

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

### **Decision notice**

**Date:** 19 November 2020

**Public Authority:** Wirral Council  
**Address:** Town Hall  
Brighton Street  
Wallasey  
Wirral  
Merseyside  
CH44 8ED

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

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1. The complainant has requested copies of any emails which relate to an incident which occurred at Seacombe Birthing Centre in 2018. The council provided some information however it withheld other information on the basis that section 40(2), and section 36 of the Act applied.
2. The Commissioner's decision is that the council was correct to withhold the information under section 36(2)(b)(ii) and section 40(2). She has however decided that the council did not comply with the requirements of section 10(1).
3. The Commissioner does not require the council to take any steps.

## Request and response

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4. On 13 August 2019, the complainant wrote to the council and requested information in the following terms:

*"I request copies of all emails from March 2018 (7th March to 31st March) sent and received by Council employees and Councillors regarding the Open Day held at the prospective Seacombe birthing centre on 7th March 2018 in particular relating to a visit of four people from a health campaigns group referred to as either Save our NHS or Defend our NHS. The staff and Councillors should include [name redacted], [name redacted], Cllr [name redacted], Cllr [name redacted], Cllr [name redacted], Cllr [name redacted], Cllr [name redacted] and Cllr [name redacted].*

*Any other information=The four people who attended the Open Day were alleged to have behaved inappropriately towards staff at the centre."*

5. On 9 September 2019 the council wrote to the complainant and stated that it needed further time to consider the request. It said that it would therefore respond by 25 September 2019.
6. The complainant wrote to the council again on 8 October 2019 asking the council to respond as per the requirements of the Act.
7. The council subsequently responded on 5 November 2019. It provided some information, however it withheld other information on the basis that section 40(2) (personal data of a third party), and section 36(2)(b) (prejudice to the effective conduct of public affairs) applied.
8. On 1 January 2020 the complainant wrote to the council and asked it to carry out an internal review. He highlighted that some documents were missing, and that he disagreed with the redactions of the names of some officers.
9. Following its internal review, the council wrote to the complainant on 17 January 2020. It maintained its decision that sections 36(2)(b) and section 40(2) applied to withhold the information.

## Scope of the case

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10. The complainant initially contacted the Commissioner 18 October 2019 to complain about the way his request for information had been

handled. His complaint initially related to the council's failure to respond to his request for information.

11. Following the review of 17 January 2020, the complainant confirmed that he remained unhappy at the council's application of the exemptions to withhold the requested information from him. He did however clarify that he considered that the council was correct to withhold the names of council staff under section 40(2) but considered that the names of elected officials (i.e., the councillors) should be disclosed.
12. The Commissioner considers therefore that the complaint is whether the council was correct to withhold the requested information under section 40(2) and section 36.

## **Reasons for decision**

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### **Background information**

13. The issue relates to an open event regarding Seacombe Birthing Centre. Four individuals representing the group Defend Our NHS attended and asked questions of the representatives of the council and Wirral University Teaching Hospital (WUTH). Allegations were subsequently made that the four acted inappropriately, which the group stridently deny. A subsequent letter was sent by the group to both the Trust and the council requiring that an apology was issued for the allegations.
14. The complainant attended the open event and is identified in some of the withheld information. To some degree, therefore, some of the withheld information relates to, and is personal data relating to him.
15. The complainant has obtained some of the withheld information from a similar request which he made to the WUTH.

