

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

## **Decision notice**

**Date:** 9 March 2021

**Public Authority:** Royal Borough of Windsor and Maidenhead

**Address:** Town Hall  
St. Ives Road  
Maidenhead  
SL6 1RF

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

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1. The complainant has requested an unredacted copy of a report into complaints about a councillor and council officers.
2. The Commissioner's decision is that the Royal Borough of Windsor and Maidenhead has correctly applied section 41(1) and section 40(2) to the withheld information. However, it breached section 10(1) in providing the final response to the complainant outside of the statutory time periods.
3. The Commissioner does not require any steps.

## Request and response

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4. On 18 November 2019, the complainant wrote to the Royal Borough of Windsor and Maidenhead ('the council') and requested information in the following terms:

*"please would you forward to me a copy of [redacted] report."*

5. The council responded on 18 November 2019 and refused to provide the requested information on the grounds that it contained personal data about officers and other people interviewed for the report.
6. The complainant contacted the council on 22 November 2019, stating that a redacted version of the report could be provided to protect any personal data.
7. The council responded on 31 December 2019. It released a redacted version of the report, stating that some information was withheld on the basis of section 41 (information provided in confidence), and section 40(2) (personal information). The council advised that that section 40 was applied where individuals other than [redacted] and [redacted] are identified.
8. The complainant requested an internal review on 8 January 2020.
9. Following an internal review, the council wrote to the complainant on 28 August 2020 and stated that it maintained the original position.
10. During the investigation, on 26 October 2020, the council provided the complainant with an updated response. A second version of the report was released with fewer redactions. The remaining redactions were made on the basis of section 40(2), section 41 and section 36(b)(ii).
11. As part of the investigation the complainant raised that consent had been given for the release of some information redacted in the report, on the basis of section 40(2) and section 41. During the course of the investigation this was resolved. On 4 February 2021 the council published a further version of the report with those redactions removed.

## Scope of the case

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12. The complainant contacted the Commissioner on 20 May 2020 to complain about the way their request for information had been handled. Specifically, that the information should be fully disclosed, excluding the contact and identification information for some members of the general

public, as the exemptions cited are not engaged and the balance of the public interest favours disclosure.

13. The requested information is a report ('the Report') of an investigation into complaints regarding the conduct of a former councillor. The complaints were regarding his reference during a pre-election speech to a council draft pre-emption agreement in favour of a mosque for land currently occupied by a private club under a 27 year lease.
14. The Commissioner considers the scope of this case is to establish whether the council has correctly engaged the exemptions at sections 40(2), section 41 and section 36(b)(ii) to withhold the information.

### **Further background**

15. The complaints about the speech relate to the disclosure of information during 'Purdah' and allegations of misleading a specific community to obtain votes.
16. The councillor resigned from the council prior to production of the Report therefore the author states he was not able to speak to him or draw a conclusion on whether the council's code of conduct had been breached.
17. The author states however he is able to draw a conclusion regarding other officers involved. The Report finds that there had not been any deliberate wrongdoing on the part of officers.
18. It is the complainant's position that the investigation was flawed and that there are undisputable signs of wrongdoing. The complainant's view is that it is in the public interest to identify the senior officer(s) and disclose their testimony unredacted.

### **Reasons for decision**

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#### **Section 41 – Information provided in confidence**

19. Information under consideration for this exemption is:
  - All of the information supplied in part six of the Report, which has the published title [redacted] excluding the first two paragraphs which the council states have been released as they contain factual information concerning the public-facing role of an executive director of the council.
  - Part 11, titled "*Considerations*" (paragraphs 11.1 – 11.6) and paragraph 11.7 (in part) containing the Report author's views on the evidence presented.

- Part 12 (paragraphs 12.2 – 12.5) containing the Report author’s final conclusions.

20. Section 41(1) provides that –

- (a) “Information is exempt information if it was obtained by the public authority from any other person (including another public authority); and,
- (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.”

21. To properly engage section 41, disclosure of the requested information must give rise to a possible actionable breach of confidence. This requires the information to have the necessary quality of confidence. The information must therefore be more than trivial and not be otherwise accessible.

22. The information needs to be communicated in circumstances which import an obligation of confidence. This obligation can be implicit or expressed explicitly.

*41(1)(a) – was the information obtained from another person?*

23. The author of the Report, (‘the Author’), is an independent solicitor who was commissioned by the council to carry out an investigation into complaints regarding a former councillor and possible concerns about officers of the council. The Report states that the information contained within it, and the conclusions drawn, are based upon a review of written materials and interviews that the Author conducted with public officials, council officers and members of the public.

24. The Commissioner’s guidance on section 41<sup>1</sup> states that although the exemption won’t cover information the authority has generated itself, it may cover documents (or parts of documents) generated by the public authority if these records constitute information provided in confidence by another person, for example situations such as the testimony of an employee.

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<sup>1</sup> <https://ico.org.uk/media/for-organisations/documents/1432163/information-provided-in-confidence-section-41.pdf>

25. The Commissioner has reviewed the information contained in the Report and she concurs that it is information provided to the Author to assist in his investigation into the code of conduct concerns.
26. During the course of the Commissioner's investigation, the council confirmed that the report under consideration was provided to it by the Author. The Commissioner is satisfied that the Author does not work for the council and was appointed to conduct an independent investigation and produce a written report.
27. The Commissioner is therefore satisfied that the Report was obtained by the council from another person and meets the requirements of section 41(1)(a).

*Would disclosure of the information constitute an actionable breach of confidence?*

28. In considering whether disclosure would constitute an actionable breach of confidence, the Commissioner follows the test of confidence set out in *Coco v A N Clark (Engineering) Ltd [1968] FSR 415*. That judgment suggested that the following three-limbed test should be considered in order to determine if information was confidential:
  - whether the information had the necessary quality of confidence;
  - whether the information 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.
29. Further case law has argued that where the information is of a personal nature it is not necessary to establish whether the confider will suffer a detriment as a result of disclosure.

*Does the information have the necessary quality of confidence?*

30. For the information to have the necessary quality of confidence it must not be trivial and not otherwise available to the public. Information which is of a trivial nature, or already available to the public, cannot be regarded as having the necessary quality of confidence.
31. The Commissioner recognises that information should be worthy of protection in the sense that someone has a genuine interest in the contents remaining confidential.
32. In this case, the Council considered the information has the necessary quality of confidence because:

- Some of the information relates to testimonies, the council has confirmed that officers were interviewed on a confidential basis. Council officers entering into conversations with the Author were advised that their evidence would be treated confidentially and for no other purpose than helping to inform the outcome of the investigations.
  - The Author marked the report as "*Private and Confidential*" and imparted it to the Monitoring Officer solely for use as evidence to assist her in deciding whether council officers had breached the code of conduct. Therefore, the exemption also applies to the candid views of the Author and his conclusion of the investigation regarding council officers' judgement and conduct.
33. The complainant contends that some participants have advised that anonymity was not promised, and in fact was not desired because of the significance of free and fair elections.
34. The Commissioner notes that some testimonial information is released in the Report, some of which occurred during the course of her investigation. The council advise that this is because the permission to publish was granted by those individuals.
35. However, the council has confirmed to the Commissioner that the remaining redactions are required because the individuals involved maintain a genuine expectation that the content recording or relating to their testimony remains confidential.
36. Having viewed the information withheld in the Report on the basis of section 41, the Commissioner is satisfied that it is more than trivial and not already in the public domain.
37. The Commissioner is therefore satisfied that the withheld information in this case has the necessary quality of confidence required to sustain an action for breach of confidence, and as such she considers that this limb of the confidence test is met.

*Was the information imparted in circumstances importing an obligation of confidence?*

38. Even if information is to be regarded as confidential, a breach of confidence will not be actionable if it was not communicated in circumstances that created an obligation of confidence.
39. The Commissioner's guidance recognises that there are essentially two circumstances in which an obligation of confidence may apply:

*"The confider has attached explicit conditions to any subsequent use or disclosure of the information (for example in the form of a contractual term or the wording of a letter); or*

*The confider hasn't set any explicit conditions, but the restrictions on use are obvious or implicit from the circumstances. For example, a client in therapy wouldn't need to tell their counsellor not to divulge the contents of their sessions to others, it is simply understood by both parties that those are the rules".*

40. The council considers that the report was provided in circumstances importing an obligation of confidence. It was produced by a third party, issued directly to the monitoring officer, and was marked "*Private and Confidential.*"
41. The council also considers that the obligation of confidence was explicitly relayed to council officers. On entering into the discussions, the council officers were advised that the evidence provided would be treated confidentially and used for no purpose other than to inform the outcome of the Author's investigations.
42. The council argues, considering the nature of such a code of conduct investigation, officers should be confident that any evidence volunteered is treated confidentially. Without such a confidence, there could be a negative and detrimental effect on the investigation.
43. The complainant states that the code of conduct process should be a matter of public scrutiny in line with the council's 2019 constitution. They argue that the officers interviewed would have understood that comments made in respect of free-and-fair open elections would be revealed. Furthermore, as previously noted, the complainant contends that some participants have advised that anonymity was not promised.
44. The council responded that the only document which is released under such code of conduct processes is the decision notice and that this would not publish officers' details. The council stated that the confidentiality clause had been added to the constitution in 2020 it has no relevance in this respect or to this case. The council reiterated, therefore, that at no time would officers know, or believe, that what they say could be published.
45. The Commissioner recognises that in some instance's confiders have given permission for their information to be disclosed within the Report. However, the council has confirmed to the Commissioner that permission has not been given to release the redacted information that remains.

46. Having considered the '*reasonable person*' test used by Judge Megarry in the *Coco v Clark* case, and considering the nature of the allegations, and the circumstances in which evidence was gathered from individuals to form the outcomes of the investigation, the Commissioner is satisfied that there is an implied obligation of confidence. She accepts that there is an expectation that the information provided was shared in confidence and will not be disclosed to the public.
47. The Commissioner therefore accepts that there is an obligation of confidence in this case. As such she considers that this limb of the confidence test is met.

*Would disclosure be of detriment to the confider?*

48. The Commissioner's guidance on information provided in confidence (section 41) establishes that case law now suggests that "*any invasion of privacy resulting from a disclosure of private and personal information can be viewed as a form of detriment in its own right*".
49. The Commissioner considers that the investigations into the allegations constitute information of a personal nature. Additionally, information provided under such circumstances may cause personal distress and potentially issues between employees. It is therefore not necessary for there to be any detriment to the confider(s) in terms of tangible loss, for this information to be protected by the law of confidence. Therefore, the Commissioner has not considered this issue further.

*A legal person must be able to bring an action for breach of confidence*

50. Section 41(b) provides that the breach of confidence must be actionable by either the legal person who gave the information to the public authority, or by any other legal person.
51. In her guidance on the section 41 exemption, the Commissioner states:  
  
*"It is not necessary for the authority to establish that a particular person would be likely to bring a claim for breach of confidence, only that a person would be able to do so"*.
52. Given the nature of the allegations in this case, the Commissioner is satisfied that those who gave information, in confidence, to the Author of the Report, would be able to bring a claim for breach of confidence.
53. The final part of the test for engaging section 41 is whether the action of breach of confidence is likely to succeed.

*Is there a public interest defence for disclosure?*



54. Although section 41 is an absolute exemption and does not need to be qualified by a public interest test under section 2 of the FOIA, case law on the common law of confidence suggests that a breach of confidence will not succeed, and therefore will not be actionable, in circumstances where a public authority can rely on a public interest defence.
55. In its response to the Commissioner the council recognised that disclosure of the information would add to the public's understanding of the chain of events that occurred and the reasons for the Author's conclusions. As some evidence specifically relates to the actions of officers it would assist in bringing about a greater degree of transparency, especially when the context of possible wrongdoing by officers forms the basis of the investigation.
56. The council stated that it had also considered the arguments for maintaining the confidence which relate specifically to the context in which it was provided by officers. This being that officers were advised it would be treated confidentially and used for the sole purpose of the investigation.
57. Furthermore, the council has stated that the public interest case is diminished because the allegations of wrongdoing were not upheld in the Report. The Commissioner observes that this conclusion may be drawn from the information that is published in the Report.
58. The council has also made a case that the disclosure of information gained through the course of such an investigation may have a detrimental effect on the successful conduct of future investigations of a similar nature. It stated that officers may refuse to comply in future investigations, and that the quality of evidence may be undermined.
59. The council concludes that in light of the importance of such code of conduct investigations, it considers that the interests in maintaining the confidence outweigh the public interest argument for disclosure.
60. The complainant directed the Commissioner to the *Recommended Code of Practice for Local Authority Publicity*<sup>2</sup> which outlines that officers must ensure that all council literature is "*issued with care during periods of heightened sensitivity...*" and that officers must not "*... publish any material which, in whole or in part, appears to be designed to affect public support for a political party.*"

