

**IN THE MATTER OF**

**A FREEDOM OF INFORMATION**

**REQUEST**

**CHARD TOWN COUNCIL**

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**OPINION**

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**Background**

1. On 2nd February 2023 a Freedom of Information request was submitted to Chard Town Council asking for the disclosure of a complete, full and unredacted independent report prepared by Mr Chris Rolley.
2. Reasons were provided with the request for the said disclosure, it is signed on behalf of a number of individuals.
3. The background to this request is a report which was commissioned by the Town Council last year and which was provided to them in February 2023. The Report itself

is in seven parts with three appendices and is predicated by a scoping paper provided to the author of the report Mr Rolley.

4. I have spoken to him, to assess as to any expectation which was provided to the contributors to his investigation as to their privacy and confidentiality.
5. It was clear to me that confidentiality was implied in relation to those who participated or were consulted in the report. That they did so on the basis that they would not be named or their identity not disclosed in a manner which would link them to any of their comments.
6. An Appendix B was attached to the report detailing in a schedule a list of those consultees and participants.
7. I have not been able to ascertain as to whether any of the individuals express any particular view concerning the name being mentioned and circulated as a result of the report being prepared but I do bear in mind the indication provided to me by the report author.
8. It is important to note that the investigation conducted was not into any particular counsellor but rather an investigation into the events leading up to the resignation of the Town Clerk at the time of the resolution and the actions of members and officers alike in that respect.

9. The stated aim of the investigation was to understand the events leading up to the said resignation and to develop recommendations which, when implemented, will address the working environment within the Council.
  
10. In my opinion the most relevant principle in this case is the first data protection principle. This requires that personal data is processed fairly and lawfully.
  
11. The exemption from disclosure is provided under **s.40(2) Freedom of Information Act 2000**. In my opinion it is right to consider as to whether the data within the report is the personal data of any Councillor or other third party and whether its release was beyond their reasonable expectations and would breach the first data protection principle.
  
12. I approach this on the basis that it is appropriate to consider the report in its entirety but that the nature and content of the Report allows the Town Council to distinguish between the eight parts and look at them as individual parts. In this opinion, I shall do so.
  
13. It is important to note that it is not my decision as to whether to disclose this is merely an advice and opinion as to what may be capable of being exempt from disclosure under the Act. The decision on disclosure is the decision of the Town Council.

## Analysis

14. The report provides information within it which could lead to the identification of third parties.
15. In my view the Council has to consider and take account as to whether or not the disclosure of the identity of those individuals will be within their reasonable expectations.
16. Although it is true that expectations do not necessarily determine the issue about whether the disclosure would be fair. Any public authority needs to decide objectively what would be a reasonable expectation in these circumstances.
17. I note that the report is marked private and confidential as the contents relate to an investigation into conduct of individuals elected and otherwise. It is clearly information of a confidential nature.
18. I consider that a reasonable expectation of privacy is confirmed on the participants in the light of the conversation I have had with the report author.
19. I am also conscious of the fact that this is not a report as to any particular allegation of wrongdoing which would ultimately be referred to the appropriate standards subcommittee. This would be done with a view to the local authority itself to take action

and make recommendations. In these circumstances any finding of wrongdoing would ultimately be put into the public domain.

20. in my opinion there is an expectation of privacy generally that arises in relation to information pertaining to disciplinary matters, the issues of counsellors conduct, and the views of authority staff, because of the inherent sensitivity of that information.

21. I am of the view and acknowledge that all residents have a legitimate interest in their elected representatives complying with the members Code of Conduct, but it is important to note that this report does not seek to in anyway investigate any individual actions by a counsellor for the purposes of a disciplinary hearing.

22. As a side issue it is important for me to touch up on s. 36 of the Act which allows an exemption on the grounds generally that to disclose would inhibit free and frank provision of advice exchange of views for the purpose of deliberation or otherwise prejudice the effective conduct of public affairs.

23. Whether this exemption applies can only be for the “Qualified Person” of a public authority and to make such a finding, any such judgment about prejudice or inhibition must be made reasonably by that person.

24. As I am not that person I cannot apply s. 36 to the request for information that is before me but it is a matter which the Town Council needs to consider.

25. In assessing all the matters outlined above I have no hesitation in concluding that in my opinion the following parts of the documents provided to me should be disclosed:

- Scoping paper
- Index
- Introduction
- Background and Context
- Executive Summary
- Best Practice Evaluations and Comparisons
- Summary of Recommendations
- Appendix A
- Appendix C

26. As I have indicated above, I have been able to distinguish between the different parts of the report but for the purposes of consistency and to properly balance matters I have looked at each section as a whole.

27. **Appendix B** lists the contributors and in my view the information within this appendix is personal data. The expectations of the individuals were reasonable that their identity would not be disclosed.

28. The matters outlined within the investigation report headed ‘**Historical Working Relationships and Processes**’ and ‘**Current Working Practices and Relationships**’ are more problematic.

