

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: **2 September 2022**

Public Authority: **Liverpool City Council**

Address: **Municipal Buildings**

Dale Street

Liverpool

L69 2DH

Decision (including any steps ordered)

1. The complainant has requested information on an audit report commissioned by Liverpool City Council ('the Council').
2. The Commissioner's decision is that the Council is not entitled to rely on the exemption at section 36(2)(b)(i) – disclosure would, or would be likely to, inhibit the free and frank provision of advice. The Commissioner finds the exemptions at section 36(2)(b)(ii) – disclosure would or would be likely to, inhibit the free and frank exchange of views for the purposes of deliberation – and section 36(2)(c) – disclosure would otherwise prejudice, or be likely otherwise to prejudice, the effective conduct of public affairs – to be engaged. However, the public interest favours disclosure. In addition the Commissioner's decision is that the Council has failed to demonstrate that the exemption at section 40(2) is engaged with regard to the named references contained in the reports with respect to senior staff and a third party. He finds that the Council has correctly relied on section 40(2) to withhold names of more junior staff and other third parties.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the two reports subject to the section 40(2) redactions set out in in the confidential annex.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court

pursuant to section 54 of FOIA and may be dealt with as a contempt of court.

Background

5. The Beautiful Ideas Company¹ was set up by local business people and registered with Companies House as a Community Interest Company (CIC) on 18 July 2014. A CIC is a limited company formed with the intention to use its profits and assets for the benefit of the community rather than generating profits for shareholders. CICs, by virtue of being limited companies, have their own articles of association, their own individual accounts and a Board of Directors.
6. The Council explained to the Commissioner that its Internal Audit Service conducts audits of internal services within the Council and, in addition, of organisations who are in receipt of public funding or grant awards allocated by the Council as part of the conditions for grant monitoring and assuring compliance.
7. The Council confirmed that the Beautiful Ideas Company is separate to - and independent of - the Council. It explained that the Council's Cabinet in 2015 addressed governance and audit oversight, specifically:

"The City Council will audit the Car Park Income and will approve the governance arrangements associated with the administration of the surplus income provided by the City Council for the Beautiful Ideas Company (North) Community Interest Company ensuring that there is sufficient probity and governance around this use of public money and ensuring that the Company has satisfied itself and therefore the City Council that there are no State Aid issues associated with its use."

¹ The Beautiful Ideas Company can be described as a regeneration Community Interest Company that supports and promotes social innovation, entrepreneurship and economic growth, primarily in North Liverpool. It was born out of the Beautiful North and is a partnership between the public and private sector with its mission to facilitate a future generation of ventures that support job creation, innovation and local regeneration.

Request and response

8. On 23 January 2021, the complainant wrote to the Council and requested information in the following terms:
- “Liverpool City Council commissioned a report into the activities grants and donations made by the Beautiful Ideas Company (North)
- 1/ Please supply a copy of the Report prepared by the internal auditor.
- 2/ Who commissioned the Report?
- 3/ Who considered the Report?
- 4/ Were all those who read the report asked to sign a non-disclosure document or similar gagging instrument?
- 5/ What actions were taken following delivery of the Report?
- 6/ Under what authority was the Report kept secret?”
9. The Council responded on 12 March 2021 with a refusal notice in reliance of section 33(2) - Audit functions and section 40(2) - Personal information.
10. The complainant wrote to the Council on 13 March 2021 questioning the Council's reliance on section 33(2). Following an internal review the Council wrote to the complainant on 15 April 2021. It apologised for its reliance on section 33(2) and revised its response to rely on section 36(2)(b)(i) and (ii) and (c) - Prejudice to effective conduct of public affairs, alongside section 40(2).

Scope of the case

11. The complainant contacted the Commissioner 4 May 2021 to complain about the way their request for information had been handled. They explained his concerns about the Council not disclosing two reports “which were carried out following allegations that more than a million pounds in cash was missing and unaccounted for.”
12. In requesting an internal review the complainant set out their concerns. They explained:
- “The purpose of this request is to establish what Liverpool City Council did in relation to repeated requests to investigate what happened to

an estimated £1.4million pounds in match day car park money. This money was supposed to be managed and accounted for by Liverpool City Council through the Beautiful Ideas Company. Initially, despite taking thousands in ten pound notes each game, the Beautiful Ideas Company had no bank account and the money, collected on behalf of LCC via the Company they had established and with Councillors as Directors, was taken away at the end of games to be counted by private individuals. This money was intended for good causes in the area to promote employment and regeneration.”

