

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

### **Decision notice**

**Date:** 25 July 2024

**Public Authority:** Walsall Council

**Address:** Civic Centre  
Darwall Street  
Walsall  
WS1 1TP

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

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1. The complainant requested information from Walsall Council (the Council) relating to a Serious Case Review (SCR) conducted by Walsall Safeguarding Partnership, including material supplied by the Council in connection with the SCR.
2. The Council stated that some of the information was held on behalf of the Local Safeguarding Children's Board (LSCB) (section 3(2)(a) (public authorities)) of FOIA. With respect to the remaining requested information, it refused to provide that, citing sections 38 (health and safety), 40 (personal information), 41 (information provided in confidence) and 44 (prohibitions on disclosure) of FOIA.
3. The Commissioner's decision is that the Council holds the review material for the purposes of FOIA but that it is exempt from disclosure by virtue of section 40(2). He has also decided that the Council was entitled to rely on section 40(2) to refuse to disclose the actual review.
4. The Commissioner requires no steps to be taken as a result of this decision.

## Background

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5. The request in this case references Operation Satchel. Operation Satchel was an investigation carried out by the West Midlands Police which uncovered the systematic sexual abuse of children in Walsall<sup>1</sup>.
6. As referenced in the request, the safeguarding review has not been published<sup>2</sup>.

“A safeguarding review into how 21 people were able to abuse seven children will not be made public.

The abuse ring - which included seven women - was convicted for offences against victims aged 12 years old or younger spanning nearly a decade in Walsall and Wolverhampton.

The Walsall Safeguarding Partnership said the report will not be published to protect the identities of victims”.

7. From his own investigation, the Commissioner understands that an Independent Management Review (IMR) is a detailed review of an agency’s involvement with a child and is one of the principal means of capturing information for use in Serious Case Reviews (SCR’s).

“An IMR is a process which produces a report detailing, analysing and reflecting on the actions, decisions, missed opportunities and areas of good practice within the individual organisation”<sup>3</sup>.

## Request and response

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8. On 11 April 2023, the complainant wrote to the Council and requested information in the following terms:

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<sup>1</sup> <https://www.cps.gov.uk/cps/news/final-four-defendants-jailed-their-part-largest-child-sexual-abuse-prosecution-west>

<sup>2</sup> <https://www.bbc.co.uk/news/uk-england-birmingham-65203493>

<sup>3</sup> <https://www.hullapppp.co.uk/conducting-an-individual-management-review/#:~:text=The%20purpose%20of%20the%20IMR,changes%20will%20be%20brought%20about>

“• A copy of the review which Walsall Safeguarding Partnership, of which the council’s Children’s Services and Adult Services are a part, has decided not to publish related to child sexual abuse offences involving 21 convicted defendants entitled Operation Satchel by West Midlands Police

• A copy of the review material supplied by Walsall Council to the review which Walsall Safeguarding Partnership, of which the council’s Children’s Services and Adult Services are a part, has decided not to publish related to child sexual abuse offences involving 21 convicted defendants entitled Operation Satchel by West Midlands Police.”

9. The Council responded on 8 June 2023, recognising only that the request was for “copies of the material provided to the LSCB to enable it to carry out its review”. It denied holding that information for the purposes of FOIA. It explained, however, that, should it be considered that the Council does hold the documents, sections 40(2) (personal information) and 38 (health and safety) of FOIA would be applicable.
10. Following an internal review the Council wrote to the complainant on 26 October 2023. It stated that it maintained its original position.

### **Scope of the case**

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11. The complainant contacted the Commissioner to complain about the way their request for information had been handled. They considered that the Council had failed to address their request in its entirety, specifically that it had not considered the information specified in the first part of the request. For the purposes of this decision notice (DN), the Commissioner will refer to that information as ‘the review’.
12. The complainant also disputed the Council’s position that the information in scope of the second part of the request is not held for the purposes of FOIA. While the Commissioner notes that the Council refers to this information as IMRs or Information Management Reviews, for the purposes of this DN the Commissioner will refer to the information in scope of that part of the request as ‘the review material’.
13. During the course of the Commissioner’s investigation, the Council revisited its handling of the request. It confirmed that while its response had concentrated on the review material, it was also withholding the requested review. In that respect, it cited sections 38, 40(2), 44 and 41.
14. It confirmed that it would advise the complainant about its position regarding the review.

