

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

### **Decision notice**

**Date:** 28 February 2023

**Public Authority:** Thanet District Council  
**Address:** Cecil Street  
Margate  
Kent  
CT9 1XZ

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

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1. The complainant requested a specified report from Thanet District Council (the 'Council') by the Independent Monitoring Officer. The Council ultimately refused to provide the full report (a summary version having already been released on its website) citing section 40(2) of FOIA (the exemption for personal information).
2. The Commissioner's decision is that the Council was entitled to withhold the full report by virtue of section 40(2) of FOIA.
3. No steps are required as a result of this notice.

#### **Request and response**

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4. On 24 April 2022, the complainant wrote to the Council and requested information in the following terms:

"Please provide me with a full unredacted copy of the REPORT FROM THE INDEPENDENT MONITORING OFFICER which will be discussed at a meeting of TDC's [the Council's] General Purposes Committee on 27 April 2022.

It is my opinion that the public interest in the disclosure of the full unredacted version of this report far outweighs the public interest in its non-disclosure."

5. The Council responded on 23 May 2022. It refused to provide the requested report citing section 44(1) of FOIA (the exemption for

prohibitions on disclosure). The Council said that the applicable statutory bar is that as set out in Paragraph 1 of Schedule 12A Part 1 of the Local Government Act 1972 (which is 'Information relating to any individual').

6. The complainant requested an internal review on 24 May 2022. He argued that section 44(1) could not be applied referencing certain paragraphs both in the Commissioner's guidance on this exemption<sup>1</sup> and within a previously issued decision notice<sup>2</sup>.
7. Following its internal review the Council wrote to the complainant on 9 June 2022. It agreed with the complainant's view and revised its position. It now stated that section 40(2) (personal information) of FOIA applied to the withheld report.

### **Scope of the case**

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8. The complainant contacted the Commissioner on 5 October 2022 to complain about the way his request for information had been handled. Although the Commissioner normally only accepts FOIA complaints submitted within three months of date of the last correspondence, the complainant submitted personal grounds for the delay in this case. The Commissioner has exercised his discretion and accepted this complaint.
9. The complainant submitted detailed grounds of complaint which include his arguments as to why the withheld report should be disclosed. The Commissioner has considered the complainant's submissions, as well as those of the Council.
10. From both parties' submissions, the Commissioner understands that the decision to commission an Independent Monitoring Officer ('IMO') in December 2021 to produce the report referenced in the request resulted from statutory recommendations set out to the Council in a report from its external auditors.
11. The IMO focused on the areas of concern raised within the auditor's report to understand what happened and why. He also worked to support the resolution of outstanding grievances to ensure these

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<sup>1</sup> <https://ico.org.uk/media/for-organisations/documents/2021/2619033/s44-prohibitions-on-disclosure.pdf>

<sup>2</sup> [https://ico.org.uk/media/action-weve-taken/decision-notices/2014/970282/fs\\_50517099.pdf](https://ico.org.uk/media/action-weve-taken/decision-notices/2014/970282/fs_50517099.pdf)

matters were concluded. To assist with this process, the IMO spoke with a number of councillors, officers, external partners and external lawyers, and reviewed documentation.

12. The IMO's review and his full report was shared with councillors on 19 May 2022. The Council has explained that the full report is so sensitive that in the Council meetings to discuss it, Paragraph 1 of Schedule 12A Part 1 of the Local Government Act 1972 was enabled which withholds information from the general public. In those meetings, members of the Council voted to exclude the press and public from the meeting in order to deal with complex employment matters in confidential session.
13. The Council also said that the full report was never intended for publication or to have a wide readership, in or outside of the Council, and that circulation has been limited to only those councillors on the relevant committees and to certain senior Council officers. The Council provided the Commissioner with a list of those individuals in receipt of the full version of the report.
14. Further information and the public summary version of the IMO's report<sup>3</sup> was published on the Council's website, including the IMO's recommendations.
15. The Commissioner has determined whether the Council was entitled to rely on section 40(2) of FOIA to withhold the full version of the requested report. He has reviewed both the published summary and the full version of the report.

## **Reasons for decision**

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### **Section 40 personal information**

16. 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.
  17. In this case the relevant condition is contained in section 40(3A)(a)<sup>4</sup>. This applies where the disclosure of the information to any member of
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<sup>3</sup> <https://www.thanet.gov.uk/councillors-approve-independent-monitoring-officers-recommendations/>

<sup>4</sup> As amended by Schedule 19 Paragraph 58(3) DPA.

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').

18. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of FOIA cannot apply.
19. 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?**

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

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

21. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
22. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
23. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
24. In the circumstances of this case, having considered the withheld information within the full report, the Commissioner is satisfied that the information relates to either current or former employees of the Council or third parties. He is satisfied that this information both relates to and identifies those individuals concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
25. 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.
26. The most relevant DP principle in this case is principle (a).

## Would disclosure contravene principle (a)?

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

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

28. 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.

29. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.

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

30. Article 6(1) of the UK 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.

31. 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>5</sup>.”

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<sup>5</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 and by Schedule 3, Part 2, paragraph 20 the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019) provides that:-

“In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK 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”.

32. In considering the application of Article 6(1)(f) of the UK 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.
33. 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

34. 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.
35. In this case, the Council recognised that there is a legitimate interest in the disclosure of the full report. It said:
- "The Council recognises that there is a legitimate interest in the conduct of its staff, particularly at its most senior level where there has been particular interest due to the excessive costs triggered by the historical disagreements amongst most senior four staff. Disclosure of such information supports transparency and accountability and enables the public to hold highly paid senior officers to account for their conduct in office and question the diversion of public money to deal with costly and drawn out employment disputes that could have been avoided if individuals conducted themselves appropriately."
36. The complainant submitted a number of legitimate interest arguments which included detecting or exposing crime or the threat of crime, disclosing a person or organisation's failure or likely failure to comply

with any obligation to which they are subject, raising or contributing to a matter of public debate, including serious cases of impropriety, unethical conduct or incompetence concerning the public.

37. The Commissioner accepts that there are a number of legitimate interests in disclosure of the requested information.

Is disclosure necessary?

38. '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.
39. The Commissioner has taken both parties' submissions into account. Having also reviewed the content of the full unredacted full report, he considers that the published summary version and accompanying recommendations suffice to meet the legitimate interests in this case. His view is that providing the requested report in a full and unredacted format would grossly exceed the purpose limitation principle (UK GDPR, Article 5(1)(b)) - the purpose is to hold senior staff in public office to account. The Commissioner considers that publishing the full unredacted report would not be necessary to fulfil that aim. Disclosure of all the personal data requested - pertaining both to former and current officers of the Council - goes beyond what is necessary for any public interest argument.
40. As the Commissioner has decided in this case that disclosure is not necessary to meet the legitimate interest in disclosure, he has not gone on to conduct the balancing test. As disclosure is not necessary, there is no lawful basis for this processing and it is unlawful. It therefore does not meet the requirements of principle (a).

**The Commissioner's view/conclusion**

41. 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).

## Right of appeal

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42. 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)

43. 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.
44. 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 .....**

**Laura Tomkinson**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**