13. The Commissioner notes that the Council did not provide any information in response to any of the points of the request. However, the complainant, in their correspondence with the Commissioner, focusses on 'two reports'. The Commissioner has therefore likewise focussed the scope of his investigation on the 'two reports'. In providing the withheld information to the Commissioner the Council provided two reports "Internal Audit, Anfield Car Park, 27 July 2015" and "Internal Audit, Beautiful Ideas Company 2018/19, June 2019" which are linked reports which the Commissioner accepts as relevant to point 1 of the request.
14. The Commissioner considers the scope of his investigation to be the Council's application of the section 36(2) and section 40(2) exemptions to withhold the above reports.

Reasons for decision

15. Section 36(2) of FOIA states:

“(2) 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,

(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.”

16. Unlike other exemptions in FOIA, an exemption in section 36(2) can only be applied where a public authority has consulted with a qualified person, as defined in the legislation, and it is the qualified person's

opinion that the harm stated in the exemption would, or would be likely to, arise through disclosure of the requested information.

17. To find that any limb of section 36(2) is engaged, the Commissioner must be satisfied not only that a qualified person gave an opinion on the likelihood of the prejudice cited in the exemption occurring but also that the opinion was reasonable in the circumstances. This means that the qualified person must have reasonably concluded that there is a link between disclosure and a real and significant risk of the prejudice that the relevant exemption is designed to protect against. A public authority may rely on more than one exemption in section 36(2) as long as the qualified person has offered a view on each of the exemptions cited and the arguments advanced correspond with the particular exemption.
18. The Council advised the Commissioner that the qualified person in this instance was the City Solicitor and Monitoring Officer in post at the time of the request. The Commissioner notes that at the time of his investigation this officer had stood down but was consulted in the preparation of submissions to the Commissioner. The Council advised that the current City Solicitor and Monitoring Officer was also consulted on those submissions.
19. The Commissioner is satisfied that, as the Monitoring Officer, the person consulted about the request meets the definition of a qualified person set out by section 36(5) of FOIA.
20. The Council advised the Commissioner that the qualified person's opinion was sought and obtained at the time of the internal review. At that time they were provided with full, unredacted copies of the two interlinked audit reports in the scope of the request. The qualified person discussed the request with the Head of Internal Audit, a Lead Internal Audit Officer and the Information Manager.
21. The Council has not provided the Commissioner with any written submissions presented to and issued by the qualified person and he must therefore conclude that the qualified person's opinion was contained in verbal discussion. The Council states:

"These discussions included an exploration of factors for and against disclosure which would subsequently form the basis of a public interest review."
22. When asked to clarify which limbs of section 36(2) the qualified person considered to be engaged the Council advised the Commissioner as follows:

"The Council in our revised response to the requestor applied s.36(2)(b)(i) and (ii) and conducted a specific review of public interest factors engaged with this exemption.

The Council further considered whether an exemption was engaged under s.36(2)(c) specifically prejudice to the effective conduct of public affairs. In considering this exemption the Council considered the case of *McIntyre v Information Commissioner and the Ministry of Defence (EA/2007/0068)* in which the Tribunal acknowledged that the s.36(2)(c) exemption was intended to apply to cases where the disclosure of information would be likely to prejudice a public authority's ability to offer an effective public service or to meet its wider objectives due to the disruption caused by disclosure."

23. The Council stated that taking into consideration the content quoted above in paragraph 22, the qualified person, the Monitoring Officer at the time of the internal review, considered that disclosure of the requested information:

"... would prejudice the effective conduct of public affairs. This is because the disclosure of the internal audit report would be likely to substantially prejudice the Council's ability to undertake internal audit services in relation to the company, together with any prospective legal proceedings to recover funds arising because of the audit investigations."

24. The Commissioner notes that, whilst the Council has referred to three specific limbs of the exemption, the qualified person appears to have given an opinion on section 36(2)(i) and (ii) together followed by their opinion on section 36(2)(c). As the Commissioner has not had sight of any written submissions to, or opinion of, the qualified person he must rely on the Council's assertion that the qualified person's opinion was that the three limbs of the section 36(2) cited by the Council are engaged.