15. The following analysis first considers whether the Council holds the review material, the information of the description specified in part 2 of the request, for the purposes of FOIA. If the Commissioner finds that the information is held by the Council, he will go on to consider whether the Council is entitled to withhold that information.
16. The Commissioner will also consider the Council's application of exemptions to the review in scope of part 1 of the request.
17. The Commissioner has addressed the concern raised by the complainant about the timeliness of the internal review in 'Other matters' at the end of this notice.

## **Reasons for decision**

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### **Section 1 general right of access**

#### **Section 3(2) – information held by a public authority**

18. Section 1 of FOIA states that:

“Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him”.

19. Section 3(2) sets out the circumstances in which information is considered to be 'held' for the purposes of FOIA:

“For the purposes of this Act, information is held by a public authority if—

- (a) it is held by the authority, otherwise than on behalf of another person, or
- (b) it is held by another person on behalf of the authority.”

20. The Commissioner interprets the phrase “otherwise than on behalf of another person” to mean that a public authority holds information for the purposes of FOIA if it is held to any extent for its own purposes.

21. The Commissioner's guidance<sup>4</sup> 'Information you hold for the purposes of FOIA' makes it clear that whether information is held by a public authority, or is held on behalf of a public authority, depends on the facts of the case.
22. The effect of section 3(2) and the meaning of 'held' in the context of FOIA were clarified through case law, in the decision of University of Newcastle upon Tyne v Information Commissioner and BUAV<sup>5</sup>.
23. The Commissioner's published guidance states:

"When requested, section 1 of FOIA requires you to provide information you hold as a public authority, unless you can demonstrate an exemption applies. Section 3(2) sets out in which circumstances information is considered to be 'held' for the purposes of the Act.

[...]

The BUAV case means that – to decide if you 'hold' the information for the purposes of FOIA – you need to establish if there is an 'appropriate connection' between the requested information and your role and functions as a public authority".

24. The Commissioner must therefore consider whether there is "an appropriate connection" between the information and the Council, so that it can be properly said that the information is held by the Council.
25. In accordance with his guidance, the Commissioner will decide whether a public authority holds information for the purposes of FOIA based on the balance of probabilities.
26. Under section 3(2)(a), a public authority has to determine if it holds the information for its own purposes or solely on behalf of another person.

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<sup>4</sup> <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/information-you-hold-for-the-purposes-of-foia/>

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[https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i459/B UAV v IC & Newcastle University \(0064\) PI Decision 10-11-10 \(w\).pdf](https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i459/B UAV v IC & Newcastle University (0064) PI Decision 10-11-10 (w).pdf)

27. The Commissioner's guidance explains that various factors can help a public authority decide the extent to which it holds information for its own purposes as a public authority. Those factors include:
- the extent to which it has access to the information,
  - the degree of control it has over the information, including controlling who has access to it and how it is used,
  - the extent to which they use it for their own purposes, regardless of whether it was created by a third party,
  - the extent to which it had an input in its creation or alteration,
  - the extent to which it retains ultimate responsibility over the management of the information, including its retention and deletion, and
  - whether it is merely providing storage, either on its physical premises or on its electronic and cloud systems.
28. The Commissioner recognises that this is not an exhaustive list and the weight attached to each factor varies depending on the circumstances of each case.

### **The Council's view**

29. By way of background, the Council told the Commissioner:

"On 13 November 2017 the LSCB requested the council to carry out its own management review, and then to provide it with the documents containing that review".

30. It also explained:

"The requested documents served no purpose within the council, and were written solely for the benefit of, and at the request of, the LSCB".