### **Section 36(2) – prejudice to the effective conduct of public affairs**

16. The council applied section 36(2)(b)(i) and (ii) to withhold the information. Section 36(2) provides that –

*'Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act –*

*(b) would, or would be likely to, inhibit –*

*(i) the free and frank provision of advice, or*

*(ii) the free and frank exchange of views for the purposes of*

*deliberation, or...'*

17. Section 36 can only be engaged if, in the reasonable opinion of the qualified person, disclosure would result in any of the effects set out in section 36(2) of the Act.
18. The council clarified that the qualified person in the council is the Director of Governance and Assurance, who is also the council's Monitoring Officer. He is the qualified person under the provisions of section 36(5)(o) of the FOI Act: *any officer or employee of the public authority who is authorised for the purposes of this section by a Minister of the Crown.*
19. The council provided evidence that the qualified person's opinion was sought on 18 October 2019, that he had given his opinion following the withheld information being described to him. The qualified person provided his opinion on 24 October 2019.
20. The Commissioner is therefore satisfied that the qualified person's opinion was properly sought and obtained for the purposes of the application of section 36.
21. The next step in determining whether the exemption is engaged is to consider whether the opinion of the qualified person is reasonable. The Commissioner's guidance explains that the opinion does not have to be one which the Commissioner would agree with, nor the most reasonable opinion that could be held. The opinion must be in accordance with reason and not irrational or absurd.
22. The Commissioner would emphasise that section 36 is concerned with the processes that may be inhibited by disclosure of information, rather than what is in the information itself. The issue is whether disclosure of the information would inhibit the processes of providing advice or exchanging views (section 36(2)(b)) or would otherwise prejudice the effective conduct of public affairs (section 36(2)(c)).
23. In *Information Commissioner v Malnick and ACOBA [2018] UKUT 72 (AAC), the Upper Tribunal (UT)* found that the First Tier Tribunal (FTT), in finding that section 36 was not engaged in EA/2016/0055, had erred in law by taking into account matters of public interest when deciding whether an opinion of the qualified person was reasonable for the purpose of section 36(2), which is concerned with substantive but not procedural reasonableness. The decision on the issue of reasonableness cannot therefore take any wider public interest factors into account.
24. The qualified person provided reasons why he considers that the exemption applies. The withheld correspondence can broadly be

described as councillors and senior council officials discussing the situation and how best to address it.

25. The opinion relates to the council's ability to manage its affairs, discuss policy, and deliberate on issues within a safe space, away from the public eye. These issues fall squarely within the remit of the exemption in section 36(2)(b)(ii) of the Act.
26. The Commissioner is satisfied that the application of the exemption clearly meets the intentions behind section 36(2)(b) and in particular, protecting the ability of councillors and senior staff to debate, discuss and deliberate an issue in a free and frank way. She accepts that it is reasonable for the qualified person to consider that there was a need for a safe space to deliberate upon the issues as they developed. She also accepts that the correspondence retained its sensitivity even at the time that the request was received.
27. Having reviewed the withheld information the Commissioner is therefore satisfied that it was reasonable for the qualified person to conclude that section 36(2)(b)(ii) applied to it.
28. As a qualified exemption, section 36 is subject to a public interest test. Having accepted the opinion of the qualified person as reasonable, the Commissioner must consider whether the public interest in maintaining the exemptions claimed outweighs the public interest in the information being disclosed.

### **The Public Interest**

#### The public interest in the disclosure of the information

29. The Commissioner has considered the public interest in the information being disclosed. She notes the situation outlined by the complainant and within the withheld information. She notes also that the complainant has some of the redacted documents in an unredacted form, which he obtained from the Trust.
30. The complainant has outlined his consideration of the issues; however, these relate primarily to his private interests, and those of the other individuals in the group which attended the open event.
31. The complainant, and the other individuals concerned have rights to request information relating to them personally under the Data Protection Act 2018. A disclosure under the DPA is to the individual concerned. Under the FOI Act disclosures are considered to be to the whole world.

32. The Commissioner does not consider that the complainant's arguments give rise to any particularly strong wider public interest arguments towards the disclosure of the information.
33. She considers the main public interest in the disclosure of the would be to create greater transparency over how councillors and council officials discussed and reacted to a situation and to the correspondence received following the incident. The Commissioner believes, however, that that the public interest in disclosure is very limited under the circumstances.