25. The Council went on to state that in respect of section 36(2)(b)(i) and (ii) the opinion of the qualified person was that disclosure would:

"...substantially prejudice the Council in the effective conduct of public affairs and substantially inhibit and fetter the ability of the Council's Internal Audit Service to conduct and complete audit investigations and make recommendations relating to the company, including gathering information from Officers and third party individuals which would reasonably and legitimately be expected to attract a quality of confidence such as to protect the identities of those individuals from disclosure."

26. With regard to section 36(2)(c) the Council stated:

“The opinion of the Qualified Person that disclosure would substantially prejudice the effective conduct of public affairs, and substantially inhibit and fetter the ability of the Council’s Internal Audit Service to conduct and complete audit investigations and make recommendations on the company.”

27. When deciding on the reasonableness of the qualified person’s opinion, the test to be applied is whether the opinion is one that a reasonable person could hold and not whether it is the most reasonable opinion. As stated, the critical issue is that the arguments being advanced by the qualified person not only link to the factors described in the exemption but also relate to the information to which the exemption has been applied.

28. The Commissioner’s guidance on section 36² makes clear that when he is considering a complaint regarding information withheld under section 36, he will consider all relevant factors to assess whether the opinion was reasonable. These may include, but are not limited to:

- Whether the prejudice relates to the specific subsection of section 36(2) that is being claimed. If the prejudice or inhibition envisaged is not related to the specific subsection the opinion is unlikely to be reasonable.
- The nature of the information and the timing of the request, for example, whether the request concerns an important ongoing issue on which there needs to be a free and frank exchange of views or provision of advice.
- The qualified person’s knowledge of or involvement in the issue.

29. From the submissions provided by the Council in respect of section 36(2)(b)(i) the Commissioner is not satisfied by the reasonableness of the qualified person’s opinion that disclosure of the two internal audit reports would or would be likely to inhibit the free and frank provision of advice. The Council has not provided an explanation on how this inhibition would or would be likely to result from or relate to disclosure of the two reports. The Commissioner considers that the passages from

² <https://ico.org.uk/media/for-organisations/documents/2260075/prejudice-to-the-effective-conduct-of-public-affairs-section-36-v31.pdf>

the Council's submissions quoted above at paragraphs 23 and 25 combined with his assessment of the withheld information provide insufficient evidence to demonstrate the reasonableness of the opinion. Therefore the Commissioner has concluded that the qualified person's opinion with respect to section 36(2)(b)(i) is not reasonable.

30. The Council explained that:

"The disclosure of audit processes in the form of reports, submissions, communications, or evidence including that otherwise exchanged internally between the Council's Internal Audit Service, as well as to and from external third parties would substantially impair the Council in its conduct and discharge of audit functions.

Any disclosure would result in substantial reluctance of parties to in future engage in a full and frank exchange of information and views, which would delay and frustrate the audit process and would specifically impair audit investigation works seeking to review the company and the control environments which relate to its activities – within the company, by the Council and by external third parties.

In addition, it is considered that releasing the information requested would be likely to substantially inhibit the ability of the Council's Internal Audit service to engage and receive information and representations on issues which occurred at the company.

The loss of the ability for free and frank exchanges of views on the company with Internal Audit would constrain and frustrate work to ensure an effective and robust governance control environment being maintained."

31. The Council further explained that:

"This remains an active, live issue and remains subject to audit investigation and oversight. Disclosure would substantially impair the ability of the Council's Internal Audit service to discharge its functions relating to the company.

32. With regard to section 36(2)(b)(ii) and 36(2)(c) the Commissioner is satisfied that the qualified person's opinion is a reasonable one as set out above.

33. The qualified person's opinion is about whether the prejudice or inhibition would or would be likely to occur. These are two different things. 'Would prejudice' means that it is more likely than not (ie a more than 50% chance) that prejudice would occur. 'Would be likely' is a lower standard; it means that the chance of prejudice must still be

significant and weighty, and certainly more than hypothetical or remote, but it does not have to be more likely than not that it would occur.

