

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 3 June 2021

Public Authority: Thanet District Council
Address: Hawley Square
Margate
Kent
CT9 1NY

Decision (including any steps ordered)

1. The complainant has requested information as to whether the Chief Executive and the Director of Operational and Commercial Services at Thanet District Council have given notice in writing to the Council of an alleged personal relationship between them, in accordance with the Council's Code of Conduct, and the date and copies of such notices if provided by both individuals. The Council refused to confirm or deny that they held the information requested under section 40(5B)(personal information) and section 41(2)(information provided by a third party in confidence) of the FOIA.
2. The Commissioner's decision is that the Council were entitled to rely on section 40(5B) of the FOIA to neither confirm nor deny holding the requested information.
3. The Commissioner does not require any steps to be taken as a result of this decision.

Background

4. The complainant's request to Thanet District Council (the Council) of 13 July 2019 was prompted by his coming into possession of covertly obtained information published online which purported to show that the Council's Chief Executive, Ms Madeline Homer, and the Director of Operational Services, Mr Gavin Waite, were involved in an intimate personal relationship. The complainant was also in possession of a leaked external investigatory report into a grievance brought by a former member of staff at the Council. In his complaint to the ICO, the complainant provided the Commissioner with a copy of this leaked report and the Commissioner is aware that some of the contents of this report have been disseminated (without the consent of the Council) in the public domain. Due to their sensitivity, both sources of information are detailed in a Confidential Annex attached to this notice.
5. On 4 September 2019, The Isle of Thanet News reported that the GMB Union was calling for the Council to overhaul its way of dealing with bullying complaints against top officers¹. The article reported that the call had come after grievances being brought by two officers, one of whom had *'named both Chief Executive Madeline Homer and Director of Operational Services Gavin Waite in a list of 10 grievances'*. The article stated that the officer had lodged an appeal over the way their grievance was dealt with, *'including being unable to see an independent investigator's report, having the case handled by a current TDC top officer, and no formal action being taken despite one grievance of bullying and harassment being partly upheld, one of a breakdown of working relationship being upheld, and one of suffering work-related stress due to the situation being upheld'*.
6. The GMB Regional Organiser expressed his confidence that senior elected members of the Council would conclude, like the GMB, *'that the current system of dealing with bullying and harassment complaints against senior officers has been compromised beyond any further use'*. He contended that *'not recognising this and not replacing it will*

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<https://theisleofthanetnews.com/2019/09/04/gmb-union-call-for-thanet-council-to-overhaul-way-of-dealing-with-bullying-complaints-against-top-officers/>

undermine and threaten the good running and integrity of the Council. GMB has experience of new independent systems in other councils for dealing with bullying and harassment complaints against senior officers that are much better'.

7. The article reported that an appeal against the grievance decision had been submitted to the Council's Deputy Chief Executive, Mr Tim Willis, who had not been involved in the original grievance, *'but he was suspended from his role last month'.*
8. A Council spokesperson stated that, *'In dealing with these matters the Council follows an agreed formal process. That process protects the right to a fair hearing for both those bringing the grievance and those who are subject to the complaint. Public comments on the matter could either prejudice the process or potentially influence the outcome'.*
9. On 10 October 2019, The Isle of Thanet News reported that Mr Willis who had been suspended in August over gross misconduct allegations, had been cleared on all counts². The article reported that the Deputy Chief Executive had been reinstated following protests from councillors and community groups. Councillors on the General Purposes Committee had unanimously cleared Mr Willis of all seven gross misconduct allegations laid out in a report by the Council's Chief Executive, Madeline Homer.
10. On 12 November 2019, the Municipal Journal reported that *'an investigation into alleged bullying and harassment found 'substantial evidence' to support some claims made against two senior Thanet DC officers, it has emerged. In May, Thanet's [name redacted], alleged harassment, bullying, intimidation, victimisation and humiliation by chief executive, Madeline Homer, and director of operations, Gavin Waite³.*
11. The Council was reported as having given the following public statement:

'Given the seniority of those involved, the monitoring officer's draft report on the outcome of the grievance and his draft recommendations were reviewed by external employment solicitors to provide an independent check – in order to ensure that his report and recommendations were both fair and objective'.