The public interest in the exception being maintained

34. The central argument surrounding the application of section 36 in this instance relates to the protection of the council's ability to have full and frank discussions within a 'safe space'.
35. The information does not particularly address or analyse the issue of the birthing centre itself but revolves purely around the issue with at the open event, and the subsequent correspondence from the group 'Defend our NHS', following it. It does contain a small amount of information which is the council's stance on the birthing centre however this is its standard viewpoint on the introduction of the centre and is already well known.
36. The initial correspondence relates to the issue of the visit to the open day regarding the birthing centre, and there is subsequent correspondence relating to a letter received from the group.
37. The council required the safe space in order to protect its ability to discuss a sensitive situation, which may also have had a political impact if mishandled. There is a clear and strong public interest in allowing the council to deliberate over the actions it took and the responses it provided regarding the issue.
38. The Commissioner accepts that the information retains its sensitivity even a number of years after the discussion took place.
39. As an aside, the Commissioner notes that where councillors are acting in their political capacity rather than in their role acting on behalf of the council, such information falls outside of the scope of the FOI Act, even where council email systems are used to facilitate and administer email discussions<sup>1</sup>. Therefore, only information held as 'council information'

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<sup>1</sup> [https://ico.org.uk/media/for-organisations/documents/1148/information\\_held\\_by\\_a\\_public\\_authority\\_for\\_purposes\\_of\\_foia.pdf](https://ico.org.uk/media/for-organisations/documents/1148/information_held_by_a_public_authority_for_purposes_of_foia.pdf)

will fall within the scope of FOI Requests. There are elements of this type of information within the withheld information, however given that the Commissioner has accepted that the exemption was applied correctly she does not need to consider this point further in this decision notice.

### The Commissioner's conclusions

40. In reaching her decision, the Commissioner has taken into account the Nolan Principles<sup>2</sup> and how these will generally temper the expectations of privacy for councillors when acting in their public capacity. Even when taking into account these principles, the ability of councillors and senior staff to have free, full and frank discussions in order to reach a view is an important aspect of council work. The information in question related to sensitive issues, and a disclosure of the information, even a number of years later, would potentially curtail councillors and senior staff's confidence that they could discuss sensitive matters in a free and frank way. The Commissioner therefore accepts the council's argument that its ability to freely discuss and deliberate sensitive matters would be affected in the future by the disclosure of the withheld information in this case.
41. Having considered the withheld information, together with all of the arguments submitted by the complainant and the council, the Commissioner's decision is that public interest rests in the exemption being maintained.
42. The Commissioner's decision is therefore that the council was correct to rely upon section 36(2)(b)(ii) to withhold the information.

### **Section 40(1) – personal data of the applicant**

43. Section 40(1) of FOIA provides that:

*"Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject."*

44. As noted above, the Commissioner accepts that some of the information relates to the complainant and is personal data relating to him.
45. Where the information is personal data relating to the complainant the information is also exempt under section 40(1) of the Act. However, the

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<sup>2</sup> <https://www.gov.uk/government/publications/the-7-principles-of-public-life>

council should also have considered the request under the complainant's rights under the Data Protection Act 2018.

46. The Commissioner has not however considered this further within this decision notice.

### **Section 40(2) - personal data relating to third parties**

47. 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.
48. 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').
49. 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.
50. 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?***

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

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

52. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
53. 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.

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



54. 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.
55. The council has highlighted the information which it has redacted as personal data from the information. It contains the identifies of officers, councillors and third parties which are identifiable from the information, and from the context within which the information is held. It also contains the identity of the requestor, as noted above.
56. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to these individuals. She is satisfied that this 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.
57. 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.
58. The most relevant DP principle in this case is principle (a).

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

59. 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".*

60. 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.
61. 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.
62. In addition, if the requested data is special category data, in order for disclosure to be lawful and compliant with principle (a), it also requires an Article 9 condition for processing.

***Is the information special category data?***

63. Information relating to special category data is given special status in the GDPR.
64. Article 9 of the GDPR defines 'special category' as being personal data which reveals racial, political, religious or philosophical beliefs, or trade union membership, and the 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.