34. The Commissioner notes the qualified person has determined the level of prejudice to be "would prejudice". Taking into account the criteria set out in paragraph 28 the Commissioner accepts as reasonable the opinion that disclosure of the information would pose a significant risk of inhibiting the free and frank exchange of views between officers and external parties and would prejudice the Council in its discharge of audit functions.

Public interest test

Public interest in disclosure

35. Both exemptions at sections 36(2)(b)(ii) and 36(2)(c) are subject to the public interest test set out in section 2(2)(b) FOIA. Therefore, the Commissioner must also consider whether in all the circumstances of the case, the public interest in maintaining the exemptions outweigh the public interest in disclosing the withheld information.

36. The complainant explained:

"PUBLIC INTEREST: This money was delivered from former school sites in the Anfield area which were being used for match day car parks and was supposed to be used to support good causes. It is absolutely in the public interest that the public know if this money went to the places that it should have gone and, if it didn't, what the Council did about it. It is my true and honest belief that it is unreasonable to rely upon this section [36(2)], in this case, where the option to redact exists and where the public interest in holding authority and elected officials to account must far outweigh the failure to disclose.

In this case, the public interest is not just in understanding investigatory and regulatory processes designed to identify and mitigate risks of fraud or misuse of public funds, but in establishing whether there are grounds to consider if fraud has taken place and, if so, what the Council may have done about this. With regards to the Council's reliance upon Section 40, I respectfully suggest that a degree of redaction could be appropriate, where the individuals are not elected officials. These elected officials who may be responsible for fraud, should be held to a higher standard of account.

...There were many concerns around the allocation of the cash and the exact amounts of money involved in collection.

One potential assertion is that the levels of failure on the part of the Councillors involved with the Beautiful Ideas Company border on the 'Criminal'. These have been 'covered up' by the refusal to disclose their Audit Committee Report and should not result in a 'redacted' copy being disclosed"

37. The Council acknowledged the public interest in understanding investigatory and regulatory processes designed to identify and mitigate risks of fraud or misuse of public funds. In addition it recognised the public interest in understanding how public funds allocated to a third party are used and how this is overseen by the Council.

Public interest in favour of maintaining the exemptions

38. The Council summarised its arguments in respect of section 36(2)(b)(ii) as follows:

"• Releasing the information requested would be likely to inhibit the ability of the Council's Internal Audit service to engage and receive information and representations in a free and frank exchange of views with departments and external parties, substantially impacting adversely on the conduct, cost and effectiveness of public audit functions discharged by the Internal Audit Service relating to the company.

- The disclosure of such reports would fetter and inhibit the Council, its Service Areas and Internal Audit in ensuring the ongoing monitoring and compliance of the company with (relevant legislation) and the public sector statutory duties placed on the Council to obtain best value for use of public funding.

- The opinion of the Qualified Person that disclosure would substantially prejudice the Council in the effective conduct of public affairs and substantially inhibit and fetter the ability of the Council's Internal Audit Service to conduct and complete audit investigations and make recommendations relating to the company, including gathering information from Officers and third party individuals which would reasonably and legitimately be expected to attract a quality of confidence such as to protect the identities of those individuals from disclosure."

With regard to section 36(2)(c) the Council stated:

"• The disclosure of the two interlinked reports would fetter and inhibit the Council, its Service Areas, and Internal Audit Service in ensuring the ongoing monitoring and compliance of the company with (relevant legislation) and the public sector statutory duties to obtain best value for use of public funding.

- The reason for this is because an effective and robust internal audit process is an essential factor in ensuring effective governance and financial management. With reference to this specific company, the routine disclosure of such reports would disclose substantive audit methodologies as well as the range of internal checks and interventions undertaken such as to identify and prevent fraud. This when combined with the chilling or inhibiting effect on Officers, third parties or whistle blowers were such information to be disclosed would see a substantial, real, and ongoing prejudice to the Council's audit function relating to this company. This would also have wider effectiveness for the discharge of audit functions.
- The disclosure of audit evidence in the form of reports, submissions, communications or otherwise exchanged internally between the Council and its Internal Audit Service, as well as to and from external third parties would substantially impair the Council in its conduct and discharge of audit functions on the company. Any disclosure would result in substantial reluctance of parties to in future engage in a full and frank exchange of information and views, which would delay and frustrate the audit process on the company with consequential direct implications for the accountable use of public funds.
- The opinion of the Qualified Person that disclosure would substantially prejudice the effective conduct of public affairs, and substantially inhibit and fetter the ability of the Council's Internal Audit Service to conduct and complete audit investigations and make recommendations on the company."

