

## Freedom of Information Act 2000 (FOIA) Decision notice

**Date:** 16 September 2021

**Public Authority:** Shropshire Council  
**Address:** Shirehall, Abbey Foregate  
Shrewsbury  
SY2 6ND

### Decision (including any steps ordered)

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1. The complainant has requested information relating to complaints made about a specific councillor.
2. The Commissioner's decision is that Shropshire Council (the council) has not correctly applied section 40(2) FOIA. Any information the council may hold would be personal data and therefore the Commissioner is proactively applying section 40(5B) FOIA to prevent the council from confirming or denying if it holds the requested information.
3. The Commissioner does not require the public authority to take any steps as a result of this decision notice.

### Request and response

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4. On 4 July 2021, the complainant wrote to the council and requested information in the following terms:  
*"I formally request full disclosure of all ....., as well as full disclosure of any other complaints made against [redacted]."*
5. The council responded on 13 July 2021 and refused to provide the requested information citing section 40(2) – third party personal data.
6. Following an internal review the council wrote to the complainant on 5 August 2020 and maintained its position.

## Scope of the case

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7. The complainant contacted the Commissioner on 12 August 2021 to complain about the way his request for information had been handled.
8. Given that she is also the regulator of data protection legislation, the Commissioner will apply the various limbs of the section 40 exemption herself if she feels a public authority is at risk of disclosing personal data without a lawful basis for doing so. In this case she has proactively applied section 40(5B) of the FOIA. The reasons for this are explained below.

## Reasons for decision

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### Section 40 – Personal data

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

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

11. Section 3(2) of the Data Protection Act 2018 (the DPA 2018) defines personal data as:

*'any information relating to an identified or identifiable living individual'.*
12. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.

13. 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.
14. In this case, the request relates to the number of complaints about a named individual. If the council were to confirm that it held information it would be confirming that it had in fact received complaints about an identifiable individual. Information of this type relates to an identified individual, is about them and has them as its main focus. Therefore it is categorised as personal data.

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

15. The fact that confirming or denying whether the requested information is held would reveal the personal data of a specific individual does not automatically prevent the council from refusing to confirm whether or not they hold the information. The second element of the test is to determine whether such a confirmation or denial would contravene any of the data protection principles. The Commissioner considers that the most relevant data protection principle is set out at Article 5(1)(a) of the GDPR (Principle (a)) which states:

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

16. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed – or as in this case the public authority should only confirm whether or not they hold the requested information – if to do so would be lawful (ie, it would meet one of the conditions of lawful processing listed in Article 6(1) GDPR, be fair and be transparent.

*"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".*

17. In considering the application of Article 6(1)(f)<sup>1</sup> 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 confirmation as to whether the requested information is held (or not) 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.

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*

18. In considering any legitimate interests in confirming whether or not the requested information is held in response to a FOI request, the Commissioner recognises that such interests can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.

19. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. However, the more personal or more trivial the interest, the less likely it is that such an interest will outweigh the rights of the data subject in the balancing test.

20. In this case, the complainant has a personal interest in the requested information and considers that the public have a right to know about the character of an elected council official.

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<sup>1</sup> Article 6(1) goes on to state that:- "*Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks*". However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA 2018) 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*".

*Necessity test*

21. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity which involves the consideration of alternative measures; so, confirming whether or not the requested information is held would not be necessary if the legitimate aim could be achieved by something less. Confirmation or denial under FOIA as to whether the requested information is held must therefore be the least intrusive means of achieving the legitimate aim in question.
22. The Commissioner is aware that it would not normally be in the public domain whether or not complaints had been made about specific councillors, or the nature of those complaints.
23. She is therefore satisfied that disclosure would be necessary in this case in order to meet the legitimate interest in confirmation or denial of whether the requested information was held.

*Balance of legitimate interests and the data subject's interests*

24. It is necessary to balance the legitimate interests in confirming whether or not the requested information is held against the data subject's interests, fundamental rights and freedoms. In doing so, it is necessary to consider the impact of the confirmation or denial. For example, if the data subject would not reasonably expect the public authority to confirm whether or not it held the requested information in response to a FOI request, or if such a confirmation or denial would cause unjustified harm, their interests or rights are likely to override legitimate interests in confirming or denying whether information is held.
25. In its initial response to the request the council stated that it had asked the named councillor for their consent, and it was refused.
26. The Commissioner is satisfied that the data subject would have no reasonable expectation that the council would confirm or deny whether it held the information that has been requested in this case. She is also satisfied that confirming or denying whether or not information is held may potentially cause damage and distress to the data subject.
27. She has therefore weighed this against the legitimate interests in disclosure in this case.
28. The Commissioner considers that there is some legitimate interest in disclosing whether elected officials maintain appropriate standards whilst in office.

29. She also considers that there is some legitimate interest in the public being able to scrutinise whether the conduct of councillors meets the standards expected.
30. However, while she considers there is a legitimate interest in maintaining public confidence, this request relates to an incident not related to council standards. The Commissioner notes that the council's complaints procedure<sup>2</sup> requires complaints to be considered by a Monitoring Officer and investigated if necessary by an 'Independent Person'. She considers that this procedure ensures that councillors abide by its Code of Conduct<sup>3</sup> and satisfies the legitimate interest in public scrutiny.
31. The Commissioner is not persuaded that revealing under the FOIA whether the council has received any complaints or the nature of those complaints will provide any additional scrutiny.
32. The Commissioner has considered her decision alongside a number of previous decision notices which have been issued in similar circumstances, and alongside the decision of the First-tier Tribunal in *Foster v Information Commissioner and General Medical Council* EA/2016/02492.
33. Based on the circumstances of this case, and in line with the decisions above, the Commissioner has determined that there is insufficient legitimate interest in this case to outweigh the data subject's fundamental rights and freedoms.
34. She has therefore determined that confirming whether or not the requested information is held would not be lawful.

#### *Fairness/Transparency*

35. Given the conclusion the Commissioner has reached above on lawfulness, which included considerations of fairness, the Commissioner considers that she does not need to go on to separately consider whether confirming or denying whether the information is held would be fair and/or transparent.
36. The Commissioner has determined that the public authority should have refused to confirm whether or not it held the requested information on the basis of section 40(5B)(a)(i) of FOIA.

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<sup>2</sup> <https://shropshire.gov.uk/media/6340/making-a-complaint-against-a-councillor.pdf>

<sup>3</sup> [member-code-of-conduct-2014.pdf](https://shropshire.gov.uk/media/6340/member-code-of-conduct-2014.pdf) (shropshire.gov.uk)

## **Right of appeal**

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37. 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)

38. 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.
39. 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 Duffy**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**