² <https://theisleofthanetnews.com/2019/10/10/top-thanet-council-officer-unanimously-cleared-of-gross-misconduct-charges/>

³ <https://www.themj.co.uk/Two-senior-officers-implicated-after-bullying-claims/216128>

12. On 3 September 2020, The Isle of Thanet News reported that the head of East Kent Internal Audit Partnership, Ms Christine Parker, had written to the Chair and Vice Chair of TDC's governance committee to advise that *'action is needed at Thanet District Council to address the cultural and governance failures that stem from the very top of the organisation'*⁴. The article reported that Ms Parker highlighted concerns over senior officer relationships and *'blurred reporting lines'*, as well as raising the issue of grievance procedures that have not been brought to a conclusion. Ms Parker advised that, *'in my view, this is all about people, their relationships, behaviours and attitudes, and I only experience this culture at Thanet DC, not the other councils that I work for'*.
13. Ms Parker referenced the independent investigator's report that had been leaked into the public domain and warned that, *'with these matters unresolved, it insidiously affects the culture of the Council and is hugely damaging. If good governance is not demonstrated at the top then the rules of good governance do not apply further down the layers of the organisation'*.
14. Council leader Mr Rick Everitt said that the Council were aware of concerns and that he and the Chief Executive, Madeline Homer, had asked the Local Government Association to instigate a peer review to carry out an independent assessment. Speaking to the Municipal Journal, Mr Everitt stated that, *'We hope it will also look at the evident damaging practice of leaking internal correspondence among some individuals within the Council and why it is they are doing that'*.
15. In response, Thanet Green Party issued a statement:

'We are disappointed with the Council Leader's response as quoted in the Municipal Journal, which appears to focus more on the alleged leak rather than on the problems the report highlights. We would respectfully point out that if this matter had been dealt with when the auditor first raised it earlier in the summer, there would have been no scope for any sort of leak. We believe there is an urgent need for greater transparency at Thanet District Council. We are deeply concerned that our councillors are having difficulty assessing the information they need to fulfil their duties – even to the extent of one of our members having to resort to Freedom of Information requests. We believe that no council that is operating properly should have anything

⁴ <https://theisleofthanetnews.com/2020/09/03/whistleblowing-concerns-and-cultural-and-governance-failures-at-thanet-council-raised-by-senior-auditor>

to fear from sharing information and allowing external bodies to scrutinise its work'.

16. On 10 September 2020, The Muncipal Journal reported that the Council's Chief Executive, Ms Homer, had written to Ms Parker and rejected her concerns, contending that her letter was '*not balanced or fair*'⁵.
17. The Commissioner notes that the situation was discussed at the Council's meeting on the same date, with the published minutes recording the Leader of the Council as having stated that, '*Since the serious allegations of bullying and harassment have been reproduced in the press, Members need to have confidence that that is not an accurate characterisation of the Council as a whole, and Council Members and Officers need to be able to tell an independent authority the truth*'.
18. On 4 December 2020, The Isle of Thanet News reported that the Council's use of non-disclosure agreements was under scrutiny by external auditors⁶. The article noted that an FOI request had showed that £446,503 was spent on such orders between April 2015 and the end of August 2019, payments having been made to more than 30 staff during that time period.
19. On 1 February 2021, The Isle of Thanet News reported that the Council's Monitoring Officer, Mr Tim Howes, had been suspended, although the reason for his suspension had not been made public⁷.

Request and response

20. On 13 July 2019, the complainant wrote to the Council and requested information in the following terms:

''In accordance with paragraph 8.1 (Personal Interests) of Thanet Council's Officers' Code of Conduct, which is included in Part 5 of the

⁵ <https://themj.co.uk/Council-chief-claims-auditor-not-balanced-or-fair/218576>

⁶ <https://theisleofthanetnews.com/2020/12/04/external-auditors-to-examine-thanet-council-gagging-order-pay-outs-complaint/>

⁷ <https://theisleofthanetnews.com/2021/02/01/top-thanet-council-officer-remains-suspended-from-role/>

Council's Constitution, please tell me whether the Council's Chief Executive, Madeline Homer and/or the Council's Director of Operational and Commercial Services, Gavin Waite, have given notice in writing to the Council of any personal relationship between each other? If so, could you please tell me the date(s) such notices were submitted to the Council and could you please also provide me with copies of these notices'.

21. The Council responded to the request on 14 August 2019 and stated that:

'Further to section 17 of the Act, we will neither confirm nor deny whether notice has been given by either Ms Homer or Mr Waite under S8.1 ('Officers' Code of Conduct') in Part 5 of the TDC Constitution. The information you have requested concerns personal relationships and therefore falls within the exempted categories of 'personal information' (as defined within section 40 of the Act) and 'information provided in confidence' (as defined under section 41 of the Act)'.