29. When looked at separately, they also give rise to a valid exemption from disclosure.

30. These last two parts of the report cannot be redacted in such a way as to protect those who legitimately would wish to keep their identity confidential. Disclosure would inadvertently provide details of information that could lead to the identification of those individuals.

31. In particular, I note there was information within those two parts of the report which would lead to identification of individual staff members who would have had a legitimate expectation that their privacy would be complied with.

32. Balancing the legitimate expectation of the individuals who contributed to the report and the comments which they made which could lead to their identification with any legitimate public interest in disclosing this material it might be Section 42 is engaged and request for the complete disclosure of the report should be refused.

### **Applying the principles**

#### **Section 40(2) – personal information**

33. Section 40(2) of FOIA states:

***“Any information to which a request for information relates is also exempt information if-***

***(a) It constitutes personal data which does not fall within subsection (1), and***

***(b) The first, second or third condition below is satisfied.”***

***Subsection (1) refers to exempt information that constitutes personal data of which the applicant is the data subject.***

***6. In this instance the relevant condition is contained in section 40(3A)(a) which states:***

***“The first condition is that the disclosure of the information to a member if the public otherwise than under this Act-***

***(a) Would contravene any of the data protection principles.”***

34. The first step for the Council is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA18'). If this is not the case, then s.40 cannot be used as a basis for refusing to disclose the information.

35. Secondly, and only if the Council is satisfied that the requested information constitutes personal data, they must establish whether disclosure of that information would breach any of the data protection principles.

36. The information being withheld solely under section 40(2) are the Appendix detailed above and the contents of the two sections outlined above.

**Is the requested information personal data?**

37. Part 1, Section 3(2) of the DPA182 defines personal data as:



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

38. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable from that information.
39. 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.
40. The content of the two sections I refer to above does relate to individuals, their personal experiences and opinion's.

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

41. The fact that information constitutes personal data does not automatically exclude it from disclosure under FOIA. The Council must consider whether disclosure of the requested information would contravene any of the data protection principles.
42. The most relevant data protection principle in this case is principle (a) which states that “Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject”.
43. Personal data is processed when it is disclosed in response to the request. This means that a public authority can only disclose personal data in response to an FOI request if to do so would be lawful, fair and transparent.

44. In order to be lawful, one of the lawful bases listed in Article 6(1)5 of the UK General Data Protection Regulation (UK GDPR) must apply to the processing.

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

45. In my opinion 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.”

46. In considering the application of Article 6(1)(f) of the UK GDPR in the context of a request for information made under the FOIA, it is necessary to consider the following three-part test:

**i) Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;

**ii) Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question.

**iii) Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

47. I am of the opinion that the test of ‘necessity’ under stage (ii) must be met before the balancing test under stage (iii) is applied.

### **Legitimate interest test**

48. The Council must first consider the legitimate interest in disclosing the personal data to the public and what purpose this serves. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, it must be recognised that a wide range of interests may represent legitimate interests; they can be the requester's own interests as well as wider societal benefits.

49. These interests can include the broad principles of accountability and transparency that underpin FOIA or may represent the private concerns of the requestors.

50. It is important to remember that disclosure under the FOIA is effectively disclosure to the world at large. Legitimate interests may be compelling or trivial, but trivial interests may be more easily overridden by the fundamental rights and freedoms of the data subject during the test under stage (iii).

51. In this case the complainants are seeking access to the Report for specific reasons.

### **Necessity test**

52. The Council must also consider if disclosure is necessary for the purpose that this legitimate interest represents or if there is an alternative method of doing so.

53. 'Necessary' means more than desirable but less than indispensable or absolute necessity. The necessity test is a means of considering whether disclosure under FOIA is necessary to meet the legitimate interest identified, or whether there is another way to do so that would interfere less with the privacy of individuals.

54. I am of the view that by disclosing the parts of the Report outlined above is another way to effectively balance the competing interests.

55. I do not believe it necessary to disclose the personal data of any staff of the Council. Any decision made by a member of staff will be done in a professional capacity and representing the Council. Therefore, it is not the individual member of staff that needs to be held accountable but the organisation as a whole.

### **Balancing test**

56. To meet the legitimate interest that the request represents partial disclosure is in my opinion appropriate.

57. As the aspects of the Report, I have identified above is not necessary to fulfil the disclosure obligations and engage s. 40 is engaged, there is no lawful basis for this processing. It therefore does not meet the requirements of principle (a). I am therefore of the view that the Council are entitled to withhold the personal data in the manner and to the extent as outlined above under section 40(2), by way of section 40(3A)(a).

58. I understand the Council if they agree with this analysis may wish to rely upon it. I stress it is their decision and they must apply the factors outlined above.

59. I also note that time is of the essence in order to respond to the request. I suggest the Council contacts the requestors to update them as to when their request will be formally responded to.

David Campbell

Magdalen Chambers  
Exeter  
27<sup>th</sup> March 2023