

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

### **Decision notice**

**Date:** 18 April 2019

**Public Authority:** Essex County Council

**Address:** PO Box 11  
County Hall  
Chelmsford  
Essex  
CM1 1LX

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

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1. The complainant has requested copies of minutes and reports of the Essex Area Child Protection Committees. Essex County council disclosed the majority of the information it located however it withheld some information citing the exemption at section 40(2) – personal information.
2. The Commissioner's decision is that section 40(2) is correctly engaged for the names of officials that were redacted in Essex County Council's response. However, the council has not sufficiently demonstrated how the remaining withheld information constitutes personal data. The Commissioner also found a procedural breach of section 10 – time for compliance.
3. Commissioner requires the public authority to take the following steps to ensure compliance with the legislation: release the withheld information that is outlined for disclosure in this decision notice.
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 21 March 2018 the complainant wrote to Essex County Council ('the council') and requested information in the following terms:

*"Question 1 – Minutes of every Essex Area Child Protection Committee meeting between January 1989 and December 1991*

*Question 2 – The Essex Area Child Protection Committees Annual reports for 1989/90, 1990/91 and 1991/92."*

6. The council responded on 4 July 2018 It denied holding the requested information, stating:

*"The Area Child Protection Committee (ACPC) was a multi-agency committee. ECC was one partner to this committee. When the Children Act 2004 came into force the ACPC was replaced by the statutory Essex Safeguarding Children Board (SCB). The SCB is a statutory body which is not a public authority for the purposes of the Freedom of Information Act 2000 and it is not therefore within scope of the act. We believe that all records of the ACPC were transferred to the SCB and the records are therefore held by the SCB and are not held by ECC".*

7. The complainant requested an internal review on 4 July 2018, providing evidence to support the case that the council holds the requested information.

8. Following an internal review the council wrote to the complainant on 30 August 2018. It revised its position to:

- Question 1 – the council provided some information within the scope of the request but refused to provide the remainder. It redacted information from the minutes and cited the exemption at section 40(2) - personal information.
- Question 2 – the council stated that the information is not held for 1989/90; it provided the report for 1990/91 and the council cited the exemption at section 21 – information available by other means.

## Scope of the case

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9. The complainant contacted the Commissioner on 7 September 2018 to complain about the way the request for information had been handled. That is specifically regarding the redactions to the Question 1 response, the time taken for the council to respond, and the council's initial denial that it held any information in scope of the request.
10. The complainant has clarified which redactions he is disputing in relation to Question 1:
  - the names of the officials, redacted from all sets of minutes;
  - two small items of data regarding a '*Serious Case Review*' redacted from the minutes of the meeting of 10 December 1991.
11. The Commissioner considers the scope of this case is to establish whether the council have correctly engaged the exemption at section 40(2) to the redactions referred above, and whether it has made any procedural breaches of the FOIA.

## Reasons for decision

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### Section 40 personal information

12. 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(3A)(3B) or 40(4A) is satisfied.
13. 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 processing of personal data set out in Article 5 of the General Data Protection Regulation ('GDPR') ('the DP principles').
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 the FOIA cannot apply.

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

15. 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 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. 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.

Redactions relating to names of officials

20. The council advised that the majority of the redacted information comprises of names of meeting attendees *"The information is predominantly the names of meeting attendees and an accompanying 'his' or 'her'."* The Commissioner notes that the redacted names of meeting attendees is linked with information given such a job titles and in some instances location information.
21. Having considered the redacted names of meeting attendees, the Commissioner is satisfied that the information relates to and identifies the individuals concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
22. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is considered from paragraph 33 of this decision notice.

Redactions to two other data items

23. With regard to the two other items of data redacted from the minutes of 10 December 1991, the council advised that *"Due to the low numbers*

*discussed or individual case details we consider that the individuals concerned could be identified from them in conjunction with other personal data, especially information available in the media."*