Scope of the case

22. The complainant contacted the Commissioner on 15 August 2019 and expressed his concern that because his request concerned the Council's most senior officer (Chief Executive) and a senior Director, he did not expect that any internal review, were he to request one, would be considered in a fair and objective way. In view of the particular circumstances of this case, the Commissioner confirmed that she would waive the usual requirement for an internal review and accept receipt of the complaint.
23. On the same date the complainant wrote to the Council and, noting that they had offered him the facility of an internal review, advised that:
- 'It is my opinion that because my FOI request seeks information about the Council's Head of Paid Service and a very senior Director, that it would not be possible for the internal review to be independent and impartial. It is my belief that whatever arguments I might use to support the disclosure of the requested information, they would likely be discounted by the Council'.*
24. The complainant advised the Council that the ICO had confirmed that they would take direct receipt of his complaint about the Council's response to his request.

25. In his subsequent complaint to the Commissioner on 30 September 2019, the complainant alleged that *'rumours have been circulating widely for over a year that the Chief Executive of Thanet District Council and the Council's Director of Operational Services are having an intimate personal relationship'*.
26. The complainant stated that the Chief Executive was *'and perhaps still is'* at this time the line manager of the Director. In such capacity, the complainant stated that the Chief Executive would have been *'responsible for overseeing the work performance of the Director, approving the Director's plans, policies and budgets, ensuring that the Director adhered to Council policies and regulations, investigating any complaints about the Director, disciplining the Director and awarding the Director pay increments'*.
27. The complainant noted that he and others had written articles and commented extensively on social media about the alleged relationship, and that his concern about the alleged relationship *'was the possible conflict of interest it might cause and how this might impact upon management and decision making at the highest level in Thanet Council'*.
28. The complainant advised the Commissioner that on 3 September 2019 he had submitted another request to the Council for the same information as that requested in his request of 13 July 2019 but for another time period. He advised that the Council had replied to his further request on 10 September 2019 and had given the same reasons for refusal as in their previous response of 14 August 2019.
29. The complainant also informed the Commissioner about what he described as *'very disturbing inconsistencies'* in the way in which the Council had handled his information request and an almost identical request made by another individual. The complainant provided the Commissioner with a copy of the request made by the other individual on 9 September 2019, which had asked to view *'any declarations Ms Madeline Homer and Mr Gavin Waite may have made in the officers' register of interests since the start of August 2019'*. The Council had provided a response to that request on 10 September 2019 and had stated that they *'do not hold this information'*. The complainant noted that on the same date as this response to the third party, the Council had provided the complainant with another NCND response to his second request on 3 September 2019.
30. The complainant advised the Commissioner that *'it is of great concern to note that two FOI requests for the same information, covering the same period of time, were sent decision notices on the same day, by the same Information Governance Manager, which appear to be at odds with each other'*. The complainant contended that *'this is a remarkable, and quite*

improper, way for Thanet Council and its Information Governance Manager to manage FOI requests. It gives the impression of an authority trying to mislead, confuse and deceive information requesters'.

31. During her investigation, the Commissioner queried the Council as to the apparently inconsistent handling of the separate requests made by the complainant and the third party.
32. In submissions to the Commissioner, the Council explained that the complainant had asked about Ms Homer and Mr Waite giving written notice to the Council (of any alleged personal relationship), the date of such notices and a copy of the same (if held). However, the other individual had requested to view any declarations which Ms Homer and Mr Waite had made in the Register of Staff Declarations of Interest. The Council submitted that the two requests were asking for *'two different things and both answers are correct'*.
33. As a matter of strict interpretation, the Commissioner would accept that the two requests (from the complainant and the third party requester) were asking for different things. The wording of the request made by the third party requester on 9 September 2019 is wider than that of the complainant's request in that *'any declarations Ms Madeline Homer and Mr Gavin Waite may have made in the officers' register of interests since the start of August 2019'* could encompass any kind of interest that would require registration, such as a financial or business interest, and not just a personal relationship interest.
34. By contrast, the complainant's request of 13 July (and repeat request of 3 September) 2019 was more focused and restricted to any written notice that Ms Homer and Mr Waite may have made about their alleged personal relationship. The Commissioner recognises that the third party requester may have had the same information in mind when making his request, but his request as worded was wider in scope.
35. However, given its wide scope, the request from the third party requester would have encompassed any personal relationship between Ms Homer and Mr Waite which required registration with the Council's register of interests, which was the specific focus of the complainant's own request. The Council refers to the *'Register of Staff Declarations of Interest'* but the Commissioner is not aware of how this differs from Paragraph 8.1 of the Code of Conduct, which, at the time in question, was the appropriate provision to declare such a personal interest.
36. Therefore, by stating that they did not hold the information requested by the third party requester, the Council were implicitly confirming that they had not received any declarations from Ms Homer and Mr Waite of any personal relationship (of the nature which would require notification) which existed between them. Assuming that this response

