

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 5 June 2019

**Public Authority:** Herefordshire Council  
**Address:** Plough Lane  
PO Box 4  
Hereford  
HR4 0XH

#### Decision (including any steps ordered)

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1. The complainant requested information from Herefordshire Council (“the Council”) relating to complaints about councillors. The Council provided some information relating to current councillors, but withheld some information relating to former councillors under the exemption at section 40(2) of the FOIA – third party personal data.
2. The Commissioner’s decision is that the withheld information is the personal data of the former councillors; however, it is lawful, fair and transparent to disclose it in accordance with the provisions of the GDPR. She has therefore determined that section 40(2) is not engaged with regard to the information.
3. The Commissioner requires the Council to take the following step to ensure compliance with the legislation.
  - Disclose the requested information to the complainant.
4. The Council must take this step 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 3 May 2018, the complainant wrote to the Council and requested information in the following terms:

*"Under the Freedom of Information Act 2000, could you tell me how many formal complaints have been made about councillors and officers since Herefordshire Council's standards committee was decommissioned in 2012.*

*How many of these complaints have been dealt with or resolved by the monitoring officer?*

*How many of these complaints have been brought before the council's standards panel?*

*How many of these complaints have been upheld and against whom?*

*What actions have been taking for each of the complaints that have been upheld since 2012?"*

6. On 4 June 2018, the Council responded to the request. It refused the request for information about council officers under section 12 of the FOIA – cost of compliance exceeds appropriate limit.
7. With regard to complaints about councillors, it provided some information about current councillors and provided a general explanation as to which complaints would be investigated by the standards panel. It explained that some complaints received during the financial year 2017 – 2018 were still *"going through"* and that, therefore, this information had not been provided.
8. The Council also considered that details of nine specific complaints which had been upheld during the period 2012 – 2016/17 were exempt from disclosure under section 40(2) of the FOIA – third party personal data. It considered that it would be unfair to provide this information since the relevant councillors were no longer in post.
9. The complainant requested an internal review on 17 July 2018. He did not query the refusal of the request for information about council officers under section 12 of the FOIA. However, regarding the information about councillors, he asked whether further information about *"concluded cases"* relating to 2017 – 2018 could be provided to him, and stated that he disagreed with the application of section 40(2) to the withheld information.
10. The Council sent him the outcome of its internal review on 23 August 2018. It provided some further information from 2017 – 2018 *"for the numbers of complaints received and for subsequent questions where the process is sufficiently completed for data to be held"*.
11. However, the Council stated that it was withholding information relating to two specific complaints from this period, which had been dealt with or

resolved by the monitoring officer, under the exemption at section 22 – information intended for future publication.

12. The Council also upheld its position regarding the information which had been withheld under section 40(2) of the FOIA.

## Scope of the case

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13. The complainant contacted the Commissioner on 17 October 2018 to complain about the way his request for information had been handled. He stated that no further information had yet been published by the Council regarding the two complaints received in 2017 – 2018. He also questioned the application of section 40(2) to information about former councillors.
14. During the course of the investigation, the Council withdrew its application of section 22 of the FOIA with regard to the two complaints dealt with by the monitoring officer in 2017 – 2018, and provided the complainant with a link to this information.
15. This notice covers whether the Council was entitled to rely on section 40(2) of the FOIA (third party personal data) as a basis for refusing to provide information about complaints about councillors who are no longer in office.

## Reasons for decision

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### Section 40 - personal information

16. 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.
17. 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 ("the DP principles"), as set out in Article 5 of the General Data Protection Regulation ("GDPR").

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

18. 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.
19. 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?**

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

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

21. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
22. 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.
23. 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.
24. In this case, the Commissioner notes that the withheld information has been collated onto a table, which has been prepared by the Council for her consideration. It is in essentially the same format as the information which was disclosed to the complainant regarding current councillors; that is, it includes: the councillor's name, the council they were elected to serve on, the nature of the breach/complaint, and the resolution.
25. The Council has explained that it considers the withheld information to be the personal data of the named councillors. It considers that their name, and the reference to the relevant council, is sufficient to identify them, and that the information clearly relates to them.
26. The Commissioner notes that it may have been possible for the Council to address some aspects of the request separately; for example, whether it could disclose the total number of complaints, without identifying specific individuals. The Commissioner would consider this issue in the event that she determined that some of the requested information had been correctly withheld.

27. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information as presented both relates to and identifies the named former councillors. The information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
28. 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.
29. The most relevant DP principle in this case is principle (a).

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

30. 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".*

31. 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.

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

32. 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.
33. 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>2</sup>.*

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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".*

34. 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 interests or fundamental rights and freedoms of the data subject.
35. 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*

36. In considering any legitimate interests in the disclosure of the requested information under the FOIA, the Commissioner recognises that such interests can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.
37. 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.
38. The Commissioner is satisfied in this case that there is a legitimate interest in the disclosure of the information under the broad principles of accountability and transparency as they relate to individuals in public office. She notes, indeed, that the Council now publishes information
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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".*

about serving councillors who are found to have breached the code of conduct, as it is regarded as a matter of public interest.

39. In her view, there is a legitimate interest in the disclosure of information about local councillors' conduct while in office, and that this remains the case after councillors have recently ceased to serve (in this case, the information request covered the period of six years leading up to the date of the request, which the Commissioner considers to be recent), since the impact of those councillors' decisions may still be relevant.
40. In addition, she notes the complainant's argument that the former councillors may decide to stand for office again. While the Council has argued that it is not aware that this is the case, the Commissioner has become aware that one of the former councillors has recently stated that they may indeed be interested in standing for re-election in the future. She considers that this also adds to the legitimate interest in the disclosure of the information.

*Is disclosure necessary?*

41. '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.
42. In this case, as is set out further below, the Commissioner has evidence that some of the withheld information is, in fact, already in the public domain, either recorded on the Council website, or reported in the local press. However, she is not satisfied that this renders disclosure under the FOIA unnecessary in this case. While the public can locate some information relating to complaints that have been upheld against former councillors by searching the Council website, or by reading the websites of local newspapers, this would not inform the public as to *all* the complaints that were upheld during the relevant period, nor whom they were upheld against, nor as to their nature and outcome.
43. The Commissioner therefore considers that, in this case, disclosure of the requested information under the FOIA is the least intrusive means of achieving the legitimate aim.

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

44. 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 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.

45. 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.
46. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that the 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 them in their professional role or as individuals, and the purpose for which they provided their personal data.
47. The withheld information in this case relates clearly to the individuals' professional roles. The Commissioner has therefore considered whether the former councillors would have expected the information to remain confidential.
48. In this case, the Commissioner notes that some of the withheld information relating to complaints about the former councillors is, in fact, already in the public domain. In the case of the two upheld complaints which date from 2012, the outcome of these are noted on the Council's website. In addition, a further two complaints were reported in the local press, including, in one case, the outcome.
49. The Commissioner is aware that the conduct of any councillor while in public office is subject to public scrutiny, and considers that this has certainly been the case during the period covered by the request (from 2012 to April 2018) when local council matters are actively discussed on social media, on blog accounts and in the local press.
50. She considers that any serving councillor during that time would have some expectation that a complaint made about them would be likely to enter the public domain.

51. She also considers that, in view of the fact that the Council now publishes this type of information, the former councillors would (by the date of the request) be likely to have some expectation that the Council may disclose this type of information in response to a request under the FOIA.
52. The Commissioner notes that the Council has referred to ICO decision notice FS50585217<sup>3</sup> in support of its view that the personal data of former councillors should be withheld. However, she considers complaints on a case-by-case basis, and notes that the withheld information in that case was the written response of a former councillor to the monitoring officer in respect of a complaint which had been made about them. In her view, the nature of that information was materially different.
53. She does not consider that the information requested in this case, which provides a brief explanation as to the nature of a number of complaints and the outcome in each case (described as the "resolution") is as detailed, nor as personal in nature as in the case referenced by the Council. It is not a request for a personal opinion or account provided by any individual councillor for consideration by the monitoring officer in a specific, historic case. The withheld information in this case is a Council-generated summary of complaints over a specific period, and not a personal response composed by an individual former councillor.
54. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to the former councillors.
55. The Commissioner acknowledges that the disclosure of a complaint dating back to their time in office may be unwelcome, and to some degree upsetting, to those former councillors who are named and about whom the information is not already in the public domain.
56. However, considering the withheld information itself, the Commissioner considers that it is sufficiently general and non-specific not to cause significant distress. While it would not be appropriate for her to discuss the information in detail on this notice, she is satisfied that, while it may be an unwelcome reminder for some of the named former councillors that a complaint against them had been received during their time in office, the information does not disclose anything likely to cause significant harm.

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<sup>3</sup> [https://ico.org.uk/media/action-weve-taken/decision-notice/2015/1560096/fs\\_50585217.pdf](https://ico.org.uk/media/action-weve-taken/decision-notice/2015/1560096/fs_50585217.pdf)

57. Based on the above factors, the Commissioner has determined that, in this case, 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, and so the disclosure of the information would be lawful.

### **Fairness and transparency**

58. 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).
59. 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. In this case, she is satisfied that disclosure would be fair.
60. The requirement for transparency is met because as a public authority, the Council is subject to the FOIA.

### **The Commissioner's decision**

61. The Commissioner has determined that the disclosure of the information would not be in breach of Article 5(1)(a) of the GDPR, since the processing would be lawful, fair and transparent.
62. The Commissioner has therefore decided that, in this instance, the Council has failed to demonstrate that the exemption at section 40(2) is engaged.

## Right of appeal

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63. 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)

64. 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.
65. 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 .....**

**Ben Tomes  
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