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<sup>2</sup> <https://www.gov.uk/government/publications/recommended-code-of-practice-for-local-authority-publicity>

61. The complainant states that the redacted information should therefore be released so that the public can understand whether senior council officers followed the council's process regarding 'Purdah' and acted in adherence with the recommended code of practice for publicity.
62. The complainant submits that officers discussing free and fair elections should not expect anonymity and furthermore that some public participants and councillors were not promised anonymity and, in fact, did not want it because of the significance of free and fair elections.

*The Commissioner's view*

63. In a case such as this, the test is whether there is a public interest in disclosure which overrides the competing public interest in maintaining the duty of confidence.
64. This test does not function in the same way as the public interest test for qualified exemptions, where the public interest operates in favour of disclosure unless outweighed by the public interest in maintaining the exemption. Rather, the reverse is the case. 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
65. The Commissioner has considered whether there is any overriding public interest in the disclosure of the unredacted report that would justify an actionable breach of confidence.
66. The Commissioner recognises that some weight should always be afforded to the general public interest in ensuring that public authorities remain transparent, accountable and open to scrutiny. In that respect, she acknowledges that the council has published a redacted version of the report on its website.
67. The Commissioner also understands that information concerning the complainants key remaining issue, in relation to senior officer actions at a sensitive time, remains redacted.
68. The Commissioner is cognisant of the significance of free and fair elections. As such there is clearly public interest in understanding any wrongdoing by council officers that may have caused some bias in this respect. However, she has balanced this against the outcome of the Report which found that the allegations of wrongdoing were not upheld.
69. The Commissioner therefore considers that, although the Report may give further insight and explanation into the events, there is a wider public interest in preserving the principle of confidentiality. The Commissioner is also mindful of the impact of the disclosure on the

interests of council officers when ultimately the allegations were not upheld.

70. The Commissioner finds that the council correctly withheld the information under section 41 of the FOIA. As such she has not gone on to consider section 40(2) and 36(b)(ii) in relation to this set of information.

### **Section 40 personal information**

71. The council have withheld some information on the grounds of section 40(2) only. Information under consideration for this exemption is:

- The Report author's contact details
- Councillor personal data
- Council officer personal data
- Members of the public personal data

72. 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.

73. In this case the relevant condition is contained in section 40(3A)(a)<sup>3</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').

74. 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.

75. 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?**

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

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

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

77. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.

78. 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.

79. 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.

80. The redacted personal data identifies council officers, councillors and third parties. Individuals are identifiable from the information, and from the context within which the information is held. It also includes some contact information for third parties and the author of the report.

81. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information both relates to and identifies the individuals concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.

82. 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.

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

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

84. 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"*.

85. 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.

86. 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

87. 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.

88. 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>4</sup>.*

89. 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.

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<sup>4</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”.*

90. 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*

91. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that 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. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
92. The complainant confirmed to the Commissioner that they do not dispute the redaction of personal information relating to members of the public nor the contact information of the Author. However, it is their view that the personal data of officers of the council should not be redacted, as they are public servants.
93. The council advised that disclosure may improve transparency and therefore contributes to the reader's understanding of what occurred. However, the council stated that only the names of the individuals had been withheld to anonymise them. It iterated that the circumstances and context in which the names appear had not been redacted and as such does not adversely affect the reader's understanding of the events that occurred.
94. The complainant agrees with the withholding of personal information that relates to third parties; but they emphasise that the report title states it is an investigation into the councillor and "*Officer(s) of the Council...*". As such the complainant states that there is a legitimate interest in transparency of information identifying any senior officers named in the report, and the information considered in regard to them, in order to understand fully how the Author reached his conclusions.
95. The Commissioner agrees that there is a legitimate interest in the transparency of information relating to senior officers of the council. She also finds that there is no legitimate interest in identifying other third parties named in the report or any contact details.