The Commissioner's view

39. The Commissioner considers that there is significant public interest in public authorities operating in an open and accountable manner. He believes that greater transparency leads to better public understanding of particular issues and enables the public to participate in the decision making process where possible. It therefore follows that transparency in matters such as those covered by the request in this case must carry significant weight when balancing the public interest.
40. The Commissioner understands the complainant's concerns as set out above in paragraph 36. He accepts the significant public interest in understanding investigatory and regulatory processes designed to identify and mitigate risks of fraud or misuse of public funds along with the actions taken by the Council in this regard.
41. Considering the section 36(2)(b)(ii) exemption the Commissioner notes the Council's explanation set out in paragraph 38. The Council has not provided the Commissioner with a conclusion why these points favour

maintaining the exemption. The Commissioner has deduced that the Council is arguing that the public interest would not be best served by disclosure of the reports because this would deter a free and frank exchange of relevant views which would adversely affect the Internal Audit Service in the fulfilment of its duties in regard to the Beautiful Ideas Company.

42. The Commissioner notes the third bullet point's reference to the identities of individuals concerned with the reports. This is of greater relevance to the section 40(2) exemption for personal data which the Commissioner will address later in this notice.
43. Regarding the Council's points in favour of maintaining the section 36(2)(c) exemption, again the Commissioner has deduced the Council's reasoning why the points raised in paragraph 38 are cited as factors in the public interest. He understands that any inhibition of the Council in ensuring the Beautiful Ideas Company's compliance with the relevant legislation and the Council's statutory duty to obtain best value for the use of public funding is clearly not in the public interest. In the circumstances he considers that there is a strong public interest in the Council considering the company's compliance, particularly in respect of the spending of public money or money intended to be contributed to public funds.
44. The Commissioner notes the Council's points in the second bullet point concerning audit methodologies. In order to understand this point he asked the Council to further explain whether internal audits always followed the same methodology. The Council explained that the standards for the conduct of audits within the public sector are governed by the Public Sector Internal Audits Standards³ which provide an overarching framework and standards under which audits must be undertaken. The Council added:

"Whilst there is an overarching method for undertaking audits, the unique circumstances of each audit investigation mean that the methodology varies pending the nature of the assignment. Common factors would be shared depending on the nature of audits however there is no single method."

3

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/641252/PSAIS_1_April_2017.pdf

45. Considering the above and having seen the withheld reports the Commissioner is not convinced by the Council's argument that a particular methodology used by Internal Audit in these reports is clear such that disclosure would:
- "...fundamentally undermine any additional control measures required to ensure the conduct of public affairs and use of public money remains lawful and subject to account."
46. The Council summarised its balancing of the public interest as follows:
- "...the balance of public interest rests with enabling the Council and its Internal Audit Service to conduct, complete and take relevant measures necessary such as to discharge an effective public audit function."
47. The Commissioner asked the Council if it ever proactively places internal audits in the public domain. The Council responded:
- "The publication of pro-active audit work including findings is not something which the Council undertakes – to do so would fundamentally undermine any additional control measures required to ensure the conduct of public affairs and use of public money remains lawful and subject to account. Members may write to the Head of Audit setting out their reasons for requiring to view audit reviews and if considered legitimate would be required to sign a non-disclosure agreement and confidentiality undertaking prior to invited to view the report(s) in question."
48. The Commissioner considers that significant weight should be attributed to the effective monitoring of the use of public funds. In this regard an unhindered, prompt audit function is clearly a desirable function.
49. In this case the Commissioner is concerned about the length of time taken by the Council to provide any public transparency about this matter. He also notes the Council's stringent procedures set out in paragraph 47 to prevent any information being placed in the public domain about a matter which clearly impacts the public purse.
50. The Council explained that the 2015 report is "finalised". The recommendations made in the report were subject to standard follow-up procedures according to the Council's Internal Audit Manual. The 2019 report provided "lessons learned" recommendations to the Council and has not been subject to standard follow-up procedures. Furthermore, the company surrendered its licence for the car park operated on Council owned land during the first half of 2019. The Council advises that it is in on-going discussions with the company and "seek to conclude any outstanding matters". It further advised that the company

"disputes elements of both reports" with the later report in particular being subject to "ongoing exchanges". It considers this to be a "live audit and as such the report remains subject to potential revision."

