



IN THE FIRST-TIER TRIBUNAL

Appeal No: EA/2016/0044

GENERAL REGULATORY CHAMBER  
(INFORMATION RIGHTS)

MICHAEL THOMPSON

Appellant

And

THE INFORMATION COMMISSIONER

Respondent

And

CHESHIRE EAST COUNCIL

Second Respondent

**Hearing**

Held on 4 August 2016 at Fox Court, London

Before Roger Creedon, Dave Sivers and Judge Taylor.

**Decision**

We dismiss the appeal.

## Reasons For The Decision

### Background

1. In August 2014, the Appellant made a complaint to Cheshire East Council (the 'Council') about a councillor ('Councillor'). The Council considered it under its 'Members Code of Code of Conduct Complaint Process', and decided to take no further action.<sup>1</sup>
2. At time of the request, the Appellant was also a councillor at the Council.<sup>2</sup>

### The Request

3. On 20 March 2015, the Appellant requested from the Council:  
*"A copy of [named councillor's] response to my formal complaint made in August 2014, as despite being found in breach of the Code of Conduct, I am dissatisfied with the outcome." □*
4. On 1 April 2015, the Council responded noting that the Councillor had not been found to have breached the Code of Conduct and explaining that they would need to contact 'the relevant people' for their 'consent'. The Council subsequently informed us that the reference to 'people' in the plural was inaccurate, as they had only needed to contact the Councillor in relation to the requester's complaint. They explained that *"with hindsight, it would have been better had that letter said that it would "contact Councillor [X] for his consent to release the information requested" as the council had in fact only received information from [the] Councillor [X]"*, however, at the time of the letter the author did not know whether there was also information received from others.<sup>3</sup>
5. On 7 April 2015, the Appellant replied apparently seeking to broaden his request. He reasoned that given the limited number of people present at the times of the incident, which gave rise to the complaint, the only reliable document in the Councillor's defence would be that provided by him. He concluded: *□ "It is therefore necessary to have copies of all the evidence supplied in support of [named councillor] defence against my complaint, as such evidence may have been influential in causing a miscarriage of justice." □*
6. On 10 August 2015, the Council refused to disclose the information relying on section 41 (*information provided in confidence*) of the Freedom of Information Act 2000 ('FOIA' or 'the Act'). It explained that the material had been provided in confidence as its 'Code of Conduct Complaint Process' specifically noted that written replies by a respondent were provided in confidence and that there was no

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<sup>1</sup> See page 86 of the Bundle which explains that section 28 of the Localism Act 2011 requires the Council to have in place arrangements to investigate allegations concerning a member's compliance with the authority's Code of Conduct.

<sup>2</sup> For the purposes of this decision, 'Councillor' is used below to denote the councillor against whom the Appellant made a complaint.

<sup>3</sup> See para.8 of the Council's undated Response.

expectation that the information would be released through a response to an FOI request. It also noted that the Councillor had not consented to its release. □

7. The Appellant progressed the matter through the usual channel leading to a complaint to the Information Commissioner ('IC'). The Council then decided to rely additionally on s.21 (*information accessible by other means*) and s.40(2) (*personal information*) FOIA.
8. In its Decision Notice (*Ref.FS50597460*), the IC concluded:
  - i. **Scope:** The scope of the information within the request comprised of the Councillor's rebuttal response and attachments provided in that response. The attachments were the Handforth Town Council minutes and its budget for 2014/2015. It was noted that the Council had explained that there were no supporting documents provided from third parties in respect of the complaint such that the Council did not hold any.
  - ii. **Exemptions:** The Council had correctly relied on s.40(2) and s.21 FOIA so as to exempt it from disclosing the requested information. In relation to s.40(2) FOIA, the IC decided that disclosure of the information would be unfair, and therefore in breach of the first data protection principle of the DPA, such that he did not consider whether there was a condition under Sch.2 DPA for disclosing it. (See *para.s 19 to 23 below*). Factors he considered included:

#### Section 40(2)

- a) **General expectation of privacy for conduct investigations:** Information relating to complaints against individuals carried a strong general expectation of privacy due to the likelihood that disclosure could cause the data subjects distress and also permanent damage to their future prospects and general reputation. □ This was consistent with the IC's guidance<sup>4</sup> which states that information related to an internal investigation or disciplinary hearing would carry a strong general expectation of privacy.
- b) Reference was made to para. 40 of the First-Tier Tribunal decision in *Rob Waugh v Information Commissioner and Doncaster College (EA/2008/0038)*:

*"...there is a recognised expectation that the internal disciplinary matters of an individual will be private. Even among senior members of staff there would still be a high expectation of privacy between an employee and his employer in respect of disciplinary matters."* □
- c) **Legitimate Expectation of Privacy:** The IC concluded that there was an expectation of confidentiality and privacy in relation to the requested information. □ Factors considered were:
  - The complaint had been dealt with under the members' Code of Conduct complaint process, which the Council considered was not subject to normal access to information rules unless a subsequent

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<sup>4</sup> See personal information (section 40 and regulation 13) v.1.5 found on the IC's website.

hearing took place. If the complaint had been accepted, a public hearing would have taken place and further communications would have taken place regarding publication of all the correspondence relating to the case.

- The Council had assessed the complaint and decided to take no further action.
  - The Council thought it important to maintain that the complaint process was undertaken in confidence. If for any reason the full details of member complaints were released to the world in response to requests for information, all confidence in the process would be lost.
  - The IC noted that whilst the written process did not refer to whether the Councillor's response to the complaint would be kept confidential, it stated that the investigator's report would be provided to both the complainant and the councillor. It concluded that this omission, in conjunction with custom and practice, could have shaped the Councillor's reasonable expectation of privacy in relation to his response to the complaint. □
  - The IC then took into account that he had not found information that would lead to an expectation that the response would be made publically available.
  - The Council had stated that it: *'is keen to ensure that spurious and unmeritorious complaints about councillors are not given the oxygen of publicity since such publicity can be damaging to the reputation of the individual concerned and the council they come from. Therefore, the Council treats all complaints made as confidential until it has decided what to do with them. If it decides to take no action over a complaint it continues to treat it as confidential. This helps to ensure, as far as the council can, that the making of a complaint which is not going to be investigated does not produce damaging publicity for the councillor or Council concerned.'*
  - **Councillor's objections** The Council reported the Councillor had stated that the issue was not trivial and was extremely concerning to him, and he considered the matter closed and did not wish for it to be re-opened leading to unnecessary public debate. The IC did not consider the Councillor's objection to disclosure as leading to a reasonable expectation that the information would remain confidential. It considered that these were more relevant to the impact of the consequences of disclosure on fairness. □
  - The withheld information related to the Councillor's public function rather than private life.
- d) **Unwarranted damage or distress:** The IC concluded that disclosure would cause unwarranted damage or distress to the Councillor. The

parties involved in the matter were no longer councillors and there was no further recourse of action that could be taken with the complaint.

