

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

### **Decision notice**

**Date:** 20 February 2025

**Public Authority:** Ards and North Down Borough Council  
**Address:** City Hall  
The Castle  
Bangor  
BT20 4BT

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

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1. The complainant has requested information from Ards and North Down Borough Council ("the Council"), namely a document relating to the flying of the Union flag. The Council relied on sections 41 and 40(2) of FOIA (third party personal information) to withhold the information. The Council has since withdrawn its reliance on section 41 of FOIA, however it continues to rely upon section 40(2) to withhold part of the requested information.
2. The Commissioner's decision is that the public authority has correctly relied on section 40(2) of FOIA to withhold that information.
3. The Commissioner does not require further steps to be taken.

#### **Background**

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4. The ability to "call in" decisions developed within Northern Ireland councils is a mechanism by which council decisions can be reconsidered or reviewed before they are implemented. It is designed to ensure accountability and safeguard minority interests, promoting democratic decision-making. The process is provided for under s41 of the Local Government Act (Northern Ireland) 2014 (LGA 2014).
5. The Council received a Call-In requisition under s41(1)(b) of the LGA 2014 to 'amend its Flag Policy to include the flying of the Union flag at every war memorial all year round as agreed at a Council meeting on the 20

December 2023'. The Council believed that the Call-In requisition met the requirements, accepted it, and sought legal advice on the requisition as required by s41(1)(b) of the LGA 2014.

6. The Commissioner is aware that Call-In requisitions are not normally made public but discussed 'in confidence' especially when legal advice has been sought (Schedule 6 to the LGA 2014) refers. This item was listed to be discussed in confidence under s43(2) and Schedule 6 to the LGA 2014 at the Council meeting on the 24 April 2024. At this meeting the Council agreed to accept a proposal by Councillors that the Call-In requisition should be discussed in public session as opposed to committee (in confidence). The Chair explicitly stated at the meeting that the legal advice should not be referenced. The legal advice directly addressed the points raised in the Call-In requisition.
7. The Call-In requisition received the valid number of votes required to overturn the previous Council decision. The decision was subsequently the subject of a Judicial Review and during this process Council accepted that the Call-In requisition was out of time when submitted and therefore became invalid. The initial Council decision of the 20 December 2023 was reinstated.

## **Request and response**

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8. On 25 April 2024 the complainant requested the following information from the Council:-

"Please provide a full copy of the call-in requisition lodged by the Alliance Party and SDLP in relation to the matter of flying the Union flag 365 days a year from war memorials across the Borough."
9. The Council responded on 28 May 2024 stating that it was refusing to provide the requested information, citing section 41 of FOIA (information provided in confidence).
10. The complainant requested an internal review on 12 June 2024 and the Council responded on 27 June 2024 upholding the application of section 41.
11. During the course of the Commissioner's investigation it transpired that the Council had been relying on section 41 to protect information which it became apparent had already been disclosed into the public domain at the time of the request. Following this, the Council stated that section 41 did not apply to the majority of the requested information, which it accepted could be disclosed, however it wished to apply section 40(2) of FOIA in order to redact a small part of the document,

i.e. names and signatures of Councillors. The complainant considers that the entirety of the requested information should be disclosed.

### **Scope of the case**

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12. The complainant contacted the Commissioner on 15 July 2024 to complain about the way their request for information had been handled.
13. The Commissioner considers that the scope of his investigation is to establish whether the Council is entitled to withhold part of the requested information ("the withheld information") under section 40(2) of FOIA

### **Reasons for decision**

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14. 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.
15. 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').
16. 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.
17. 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?**

18. Section 3(2) of the DPA defines personal data as:  
"any information relating to an identified or identifiable living individual".
19. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.

20. 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.
21. 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.
22. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to the data subject(s). The names and signatures of the data subjects (the individual Councillors who signed the document) quite obviously is information that both relates to and identifies those concerned.
23. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
24. The fact that information constitutes the personal data of an identifiable living individual 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.
25. The most relevant DP principle in this case is principle (a).

**Would disclosure contravene principle (a)?**

26. 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".

27. 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.
28. 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**

29. 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"<sup>1</sup>.

30. 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.
31. 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**

32. 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.
33. 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.
34. The Commissioner accepts that the complainant has a legitimate interest in knowing exactly which Councillors submitted the call-in requisition. There is also a public interest in knowing this as the reason

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<sup>1</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 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".

for the call-in requisition being submitted is a highly controversial topic in Northern Ireland.

35. The Council accepts that Councillors are publicly elected figures and as such are expected to conduct Council business with integrity and transparency. In the interests of transparency, most Council decisions are made in public, and a minute of the meeting is made available afterward, often including Councillors remarks and voting. The complainant and all members of the public are entitled to this transparency and have a legitimate interest in knowing how their publicly elected representatives conduct business. There are however some exceptions, as provided for by the LGA 2014.

### **Is disclosure necessary?**

36. '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.
37. The Commissioner is satisfied in this case that disclosure would be necessary to satisfy the legitimate interests in question, as he cannot see any other less intrusive means of finding out the names of the Councillors who signed the document.

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

38. 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.
39. 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.
40. 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.
41. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.

### **The potential harm or distress that disclosure may cause**

42. The Commissioner accepts that elected representatives hold public office and to a degree then their actions will fall under public scrutiny. When Councillors make representations on behalf of the public, there is an expectation that they do so publicly, transparently and in accordance with legislation.
43. The Commissioner also accepts, however, that there are certain sensitive topics in Northern Ireland politics which make it more problematic for elected representatives, especially when these representatives are in a minority. Council legislation in Northern Ireland has been adapted to help give minorities in Council a stronger voice.
44. The Commissioner is aware that the flying of flags in Northern Ireland is an extremely sensitive topic. In the most recent past, in 2012/2013, this resulted in widespread riots in Northern Ireland, which commenced in Belfast.
45. There exists a variety of areas where the Council has responsibility to protect the health and safety of its Councillors whilst they are serving as elected representatives. The Councillors are fearful of being targeted for attempting to challenge a Council decision on the flying of flags on war memorials 365 days per year. The Councillors are aware of comments on social media regarding this, and the Councillors are highly concerned about what conduct might be levelled at them if they are named.

### **Whether the information is already in the public domain**

46. The complainant has stated that the signatories to the 'call in' requisition "self-publicised" this and set out their position in press statements, and via contributions in the chamber- held in public session. The Councillors have stated that they have not 'self-publicised' that they were signatories to the 'Call-In' Notice. The Council has no evidence to suggest that this is incorrect and no evidence from the complainant to support that position.

The Council stated that it would reconsider its position if such evidence were provided.

47. The complainant has provided a newspaper article as evidence, however in the view of the Commissioner and the Council, this only shows what parties the Councillors submitting the requisition are from but does not identify individual Councillors.
48. The Councillors have clearly stated that they are opposed to the release of their identities from a safety perspective. The public would be aware that Councillors would have received a copy of the Call-In requisition in their pack, but the Call-In form itself was not disclosed to the public.

### **Whether the information is already known to some individuals**

49. The Council states that the papers were provided to all Councillors so they are aware of the names of these individuals. Councillors were reminded during the meeting that this item was to be treated in confidence and subject to the Code of Conduct. The Council shared the Call-In requisition as part of the Judicial Review process but the individuals' names were redacted from the document. As far as is known, no individuals beyond the signatories, Councillors and Council staff are aware of the information.

### **Whether the individual(s) expressed concern about the disclosure**

50. The Council has contacted the Councillors on two occasions to seek out their view on disclosure of their identities. On both occasions Councillors have stated that they are opposed to the release of their identities from a safety perspective.

### **The reasonable expectations of the individual(s)**

51. It is considered reasonable for these individuals to expect Council to protect their identities when asked to do so, especially if there is a potential for harm or danger if this information is disclosed. Equally Councillors should have no expectation that their identities will not be disclosed in normal circumstances when undertaking public business.
52. The Council wishes to ensure that everyone's views are heard, and everyone has the opportunity to voice those views without fear of recrimination or danger. The ability to do this is a reasonable expectation of every elected representative. The relevant Councillors have clearly stated their concerns to the Council over the disclosure of their identity. The Council believe that the Councillors in question have a reasonable expectation in this case that they have developed sufficient arguments to enable the Council not to disclose their identities.

53. 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.
54. 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.
55. The Commissioner has decided that the Council was entitled to withhold the information under section 40(2) of FOIA, by way of section 40(3A)(a).

Reference: IC-319497-X0D9

## Right of appeal

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56. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
LEICESTER,  
LE1 8DJ

Tel: 0203 936 8963

Fax: 0870 739 5836

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

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

57. 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.
58. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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