51. The Commissioner must accept that the Council considers the reports comprising the requested information refer to a "live" audit. He notes the Council's reference to the requirement for an effective and robust audit process and questions how effective this process has been considering the delay in the Council taking action as a result of the audits. He also notes that the Council also references the "potential" for it to undertake legal proceedings for the recovery of public funds in response to the findings of the second report. The Council states that the reports may be relied on as part of evidence submissions and goes on to advise:

"The disclosure of control measures and findings contained within the two interlinked reports on the company would fundamentally weaken governance and audit controls and place the Council at the risk of misuse of funds, specifically by the company but also weaken the application of similar controls applied through other ongoing audit investigations."

52. The Commissioner has considered the Council's reasoning on the public interest in detail and ultimately does not find its arguments convincing. The Commissioner is not persuaded that the public interest is served best by maintaining the exemptions. As the company "disputes elements of both reports" the company must have had sight of the reports' content and although the Council states that the reports may be subject to revision the reports are not marked as 'draft' and exist as completed documents.
53. The Commissioner accepts that it is not in the public interest for the Council to be hindered in its work. However, the reports concern the use of public funding and the Council's monitoring of a significant CIC company, as described in paragraph 5 above, formed with the intention to use its profits and assets for the benefit of the community. The Commissioner has considered the withheld information and the wider context of this particular case. The Council has not provided the Commissioner with any evidence of taking proactive steps to provide proportionate and appropriate transparency and accountability as to the findings of the reports. This lack of transparency and accountability confers the requested information with greater public interest weight and importance than would be the case if the Council had, for example, already disclosed a summary of the reports or key findings. In these circumstances the Commissioner is satisfied that the balance of the public interest falls in favour of disclosure.

54. The Commissioner's decision is therefore that the Council cannot rely on section 36 to withhold the requested reports.

Section 40 – Personal information

55. 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.
56. In this case the relevant condition is contained in section 40(3A)(a)⁴. 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 ('GDPR').
57. 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.
58. 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?

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

“any information relating to an identified or identifiable living individual”

60. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
61. 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.

⁴ As amended by Schedule 19 Paragraph 58(3) DPA.

62. In its submissions to the Commissioner the Council provided its view of the nature of the personal data contained in the inter-linked reports as follows:

“Elected members- names and activities;

Council officers – names, roles, correspondence, activities – official capacity; and

Council officers/third parties – whistleblowing concerns, comments, correspondence, investigatory evidence.”

63. The Commissioner’s guidance on section 40⁵ explains the factors he expects to be taken into account when determining personal data.

64. The Council has not identified the specific parts of the reports it considers to be personal data. The Commissioner is satisfied that Council officers names and roles, the names of elected members and the names of third parties comprises personal data. The Commissioner cannot determine the “correspondence and activities” comprising personal data contained in the reports. However, he expects any such correspondence or activity would have been undertaken in an official capacity and will form part of his consideration later . Similarly any “investigatory evidence” is not identified by the Council as personal data. He cannot identify any “whistleblowing” concerns in the reports and the Council has not identified these in the reports.

65. The Commissioner has identified personal data in the form of names, roles, contact details and specific personal information relating to a junior Council officer. He notes that information which constitutes the personal data of an identifiable living individual is not automatically excluded from disclosure under FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.

⁵<https://ico.org.uk/media/for-organisations/documents/1213/personal-information-section-40-regulation-13.pdf>

https://ico.org.uk/media/for-organisations/documents/1187/section_40_requests_for_personal_data_about_employees.pdf

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

Would disclosure contravene principle (a)?

67. 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”.

68. 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.

69. 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

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.”⁶

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:-

⁶ 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”.

- 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) 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 Commissioner considers that there is a legitimate interest in the accountability of public authorities as a general principle. The Council explained that:

"the interest in disclosure in this case is one of public understanding as to what occurred within the company and what happened with public money as a result."

76. The complainant explained their reasons for wishing to see the reports, as cited above in paragraph 36. They have strong reasons rooted in the public interest, explaining:

"This was public money that was supposed to be used expressly for the betterment of some of the most hard-to-do communities in Liverpool.