*Is disclosure necessary?*

96. '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.

97. The council argues that the withholding of a very limited amount of personal information relating to names has no bearing on the legitimate interests in making the disclosure and does not adversely affect the reader's understanding of the events that occurred.
98. Conversely though, the Commissioner notes that the purpose of the investigation was into complaints made against the councillor and officers of the council. The identity of the former councillor is not redacted in the Report. The Commissioner therefore agrees that disclosure would be necessary in order to meet a legitimate interest in the transparency of information relating to senior officers of the council.

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

99. 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 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.

100. 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.

101. 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.

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

103. The council made the following points:

- The consent of certain officers has been obtained in relation to specific aspects of the Report and this information is unredacted.
- Information relating to the work remit of senior officers has been released without consent as this information relates to their public facing role and it is a reasonable expectation that this it is made public.
- Officer(s) have expressed concern that their name(s) should be disclosed in relation to specific aspects of the Report and did not give consent when disclosure was sought.
- The reason for this is that the information provided is of a sensitive nature.
- The council contends that the information was gathered in relation to a confidential report being prepared for the Monitoring Officer. Therefore, council officers would not have expected personal information to be made public in such a context.

104. The complainant contends that:

- A senior officer's identity is already known and in the public domain from another related FOIA request which provides the name which is redacted in the same email published in the Report.
- It is therefore untenable for the council to argue anonymity has been granted to senior officers.
- Officers cannot expect anonymity in the context of free and fair elections.
- It is not clear from the information released how the Author reached his conclusion that council officers acted properly.
- The complainant raises other concerns regarding the scope of the investigation and the Author's awareness of pertinent facts in reaching the outcome. As such it is the complainant's position that there are indisputable signs of wrongdoing and therefore the public interest in publication of the withheld information far outweighs other concerns.

105. The Commissioner has considered the complainants point that a senior officer's identity is obtainable from the council's response to a separate FOIA request. The Commissioner she agrees that the name within an email quoted in the Report is in the public domain in the context of the other request and may therefore enable an informed reader to deduce the identity within the Report. However, the Commissioner does not



agree that this equates to the redacted officer's identity being in the public domain already, specifically in the context of the Report.

106. The Commissioner appreciates the complainants concerns about providing senior officer anonymity in the context of the serious allegations of wrongdoing that are addressed within the Report. She has also considered the complainants position in regard to the allegations and doubts over the outcome of the Report.

107. However, within the released information of the report, in section 11.7 (12), the Author states that "*Following a careful assessment of [redacted] conduct against the provisions of the Member / Officer Protocol and the Employee Code of Conduct, I find no breach of either on his part.*"

108. The Commissioner considers that debating the validity of the Authors investigation and therefore the outcome of the Report is beyond her remit. As such, she is therefore limited to considering whether the information should remain redacted within the context of the Report findings which have been released.

109. The Report finds no breach on the part of council officers and the individual(s) have expressed concern about disclosure of their personal data. The Commissioner considers that, in the context of the investigation, disclosure of the redacted personal information in the Report could cause damage or distress to officers involved.

110. Further information was published in the Report during the course of the investigation. The information does not go as far as providing complete transparency in terms of identifying any senior managers involved. However, the information has provided transparency in terms of clarifying that officer wrongdoing was also considered, and the outcome of the Authors investigation in this respect.

111. 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.

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

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

113. The Commissioner has therefore decided that the council was entitled to withhold the information under section 40(2), by way of section 40(3A)(a).

114. Since the end of the transition period following the UK's departure from the EU, the GDPR were replaced by the UK GDPR. As this request was received before the end of that transition period, the application of section 40(2) has been decided by reference to the GDPR. However, the Commissioner is also satisfied that the disclosure of the personal data to which that exception was applied would not contravene the UK GDPR for exactly the same reasons.

### **Section 10(1) – Time for compliance**

115. 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*".

116. The complainant made her request for information on 18 November 2019. The council did not provide its final response until 4 February 2021.

117. 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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118. 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)

119. 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.

120. 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**  
**Head of FOI Casework and Appeals**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**