 40(4) is satisfied.

18. In this case the relevant condition is contained in section 40(3A)(a)<sup>1</sup>. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the

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<sup>1</sup> As amended by Schedule 19 Paragraph 58(3) DPA.

processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').

19. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the DPA 2018. If it is not personal data then section 40 FOIA cannot apply.
20. 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 data protection principles under the DPA.

*Is the information personal data?*

21. Section 3(2) of the DPA 2018 defines personal data as:-

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

22. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
23. 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.
24. 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.
25. The Commissioner has viewed the information withheld under section 40(2) of the FOIA and notes that it comprises of the names and details of employer, of the four attendees and absentees of WITS minutes for the period specified in the request. She is therefore satisfied that it constitutes the personal data of those individuals within the definition of 'personal data' in section 3(2) of the DPA.
26. The fact that information constitutes the personal data of identifiable living individuals 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.
27. The most relevant DP principle in this case is principle (a).

*Would disclosure contravene principle (a)?*

28. Article 5(1)(a) GDPR states that:-

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

29. 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.
30. 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) GDPR*

31. 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"* bases for processing listed in the Article applies.
32. The Commissioner considers that the lawful bases most applicable is bases 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 <sup>2</sup>.*

33. In considering the application of Article 6(1)(f) 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;

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<sup>2</sup> 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".*

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

- 34. 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*

- 35. In considering any legitimate interest(s) in the disclosure of the requested information to the public 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.
- 36. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, 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.
- 37. The complainant has informed the Commissioner that WITS was previously hosted by Gwent Police until January 2017 when this was transferred to Cardiff Council. The complainant is representing the Cardiff and District Deaf Peoples' Support Group and has stated that as the group acts as advocates for the Deaf community in the area, the activities of WITS are carefully noted.
- 38. The Commissioner therefore accepts that the complainant has a legitimate interest in seeing the requested information and has gone on to consider whether this is necessary in order to meet her legitimate interest.

*Is disclosure necessary?*

- 39. 'Necessary' means more than desirable but less than indispensable or an absolute necessity. Accordingly, the test is one of reasonable necessity which involves the 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.
- 40. As stated previously, in this case the withheld personal data is the name and employer details of the four individuals who have refused consent for their personal data to be disclosed. The Commissioner notes that the four individuals are representatives from four different public authorities.

41. The Commissioner acknowledges that the complainant is representing a local Deaf Peoples' Support Group and has stated that as the group acts as advocates for the Deaf community in the area, the activities of WITS are of interest. The Commissioner is also mindful that WITS consists of representatives from local Councils, Health Boards and Police forces in Wales, and as such accepts that the complainant is likely to have an interest in knowing which organisations were present, absent and the names of their respective representatives. The Commissioner is therefore satisfied that disclosure of this information is necessary in meeting the legitimate public interest in acting as advocates for the local deaf community.

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

42. Having determined that disclosure of the personal data of the named individuals and their respective employers is necessary to meet the legitimate interests outlined above, this must now be balanced against these 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 subject would not reasonably expect that the information would be disclosed to the public under the 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.
43. 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.
44. 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.
45. The Commissioner has been unable to identify any specific harm or distress that disclosure may cause despite the fact the individuals have refused to consent to the disclosure of their personal data. Each individual is representing their employer organisation on an important



body for the local deaf community. Additionally, the Commissioner also notes that 19 of their colleagues from in some cases, the same employer, consented to the disclosure. Further, the complainant has provided copies of previous minutes when the group was hosted by Gwent police and notes that all names and employer organisations were disclosed.

46. Based on the above factors, the Commissioner has determined that there is sufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The commissioner therefore considers that there is an Article 6 basis for processing (in this case article 6(1)(f).