was accurate, it follows that either Ms Homer and Mr Waite were not in such a relationship, or that they were in such a relationship but had failed to notify the Council as required. In either event, the Council's 'not held' response to the third party requester was clearly inconsistent with the NCND response which they provided (on the same day) to the complainant, and undermined the same.

Reasons for decision

Section 40 – Personal data

37. Section 40(5B)(a)(i) of FOIA provides that the duty to confirm or deny whether information is held does not arise if it would contravene any of the principles relating to the processing of personal data set out in Article 5 of the General Data Protection Regulation EU2016/679 (GDPR) to provide that confirmation or denial.
38. Therefore, for the Council to be entitled to rely on section 40(5B) of FOIA to refuse to confirm or deny whether they hold information falling within the scope of the request, the following two criteria must be met:
- Confirming or denying whether the requested information is held would constitute the disclosure of a third party's personal data; and
 - Providing this confirmation or denial would contravene one of the data protection principles.

Would the confirmation or denial that the requested information is held constitute the disclosure of a third party's personal data?

Is it personal data?

39. Section 3(2) of the Data Protection Act 2018 (the DPA 2018) defines personal data as:
- 'any information relating to an identified or identifiable living individual'.*
40. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
41. 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.
42. In submissions to the Commissioner, the Council contended that complying with section 1(1)(a) of FOIA would reveal the personal data of Ms Homer and Mr Waite, ie it would disclose whether they had or had

not provided the Council with notification of any intimate personal relationship which might exist between them.

43. If the Council did not hold any such notifications from Ms Homer and Mr Waite, then confirmation of that fact would reveal that they had not notified the Council of any intimate personal relationship, should such a relationship have existed at the time. Conversely, if the Council did hold any information, then confirmation of that fact would reveal that both individuals were in an intimate personal relationship. In either event, such information clearly relates to Ms Homer and Mr Waite, has biographical significance to them both and is therefore their personal data.
44. The fact that confirming or denying whether the requested information is held would reveal the personal data of Ms Homer and Mr Waite does not automatically prevent the Council from refusing to confirm whether or not they hold the information. The second element of the test is to determine whether such a confirmation or denial would contravene any of the data protection principles.

Would confirmation or denial contravene one of the data protection principles?

45. Article 5(1)(a) GDPR states that:

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

46. 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 – or as in this case the public authority can only confirm whether or not they hold the requested information – if to do so would be lawful (ie, it would meet one of the conditions of lawful processing listed in Article 6(1) GDPR, be fair and be transparent.

Council contention that it is special category data

47. The Council further contended that *'as the request relates to a possible relationship between them, the information is also special category data defined by Article 9(1) of the GDPR'.*
48. The Council contended that *'in disclosing whether or not the Council holds notices in writing about a personal relationship, such disclosure would disclose the nature of the personal relationship and thereby breach Articles 9(1) and 9(2) of the GDPR. Such disclosure would not be lawful or fair under Article 5(1)(a) of the GDPR'.*
49. Information relating to special category data is given special status in the GDPR. In order for disclosure of special category data to be lawful

and compliant with principle (a), it also requires an Article 9 condition for processing.

50. The Commissioner has therefore gone on to consider whether the confirmation or denial that the information is held would involve the disclosure of special category data and if so, whether the Council is correct in their contention that its disclosure would breach Article 9 of the GDPR.

Is the information requested special category data?

51. Special category personal data is defined in Article 9 of the GDPR as:

'Personal data which would reveal racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation'.

52. The recitals to the GDPR explain that these types of personal data merit special protection. This is because use of this data could create significant risks to the individual's fundamental rights and freedoms. For example, the various categories are closely linked with:

- Freedom of thought, conscience and religion;
- Freedom of expression;
- Freedom of assembly and association;
- The right to bodily integrity;
- The right to respect for private and family life; or
- Freedom from discrimination.