31. Similarly, the Council told the complainant:

"... Documents were prepared for the use of the LSCB in order to enable it to carry out its review. Those documents were used exclusively by the LSCB. They were not intended to be used by the council, and they were not used by the council".

32. The Council told the complainant that the IMRs served no purpose within the Council of identifying shortcomings, or of setting out plans for improvement, as those matters had already been addressed.

33. With respect to the review material, the Council stated that the IMRs are not documents that are owned or made use of by the council. It told the complainant:

“... it was not expected when these IMRs were written that any use would be made of them by the council”.

34. In response to the Commissioner’s questions about retention and deletion of the information, the Council explained that, as the IMRs are not owned by the Council, the decision to destroy/dispose of these records “would not be made by the council but would be made by the LSCB (now Safeguarding Children Partnership)”.

### **The Commissioner’s view**

35. In a case such as this, the key issue for the Commissioner is whether or not the Council hold the information to any extent for their own purposes. If they do, then the information is held for the purposes of FOIA.

36. In this case, the Commissioner acknowledges that the complainant considers that the Council must hold the review material for its own purposes, on the basis that the information is directly related to the Council’s public functions.

37. He also acknowledges that the Council considers that it has no use whatsoever for the information for its own purposes and that any information that may be held is not held for the purposes of FOIA.

38. The Commissioner has taken into account the context and circumstances of the request in order to determine whether, on the balance of probabilities, the Council holds information within the scope of the request for the purposes of FOIA.

39. He recognises that it was the Council who was responsible for creating the IMRs, albeit at the request of the then LSCB.

40. He acknowledges that the Council explained that the IMRs were written after any shortcomings they documented had been identified and addressed. He accepts that the Council considers that they were not intended to be used by the Council, and were not used by the Council.

41. However, he considers that, while the IMRs were written at the request of the then LSCB, they were created by the Council in its capacity as a public authority with a function to provide children’s services. He also considers that they were written by the Council from information in its possession and that they document, and provide a record of, its involvement in the case that was subject to the SCR.

42. Having considered all of the above, and mindful of the normal meaning of the word 'hold', the Commissioner considers that, on the balance of probabilities, the requested information is held for the purposes of FOIA.
43. He has reached this decision on the basis that there are factors present that evidence an appropriate connection between the requested information and the Council. He is therefore satisfied that the review material is held by the Council.
44. Having decided that the Council holds the requested information – the review material – for the purposes of FOIA, the Commissioner next considered its application of the section 40(2) FOIA to the withheld information.
45. That information comprises the review and the review material.

### **Section 40 - personal information**

46. Section 40(2) of FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
47. In this case the relevant condition is contained in section 40(3A)(a). This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the UK General Data Protection Regulation ('UK GDPR').
48. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of FOIA cannot apply.
49. 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?**

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

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

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



52. 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.
53. 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.
54. In the circumstances of this case, having considered the nature and content of the withheld information, the Commissioner is satisfied that the information does relate to the data subject(s).
55. The Commissioner is restricted in what he is able to say without disclosing the content of the withheld information. However, in this case he is satisfied that the withheld information comprises information relating to and identifying individuals connected, in some way, to this matter.
56. 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 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 UK 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 UK 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 UK GDPR.
64. Article 9 of the UK 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. He considers this understandable given the context of the request.
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.
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 FOIA.
70. The Commissioner has next considered the remaining information withheld by virtue of section 40.

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

71. Article 6(1) of the UK GDPR specifies the requirements for lawful processing by providing that "processing shall be lawful only if and to the extent that at least one of the" lawful bases for processing listed in the Article applies.
72. 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>6</sup>.

73. In considering the application of Article 6(1)(f) of the UK GDPR in the context of a request for information under FOIA, it is necessary to consider the following three-part test:-
- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
  - ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
  - iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
74. 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**

75. 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

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<sup>6</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 UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted”.

be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

76. The Commissioner recognises that there is a general legitimate interest in the public having confidence in the accountability and transparency of public authorities. In the circumstances of this case he also accepts there is a legitimate interest in knowing how well a public authority is exercising its child protection services.

### **Is disclosure necessary?**

77. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
78. The Commissioner is prepared to accept that disclosure of the withheld information is necessary to meet the interests identified above as there is no alternative access route, other than via FOIA, by which the requested information could be obtained.

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

79. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject(s) would not reasonably expect that the information would be disclosed to the public under FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
80. In considering this balancing test, the Commissioner has taken into account the following factors:
- the potential harm or distress that disclosure may cause;
  - whether the information is already in the public domain;
  - whether the information is already known to some individuals;
  - whether the individual expressed concern to the disclosure; and
  - the reasonable expectations of the individual.
81. 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.

82. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
83. The Council considers that any disclosure would have the potential to impact on the mental wellbeing of the individuals involved.
84. It considers that the data subjects would be likely to suffer substantial distress, significantly linked to their expectations that their personal data would not be disclosed.
85. By way of background, the Council told the Commissioner that the LSCB had decided not to publish the SCR. The Council also explained that, since the production of the review under consideration in this case, a change in legislation has established a national panel to oversee Serious Case Reviews. It told the Commissioner that, while not a requirement, the review was presented to the national panel and that the panel confirmed its agreement not to publish.

### **The Commissioner's view**

86. The Commissioner accepts that, under FOIA, there is a general social need for transparency about the policies, decisions and actions of public bodies. This particularly applies to issues of interest to the wider public and where disclosure demonstrates accountability.
87. Furthermore, he appreciates that the principles of openness and transparency are strong in demonstrating that child protection services are functioning well and that improvements are made where failings have been identified.
88. In that respect he notes that para 16F of the Children Act 2004<sup>7</sup> states:
  - "4) The safeguarding partners must publish the report, unless they consider it inappropriate to do so.
  - 5) If the safeguarding partners consider it inappropriate to publish the report, they must publish any information relating to the

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<sup>7</sup> <https://www.legislation.gov.uk/ukpga/2004/31/section/16F>

improvements that should be made following the review that they consider it appropriate to publish”.

89. The information under consideration in this case comprises the review material and the review itself.
90. Disclosure under FOIA is to the world at large. The Commissioner understands that data subjects have a clear and strong expectation that their personal data will be held in accordance with data protection laws.
91. He also acknowledges the concerns regarding the personal direct impact that disclosure could have on the parties concerned.
92. The Commissioner is mindful that a serious case review is conducted when a child is seriously harmed or dies as a result of abuse or neglect or where abuse or neglect is known or suspected.
93. By its very nature, therefore, the subject matter of the review and the review material is complex.
94. From the evidence he has seen, disclosure of the review and the review material would be an intrusion of privacy and could potentially cause unnecessary and unjustified distress to the data subjects, who could recognise themselves and who would likely be recognisable to others such as friends and family.
95. The Commissioner is also mindful that the recommendations from the review, which explain the learning and actions to be undertaken, have been published and are accessible by the public. He considers that the publication provides transparency that the substantive matter has been investigated and any learning points identified. He is therefore satisfied that there are processes in place to address any failings/lessons learned.
96. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
97. Given the above conclusion, that disclosure would be unlawful, the Commissioner considers that he does not need to go on to separately consider whether disclosure would be fair or transparent.
98. 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).

## **Other exemptions**

99. In light of the above conclusion, the Commissioner has not found it necessary to consider the other exemptions the Council cited.

### **Other matters**

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100. The Commissioner cannot consider the amount of time it took a public authority to complete an internal review in a decision notice because such matters are not a formal requirement of FOIA. Rather, they are matters of good practice which are addressed in the code of practice issued under section 45 of FOIA which suggests that internal reviews should be responded to within 20 working days, and if complex it is best practice for any extension to be no longer than a further 20 working days.
101. The Commissioner considers that in failing to conduct an internal review within the timescales set out above, the Council has not acted in accordance with the section 45 code. This will be logged for monitoring purposes.

## **Right of appeal**

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102. 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)

103. 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.

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

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