24. The Commissioner notes that the redacted data items are of a locational and numeric nature, and that neither directly identify individuals by name. However, because the name of an individual is not known, it does not mean that an individual cannot be identified.
25. The Commissioner asked the council for further explanation of the process by which individuals could be identified from the redacted information. The council explained that:
  - it took a precautionary approach "*as we do not know what publicity there may have been at the time and whether or not the individuals involved could be identified*";
  - it is possible that the redacted information was in the local press at the time (30 years ago); and
  - the council does not know whether "*the allegations were unfounded or proven and the risk of identification could cause significant distress to those involved and therefore it cannot be in the public interest to make such a disclosure. It is felt that other material available from that time, including in the press, would make re-identification more likely.*"
26. The Commissioner appreciates that there could be a significant impact on individuals if identified. However, she doesn't consider that the council have explained the process by which identification would happen, even working on the assumption that the redacted information was previously released in the press.
27. The Commissioner considers that potentially there is a risk of self-identification in that a person may recognise that the information relates to themselves, however it is not clear how someone else could link the information to an identifiable individual.
28. Although the locational information when combined with the year of the report is biographically significant, the Commissioner is unable to see how any individual can be identified from the total population to whom this is biographically significant.
29. The Commissioner has also considered the combination of the redacted data items and has been unable to see how any individual could be identified. Had the council explained, perhaps with specific examples,

how individuals could be identified, she would have taken it into account in her considerations. However, it has been unable to do so.

30. The Commissioner therefore concludes that this information is not exempt under section 40 because it is not personal data; a living individual cannot be identified from it. In reaching this view, the Commissioner has had regard for her own guidance<sup>2</sup>.
31. Having concluded that section 40 is not engaged it is not necessary for the Commissioner to consider the second element of the test for these two items of data.
32. The Commissioner therefore requires the council to disclose the two items of data redacted from the minutes of 10 December 1991 that do not relate to the names of officials.

#### Redactions relating to names of officials

33. The fact that information constitutes the personal data of an identifiable living individual 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.
34. The most relevant DP principle in this case is principle (a).

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

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

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

36. 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.
37. 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) of the GDPR**

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<sup>2</sup> <https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/key-definitions/what-is-personal-data/>

38. 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*" lawful bases for processing listed in the Article applies.
39. The Commissioner considers that the lawful basis most applicable is basis (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>3</sup>.
40. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the 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.
41. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

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<sup>3</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".*

*Legitimate interests*

42. In considering any legitimate interest(s) in the disclosure of the requested information under the 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.
43. 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.
44. The complainant made a case for accountability and transparency, reasoning that:
  - *"This was a local authority committee, meeting in the public interest and making policy decisions which informed the way Social Services and other statutory agencies behaved in Essex;*
  - *The minutes of these meetings were public documents;*
  - *Minutes from many such committees at Essex Council, from the same time period, remain publicly available, unredacted;*
  - *Crucially, though, the ACPC's annual report for 1991/2 is publicly available from the Essex Records Office, unredacted.*
45. The council stated that it had not identified any legitimate interests for disclosure.

*Is disclosure necessary?*

46. '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 the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
47. The council states *"This disclosure is not necessary. This is potentially intrusive for individuals involved who may now be retired and may be elderly and vulnerable. It would not be legitimate or fair to disclose their information."*



48. The council states that the information is from a significant time ago and that it is unlikely that individuals would remain in post. The Commissioner notes that the minutes were written around 30 years ago being between 1989 and 1991.
49. The Commissioner considers that the council's release of the minutes, which detail the job roles of the officials, is sufficient to meet the stated legitimate aim.
50. Furthermore, without any evidence or argument to the contrary she is unable to determine why the release of the names of individuals, who are probably no longer in post, would further the pursued aim for accountability and transparency.
51. The Commissioner has therefore decided that the council was entitled to withhold the names of officials under section 40(2), by way of section 40(3A)(a).

### **Procedural Matters**

52. The complainant states that it was only through his own investigations that the council identified some information within the scope of his request. Subsequently, the information was provided late, being at the internal review stage.

### **Section 10(1) of the FOIA – Time for compliance with request**

53. Section 10 (1) of the FOIA states that a public authority must respond to a request promptly and "*no later than the twentieth working day following receipt*".
54. The complainant made his request for information on 21 March 2018. The council gave a response on 4 April 2018 stating that it did not hold any information within the scope of the request. It provided the redacted minutes approximately 5 months later on 30 August 2018.
55. The Commissioner therefore finds that the council has breached section 10(1) of the FOIA by failing to respond to the request within 20 working days. However, as the response was issued no steps are required.

## 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: 0300 1234504

Fax: 0870 739 5836

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.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.

**Signed .....**

**Andrew White**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
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**SK9 5AF**