With regards to the Council's reliance upon Section 40, I respectfully suggest that a degree of redaction could be appropriate, where the individuals are not elected officials. These elected officials who may be responsible for fraud, should be held to a higher standard of account."

77. In this case the Commissioner accepts that there is the legitimate interest in the requested information of the general public, specifically the public's legitimate interest in knowing about the use of public funds. There is also a legitimate interest in understanding more about whether the Council has conducted a full investigation into the company.

Is disclosure necessary?

78. '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.
79. The Council explained that it had carefully considered whether disclosure was necessary to meet the legitimate interest it had identified in paragraph 75. Furthermore it explained that it had considered several alternative ways to achieve the legitimate interest and provided the following:
- "Redaction of personal data, publication of remainder of the report – the nature of information within the remainder of the report would still disclose the identity of the individuals. This option was therefore dismissed.
- Publication of a summary report- to produce a summary would necessitate including sufficient information for the position to be understood. This would then frustrate the engagement of s36 exemptions and negate any form of exemption being applied. This option was therefore dismissed."
80. The Council went on to state that it does not consider disclosure to be necessary; "due to the on-going nature of audit investigations into the company." It also added its view that disclosure in whole or in part would prevent effective control measures being applied to the company.
81. The Commissioner is satisfied that disclosure of the requested information would be necessary to achieve the legitimate interests identified. He considers that it is important to provide as complete a picture as possible to enable a fuller understanding of the content of the reports and that there are no less intrusive means of achieving these aims.

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

82. It is necessary to balance the legitimate interests in disclosure against the data subjects' interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under the FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
83. 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
 - the reasonable expectations of the individual.
84. 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.
85. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
86. The Commissioner considers that senior members of staff at the Council and elected members should have a reasonable expectation of disclosure of their names in a professional capacity. The Council has not indicated whether any individual has been consulted about the disclosure, and so the Commissioner is not able to ascertain their views, but given their seniority he does not consider that in the circumstances of this particular case it is reasonable for such individuals to have an expectation of privacy in such a matter as it clearly concerns their actions in their role as a senior public official.
87. Similarly, current directors of a company in receipt of public funds should have a reasonable expectation of disclosure in the context of information about such funding. The Commissioner has been unable to identify any specific harm or distress that disclosure may cause to these

individuals. Scrutiny may be unwelcome but senior staff should be accountable for their decisions and actions.

88. Based on the above factors, the Commissioner has determined that there is sufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is an Article 6 basis for processing and so the disclosure of the information would be lawful.

Fairness and transparency

89. Even though it has been demonstrated that disclosure of the requested information under the FOIA would be lawful, it is still necessary to show that disclosure would be fair and transparent under the principle (a).
90. In relation to fairness, the Commissioner considers that if the disclosure passes the legitimate interest test for lawful processing, it is highly likely that disclosure will be fair for the same reasons.
91. The requirement for transparency is met because, as a public authority, the Council is subject to the FOIA.
92. In these circumstances the Commissioner has decided that the Council has failed to demonstrate that the exemption at section 40(2) is engaged with regard to some of the names and roles contained in the reports. He has determined that the names and roles of those members of staff of the Council who hold senior roles should be disclosed. His decision is based on the greater level of accountability attributable to particular roles in terms of decision making and expenditure of public money. More junior employees with responsibility for presenting information internally to senior staff for consideration and action have less expectation that their names will be disclosed. The Commissioner has therefore decided such names should be redacted.
93. In addition the Commissioner has identified other personal data relating to a junior Council officer which should be redacted as specified in the confidential annex.
94. With regard to third parties' names in the reports the Commissioner has decided that those individuals not employed by the Council and not holding other related senior roles should be redacted.
95. The confidential annex specifies those references relating to more junior staff and others which should be redacted before disclosure.

Section 10 – time for compliance

96. Section 10 of FOIA states that a public authority must comply with its duty under FOIA section 1(1) and respond “promptly and in any event not later than the twentieth working day following the date of receipt.”
97. The Commissioner notes that in this case the initial response was provided after 35 working days. In failing to provide a response to the complainant within 20 working days, the Commissioner finds that the Council breached section 10 FOIA.

Right of appeal

98. 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

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

99. 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.

100. 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

Susan Hughes
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF