

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

### **Decision notice**

**Date:** 18 April 2024

**Public Authority:** Devon County Council  
**Address:** County Hall  
Topsham Road  
Exeter  
Devon  
EX2 4QJ

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

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1. The complainant has requested a copy of an apology letter issued by a councillor to an officer of the council. The council relied on section 40(2) of FOIA (third party personal information) to withhold the information.
2. The Commissioner's decision is that the public authority has correctly relied on section 40(2) of FOIA to withhold the information.
3. The Commissioner does not require further steps to be taken.

## Request and response

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4. On 26 May 2023, the complainant wrote to the public authority and requested information in the following terms:

“Please supply copies of all the recorded information you hold concerning the sanctions agreed by Devon County Council Standards Committee in relation to item 39 in the minutes which record the proceedings of this committee on 16 March 2023 as per the item details published at...

<https://democracy.devon.gov.uk/mgAi.aspx?ID=34039>.

For the avoidance of doubt I expect this to include information related to:

- the formal apology that the subject member was required to issue to Devon County Council as a result of this resolution
- the relevant training arranged and/or provided to the subject member as a result of this resolution
- the changes made to the subject member's register of interests as a result of this resolution.

Please also supply copies of all the recorded information you hold concerning the decision not to publish the minutes of this meeting until 9 May 2023, nearly eight weeks after it took place.”

5. Following the council’s response, and an internal review, the only remaining information in question in this case is the council’s reliance upon section 40(2) to withhold a copy of the formal apology letter requested by the complainant.

## Scope of the case

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6. The complainant contacted the Commissioner on 26 September 2023 to complain about the way their request for information had been handled.
7. The Commissioner confirmed with the complainant that that the scope of his investigation is solely to establish whether the public authority is entitled to withhold a copy of the formal apology letter under section 40(2) of FOIA.

## Reasons for decision

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### Section 40 - personal information

8. Section 40(2) of FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
9. In this case the relevant condition is contained in section 40(3A)(a). This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the UK General Data Protection Regulation ('UK GDPR').
10. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of FOIA cannot apply.
11. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

### Is the information personal data?

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

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

13. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
14. 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.
15. 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.
16. In the circumstances of this case, the Commissioner is satisfied that the withheld information is personal data relating to the councillor concerned. It is a letter sent by the councillor apologising for personal actions found to have breached the councillor's code of conduct. The information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.

17. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
18. The most relevant DP principle in this case is principle (a).

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

19. 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.”

20. 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.
21. 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**

22. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

“processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child”<sup>1</sup>.

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<sup>1</sup> Article 6(1) goes on to state that:-

“Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks”.

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:-

“In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the 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”.

23. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under FOIA, it is necessary to consider the following three-part test:-
- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
  - ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
  - iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
24. 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**

25. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case specific interests.
26. 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.
27. The Commissioner is satisfied that the public has a legitimate interest in the information being disclosed. The apology letter is a sanction imposed due to a code of conduct complaint about the councillor which was upheld by the council. Details of the code of conduct decision have been published online by the council.
28. As the decision relates to an elected member of the council, the public has a legitimate interest in knowing more about the councillor's response to the decision that they had failed to comply with the code of conduct. Electors are then able to take this information into account when voting in the future.

### **Is disclosure necessary?**

29. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under

FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.

30. The council argued that it is not necessary for the letter to be disclosed. It said that the decision that the councillor's actions amounted to a breach of the code of conduct has already been published by it, as has the sanctions applied as a result. It is therefore already publicly known that an apology letter was sent. It argues, therefore, that it has already been transparent about the situation and the result of the standards complaint, and therefore it is not necessary to disclose a copy of a personal apology letter as the legitimate interests which have been identified have already been met.
31. The Commissioner considers that the publication of the decision, and the confirmation that an apology letter was sent does largely meet the legitimate interests identified. Nevertheless, a disclosure of the apology letter itself would be needed in order to fully meet those interests.
32. The Commissioner is therefore satisfied that there are no less intrusive means of fully achieving the legitimate aims identified.

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

33. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
34. 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.
35. 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. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.

36. The findings of the code of conduct committee, and the fact that an apology letter was required and sent have been made public by the council. Nevertheless, the Commissioner accepts that a disclosure of the information would be likely to cause distress to the councillor. It was written in a personal capacity, and under the circumstances, would be likely to revive interest in an issue which the councillor would consider complete with the issue of the apology letter.
37. The council also argued that the apology letter is not a public matter and that it was not issued to council as a whole. It said that it was a direct apology with no intention that the document would be circulated wider than the Head of Legal Services.
38. The Commissioner notes and accepts that the apology letter was written on a personal basis, (i.e., it was not written on behalf of the council). However, he considers that it was written in order to comply with the code of conduct committee's sanctions. The sanction was that the councillor should issue *a formal apology to the council*. The Commissioner therefore considers that the heart of the issue involved professional purposes – an apology letter required of the councillor in relation to a code of conduct breach which occurred as a result of the councillor's actions whilst in post.
39. Nevertheless, a code of conduct complaint encompasses personal issues and it is therefore also a personal matter to the councillor concerned. The Commissioner therefore accepts that the councillor would have no expectation that the letter would subsequently be disclosed in response to an FOI request.
40. The Commissioner notes that the Local Government Association guidance relating to the publicising of code of conduct decisions provides that:

“If the panel finds that a councillor failed to follow the Code and it imposed a sanction, the public summary should:

- say that the councillor failed to follow the Code;
- outline what happened;
- explain what sanction has been imposed;
- give reasons for the decision made by the panel.

The panel's reports and minutes should be available for public inspection in the same way as other local authority committee papers."

41. The Commissioner considers that this would create a level of expectation on the information which would be disclosed which would not include the publication of a letter of apology written as a result of sanctions imposed.
42. The level of expectation as regards disclosure would also be set by previous code of conduct proceedings at the council, and the level of publication of complaint and decision details following these. The council has indicated that, where a complaint has been received and there is a finding of a breach of the code of conduct, this is generally published by it. The councillor would not therefore expect that their subsequent apology letter would be disclosed in response to an FOI request when this is not what would occur generally. The Commissioner also notes that the imposed sanction required only that an apology be sent to the council, not that it be published.
43. The Commissioner has also considered what additional information would be disclosed which would meet the legitimate interests identified given that details of the decision and the sanctions have already been disclosed. The Commissioner is satisfied that a disclosure of the withheld information would provide little further information necessary to meet the legitimate interests identified.

#### The Commissioner's conclusions

44. 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.
45. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that he does not need to go on to separately consider whether disclosure would be fair or transparent.
46. The Commissioner's decision is therefore that the council was correct to withhold the information under section 40(2) of FOIA.



## Right of appeal

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

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

Tel: 0203 936 8963

Fax: 0870 739 5836

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

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

48. 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.
49. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Ian Walley**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
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**Wilmslow**  
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**SK9 5AF**