53. The presumption is that this type of data needs to be treated with greater care because collecting and using it is more likely to interfere with these fundamental rights or open someone up to discrimination. This is part of the risk-based approach of the GDPR.

54. Having considered the wording of the request the Commissioner finds that confirming or denying whether the requested information is held would involve the disclosure of special category data. She has reached this conclusion for the following reasons.

Complainant arguments that it is not special category data

55. In submissions to the Commissioner the complainant contended that his request was not seeking information which is special category data. He

advised that the purpose of his request was to secure information about whether or not Ms Homer and Mr Waite had provided the Council with a written declaration about having *'a personal relationship which could bring about a conflict with the Authority's interests'*. The complainant contended that his request seeks to discover whether or not the Council hold a declaration affirming whether Ms Homer and Mr Waite have a personal relationship and *'is clearly not a request about whether or not Ms Homer and Mr Waite have a sexual relationship of any kind'*.

56. The complainant contended that a personal relationship could just as easily be a close platonic out of work friendship, as it could be a sexual relationship, and submitted that it would be wrong for an inference to be made that his request *'seeks the disclosure of any information whatsoever about the sex lives of the two individuals'*.
57. The complainant cited The EU General Data Protection Regulation (GDPR) A Commentary (Kuner, Bygrave and Docksey, Oxford 2020) which makes the following observations about Article 9 paragraph 1:
- 'The two categories of data concerning a natural person's sex life or sexual orientation are closely connected but not identical. Sexual orientation refers to information concerning whether, for example, an individual is heterosexual, homosexual, bisexual or some other orientation. Data concerning a person's sex life is to be broadly construed to include not only this but also information about sexual practices (for example, the consumption of pornography), as well as details on marital status and intimate personal details (for example, concerning changing of gender or the use of contraception).'*
58. The complainant contended to the Commissioner that, *'Clearly, when considered within its context, my request did not aim to seek the disclosure of any information which is protected by Article 9 paragraph 1 of GDPR. To claim that it did, is to place too wide an interpretation upon this article, which could damage transparency and accountability'*.
59. The Commissioner is not persuaded by the complainant's contention that the information he requested is not special category data.
60. Paragraph 8.1 of the Council's Code of Conduct, as referenced in the complainant's request, and dealing with Personal Interests, stated that:
- 'Employees must give notice in writing of any financial or **non-financial interests which are clear and substantial and which could bring about a conflict with the Authority's interests** (Commissioner's emboldening). Any change must be similarly notified'*.
61. The Commissioner does not consider that an employee would be required to declare, for example, a platonic friendship with another employee because it would not meet the threshold of a *'clear and*

substantial non-financial interest and one which *'could bring about a conflict with the Authority's interests'*. As the complainant's request only seeks details of any declaration of a personal relationship as required by the Code, then this would seem to refer to a personal/intimate relationship, else there would be no requirement to notify.

62. This is supported by the fact that the complainant could have made his request without any reference to the Code or just asked for any information concerning details of any relationship between Ms Homer and Mr Waite beyond their working relationship as colleagues.
63. The Commissioner also considers that public comments made by the complainant on his blog, clearly show that his request was prompted by his suspicion (well founded or otherwise) that Ms Homer and Mr Waite were involved in an intimate personal relationship. Details of these comments are contained in a Confidential Annex to this notice. Furthermore, in his complaint to the ICO, the complainant referred to rumours that both individuals *'are having an intimate personal relationship'*.

Conclusion that it is special category data

64. For the reasons explained above, the Commissioner accepts and agrees with the Council's contention that the information is special category data. Any relationship between Ms Homer and Mr Waite (should such a relationship exist) would need to be in the nature of an intimate/personal relationship in order to constitute a clear and substantial interest which could bring about a conflict with the Authority's interests and therefore require notification under Paragraph 8.1 of the Council's Code of Conduct.

Is there an Article 9 condition which provides a lawful basis for the disclosure of this special category data?