### **Fairness and transparency**

47. Even though it has been demonstrated that disclosure of the requested information under the FOIA would be lawful, it is still necessary to show that disclosure would be fair and transparent under the principle (a).
48. In relation to fairness, the Commissioner considers that if the disclosure passes the legitimate interest test for lawful processing, it is highly likely that disclosure will be fair for the same reasons.
49. The requirement for transparency is met because as a public authority, Cardiff Council is subject to the FOIA.

### **The Commissioner's view**

50. In this instance, the Commissioner has decided that Cardiff Council has failed to demonstrate that the exemption at section 40(2) is engaged.

### **Section 43 – prejudice to commercial interests**

51. Section 43 of FOIA states that information is exempt from disclosure if its disclosure would or would be likely to prejudice the commercial interests of any person (including the public authority holding it).
52. In order for a prejudice based exemption such as section 43(2), to be engaged the Commissioner considers that three criteria must be met:
- Firstly, 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;
  - Secondly, 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.

- Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – i.e. disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold the Commissioner believes that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority to discharge.
53. The Commissioner's guidance explains that a commercial interest relates to a person's ability to participate competitively in a commercial activity i.e. the purchase and sale of goods or services.
54. In this case, the withheld information under this exemption relates to redactions in the following minutes of WITS meetings:
- 15 December 2017
  - 26 March 2018
  - 4 June 2018
55. The Council informed the complainant that the
- "...information sought is too commercially sensitive".*
56. It further stated that the public interest factors in favour of maintaining the exemption included the risk that releasing the information may affect the working relationship between the Council and the third parties which may prejudice the best value achieved by the council.
57. It also argued that releasing the information may be misleading in relation to the direction of travel the authority is taking when a final decision has not been made.
58. The Council further considers that releasing financial and company information which was provided as part of the application process is likely to distort competition amongst companies in the market.
59. It further argued that public disclosure of department risks could expose it to finance/asset related risks.
60. The Commissioner asked the Council to provide full arguments specifying why it considers that the exemption is engaged and pointed

out that this should include details of whose commercial interests it believes would be prejudiced in the event of disclosure and details of the nature of the prejudice itself.

61. The Commissioner further informed the Council that any claims that disclosure is likely to prejudice a third party will need to be supported with evidence that it has objected to disclosure with evidence of its objections.
62. The Commissioner also asked the Council to confirm whether it was relying on 'would' or 'would be likely' in terms of the likelihood of the prejudice occurring.
63. However, the Commissioner notes that the Council's response appeared to describe of the withheld information as opposed to providing details of why it considered the exemption is engaged. She also notes that the Council did not specify whose commercial interests would be prejudiced, or provide details of the nature of the prejudice itself or confirm whether it considered disclosure 'would' or 'would be likely' to result in prejudice to commercial interests.
64. The Commissioner wrote to the Council pointing out these omissions and notes that it merely repeated the arguments in its previous response. She therefore has no alternative but to conclude that section 43(2) is not engaged in respect of the withheld information referred to in paragraph 54 of this notice. As she has determined that the exemption at section 43(2) is not engaged, it is not necessary to consider the public interest test.

## **Other matters**

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### *Engagement with the Commissioner*

65. The Commissioner would wish to highlight that despite informing the Council that she expected a full response to the questions in her original investigation letter, including a copy of the withheld information, that the Council failed to send the withheld information, or the necessary details and arguments in support of both exemptions relied in response to her first request.
66. In respect of section 40(2) the Council failed to provide any arguments other than to state:

*"It is a longstanding decision of Cardiff Council that we do not disclose names of officers who are below Operational Manager level. Therefore*

*those names were redacted ...in line with this decision. Third party names of officers from other organisations were also redacted."*

67. Whilst public authorities often make general rule of thumb decisions in respect of the seniority of staff whose names may be disclosed, the Commissioner expects a public authority to consider each request on a case by case basis having full regard for the particular circumstances of that case.
68. The Commissioner trusts that the Council will be more thorough in its future responses to her investigation letters.

## Right of appeal

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69. 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@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)

70. 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.
71. 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**