65. Having considered the wording of the request, and viewed the withheld information, the Commissioner finds that the requested information does include special category data. She has reached this conclusion on the basis that some of the information contains political viewpoints of identifiable individuals, and in one instance, it contains reference to health information. The Commissioner notes that due to the terms of the request, the vast majority of the withheld personal data actually falls within the definition of special category data, (as it contains political views of individuals).
66. Special category data is particularly sensitive and therefore warrants special protection. As stated above, it can only be processed, which includes disclosure in response to an information request, if one of the stringent conditions of Article 9 can be met.
67. The Commissioner considers that the only conditions that could be relevant to a disclosure under the FOIA are conditions (a) (explicit consent from the data subject) or (e) (data made manifestly public by the data subject) in Article 9.
68. The Commissioner has seen no evidence or indication that the individuals concerned have specifically consented to this data being disclosed to the world in response to the FOIA request or that they have deliberately made this data public. The council argued that it considered that the nature of the political opinion set out in the information is such that it would not otherwise have been made manifestly public by the data subjects. Whilst Commissioner accepts that whilst the general political viewpoints of councillors may be known, and that these are likely to have been made public by the individuals concerned, the specifics of their views on this issue have not been manifestly made public.
69. As none of the conditions required for processing special category data are satisfied there is no legal basis for its disclosure. Processing this special category data would therefore breach principle (a) and so this information is exempt under section 40(2) of the FOIA.

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

70. 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.

71. 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>.

72. 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.

73. 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*

74. 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)

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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".*

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.

75. The complainant explained that he accepts that it was correct for the council to redact information relating to officers and other third parties from the requested information. He believes, however, that information relating to the councillors should be disclosed. He considers that the allegations were made against him and the other members of the party and they should therefore have a right to know what the discussions entailed. He said that he wishes to ensure that the views expressed were based on accurate information, especially when they relate to him personally. He argued that: *"I believe I am entitled to know what information and views about me have been shared and should be able to check that this information is correct"*.
76. He considers that councillors, as elected individuals should have a greater expectation of transparency about their actions as elected individuals.
77. The council considers that there are no legitimate interests in the information being disclosed.
78. The Commissioner notes that the public's legitimate interest in having access to the information is limited. She accepts that the complainant and the others in this group do have a legitimate interest in the disclosure of the information in that the discussions largely surround the reaction to their visit to the birthing centre and the subsequent reports that they acted inappropriately. Nevertheless, she recognises that the complainant is largely pursuing a purely private concern, unrelated to any broader public interest, and that he already has a right to request any personal data relating to him under the DPA.

#### *Is disclosure necessary?*

79. '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.
80. The council argues that it cannot be considered necessary to disclose the information in order to meet any legitimate interest as there are no legitimate interests which it is necessary to meet.

81. The Commissioner has considered the information remaining following her decisions that the exception in section 36 applies, and that the majority of information withheld under section 40(2) falls within the definition of special category data and is exempt as none of the conditions in Art 9 of the GDPR can be met.
82. The Commissioner notes the legitimate interests which the complainant has identified and considers that any information which would meet those legitimate interests has already been excluded via the exemptions above. Additionally, in light of the complainant's statement that he does not consider that council officials personal data should be disclosed, she considers that this greatly reduces the remaining information under consideration.
83. The Commissioner therefore considers that a disclosure of this information is not necessary as disclosing the remaining information still fail to meet the legitimate interests which the complainant identified he was concerned with.
84. As the Commissioner has decided in this case that disclosure is not necessary to meet the legitimate interest in disclosure, she 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*

85. 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).

**Section 10(1)**

86. Section 10(1) provides that –

*"Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."*

87. The complainant made his request for information on 13 August 2019.
88. The council informed the complainant that it would require additional time to respond to his request on 9 September 2019, stating that it would require until 25 September 2019 to do this. This notification falls within the period required by 10(3).
89. Section 10(3) states that

*"(3) If, and to the extent that—*

*(a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or*

*(b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied,*

*the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given."*

90. The question for the Commissioner is therefore whether it was reasonable for the council to then issue its response on 5 November 2019.
91. Having considered the circumstances of the case, the Commissioner considers that there were no reasonable grounds for a delay of this length to occur before the council met its obligations under section 1 of the Act.
92. The council estimated that it would be able to reach its decision by 25 September 2019, yet took a further 6 weeks beyond this date to issue its response. It did not provide a further explanation to the complainant for its reasons for taking the additional time.
93. The Commissioner's decision is therefore that the council did not meet the requirements of section 10(1).

## Right of appeal

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94. 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)

95. 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.

96. 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**