65. Special category data is particularly sensitive and therefore warrants special protection. It can only be processed, which includes disclosure of the personal data that would occur by confirming or denying whether the requested information is held, if one of the stringent conditions of Article 9 of GDPR can be met.
66. Due to its sensitivity, the conditions for processing special category data are very restrictive and generally concern specific, stated purposes. Consequently, only two are relevant to allow a data controller to lawfully

disclose under the FOIA or Environmental Information Regulations 2004 (EIR)⁸. These are in Article 9(2) of the GDPR:

- Explicit consent; or
 - The processing relates to personal data which has clearly been made public by the individual(s) concerned.
67. Explicit consent requires a record that shows that each of the individuals concerned has explicitly and specifically consented to their data being disclosed to the world in response to an FOI or EIR request. There may be situations in which the individual(s) has deliberately done something which has put their special category personal data into the public domain. An example of this would be the political affiliations of a Member of Parliament. While these constitute special category data as defined in the GDPR, they are clearly a matter of public knowledge. In such cases, this condition is clearly applicable and provides a condition for disclosure.
68. The Commissioner notes that neither of the two aforementioned conditions appear to be present in this case. Neither Ms Homer nor Mr Waite have explicitly consented to their data being disclosed to the world in response to the complainant's request. The Commissioner also understands that neither Ms Homer or Mr Waite have given any public comment as to their alleged relationship.
69. Without a relevant Article 9 condition being met, the Council cannot disclose the special category data, as such disclosure would be unlawful and therefore contravene principle (a) of the GDPR.

Provision that relates to processing of special category data for journalism

70. However in submissions to the Commissioner, the complainant advised that even if the information requested did constitute special category data (which as noted above, he does not agree that it does) he intends to include the information (if disclosed) in an article he will be writing and publishing on his blog. Consequently, the complainant contended that his request fell within the scope of paragraph 13 of Schedule 1 of the DPA 2018.

⁸ <https://ico.org.uk/media/for-organisations/documents/1213/personal-information-section-40-regulation-13.pdf> (page 14)

71. Although not explicitly stated in his submissions, it would appear that the Article 9 condition being relied on by the complainant for processing the special category data is Article 9(2)(g)(reasons of substantial public interest (with a basis in law)). This is because reliance on this condition also requires/is dependent upon one of the 23 specific substantial public interest conditions set out in Part 2 of Schedule 1 of the DPA 2018 being met, and as noted above, the complainant has contended that one of these conditions (journalism etc, in connection with unlawful acts and dishonesty etc) applies in this case.
72. Paragraph 13(1) deals with journalism etc in connection with unlawful acts and dishonesty etc and provides a lawful basis for the disclosure of special category data if certain conditions are met. This condition is met if:
- (a) *The processing consists of the disclosure of personal data for the special purposes;*
 - (b) *It is carried out in connection with a matter described in sub-paragraph (2);*
 - (c) *It is necessary for reasons of substantial public interest;*
 - (d) *It is carried out with a view to the publication of the personal data by any person, and*
 - (e) *The controller reasonably believes that publication of the personal data would be in the public interest.*
73. The complainant has contended that the issue to which the requested information relates raises important issues of 'substantial public interest'. Due to their sensitivity and to protect the confidentiality of those involved, the Commissioner has detailed these issues in a Confidential Annex to this notice.
74. Sub-paragraph (2) states that the matters mentioned in sub-paragraph (1)(b) are any of the following (whether alleged or established) –
- (a) *The commission of an unlawful act by a person*
 - (b) *Dishonesty, malpractice or other seriously improper conduct of a person;*
 - (c) *Unfitness or incompetence of a person;*
 - (d) *Mismanagement in the administration of a body or association;*
 - (e) *A Failure in services provided by a body or association.*

75. Sub-paragraph (3) states that the condition in sub-paragraph (1) is met, *'even if, when the processing is carried out, the controller does not have an appropriate policy document in place'*.
76. The Commissioner acknowledges the argument made by the complainant but a disclosure under FOIA is a disclosure to the world that is applicant and purpose blind. Therefore, it is not possible to rely upon conditions for processing that require the processing to be for a specific person or the recipient to be a particular body or individual. Therefore, the Council could refuse an FOIA request from a journalist under section 40 if they would not be able to disclose the information to other members of the public.
77. As noted above, the only two Article 9 conditions which are relevant to allow a data controller to lawfully disclose special category data under the FOIA or EIR are those contained in Article 9(2) – explicit consent or the processing relates to personal data which has clearly been made public by the individuals concerned. Since the Council cannot satisfy either of these two conditions in this case, they are not required to confirm or deny whether they hold the requested information to the complainant, as such confirmation or denial would be unlawful and contravene principle (a) (lawful, fair and transparent processing) of the GDPR.
78. The above being the case, the Commissioner considers that the Council were correct to refuse the complainant's request on the basis of section 40(5B) of FOIA. Having reached this decision, the Commissioner has not gone on to consider the Council's application of section 41(2).

Right of appeal

79. 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
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

80. 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.

81. 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

**Gerrard Tracey
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SK9 5AF**