- e) The Council had provided the IC with evidence of a considerable number of complaints about councillors where the number had seemed high given the size of the council. It had stated that the release of data would be detrimental to the Councillor and lead to unnecessary debate, reigniting ill feeling. □
- f) The Appellant had argued that given that the Councillor's □constituency office had apologised for his behaviour, and that the Council had found that he was not guilty of a breach of the Code of Conduct, he could not see how disclosure would damage his reputation further, unless he had either made false statements and/or had sought to pervert the course of justice.
- g) The IC considered the 'legitimate interests' in disclosing the requested information included generic interests in accountability and transparency and specific interests in understanding better how the complaint against the Councillor had been handled. He considered that as elected members of local government, councillors should be open to scrutiny and accountability.
- h) The Appellant had regarded his complaint as not having been handled properly. It was not within the remit of IC to consider the merits of the complaint. The IC noted that the Code of Conduct Complaint process provided that a complaint can be made to the Local Government Ombudsman if it felt that the complaint had not been properly dealt with that would go some way to satisfying the legitimate interest in the handling of a complaint. In considering the legitimate interest for the purpose of s.40(2)FOIA it was the broader legitimate public interest that was considered rather than the particular interest of the Appellant, and he had not seen any evidence to indicate that there was sufficient wider legitimate public interest which would outweigh the rights and freedoms of the Councillor in this case.□Although the IC could appreciate why the information is of particular interest to the complainant, the FOIA was motive blind. □
- i) The IC concluded that it would be unfair to the Councillor to release the requested information. Disclosure would not have been within his reasonable expectations and the loss of privacy could cause unwarranted distress. He acknowledged that there was a legitimate interest in knowing that a complaint against a Councillor has been handled appropriately but did not consider that this outweighed the individual's strong expectations of, and rights to, privacy. □

#### Section 21

- j) The IC accepted that section 21 applied in relation to the Handforth Town Council minutes and budget for 2014/2015 since the minutes were published on the Handforth Town Council website and both documents had been provided to the Appellant when he was a councillor at the time of the request.

9. The Appellant now appeals to the Tribunal, subsequent to which the IC has altered his position and relies on the exemption set out in s.40(5)FOIA (*not to confirm or deny the information held*). The Council continues to rely on s.21, s.40(2), and s.41 FOIA.
10. As regards the scope of the appeal:
  - i. There had been three complaints that the Councillor had attached to his response that were identical to the Appellant's request. The Appellant has confirmed that he is aware of these complaints and does not seek these such that we do not consider these further.
  - ii. Having reviewed the 'closed bundle' containing a copy of requested information, after the hearing, the Tribunal made directions to the parties pursuant to which the Respondents confirmed that a further document (an extract from a letter of 22 August 2014) was within the scope of the request in addition to those outlined in paragraph 10(i) above. This was because it was a document included by the Councillor as an attachment to his response to the Council. The Appellant was informed of this. The Council explained that it relied on section 40(2) and section 21 in relation to this.<sup>5</sup>

### **The Task of the Tribunal**

11. The Tribunal's remit is governed by section 58 FOIA. This requires the Tribunal to consider whether the decision made by the Commissioner is in accordance with the law or whether he should have exercised any discretion he had differently. The Tribunal is independent of the IC, and considers afresh the Appellant's complaint.
12. The Tribunal may receive evidence that was not before the Commissioner, and may make different findings of fact from the IC. This is the extent of the Tribunal's remit in this case, and therefore we do not consider other points made by the Appellant such as concerning the substance of the Appellants' complaint regarding alleged behaviour, or about the Council's handling of the Appellant's original complaint against the Councillor.
13. We have received a bundle of documents, submissions from the Respondents and a copy of the requested information provided to us on a confidential basis. The Appellant has sent grounds of appeal, but we have received no further submissions from him.

### **Grounds of Appeal**

14. So far as is within our remit, the Appellant's arguments include the following (which we have categorised for ease of reference):

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<sup>5</sup> The IC's position was more complicated because having he changed his position after the decision notice was issued so as to rely on section 40(5) FOIA. Had he relied on section 40(5) earlier, the decision notice would not have listed what category of information was held.

- i. **Issue 1: Scope of Request:** He would like to know whether there is third party information held by the Council in support of the Councillor. The Council has already stated that besides from the letter of rebuttal from the Councillor and attachments (related to minutes and a budget, and two complaints identical to the Appellant's), it holds no other information related to this matter. The Appellant seems concerned that there may have been other information provided that caused the Council to decide in favour of the Councillor. His concern may have arisen (a) for reasons explained by the Council (see paragraph 4 above) and, (b) in view of what he has written in his grounds of appeal, from the Decision Notice having stated that information is exempt from disclosure if it constitutes third party data. We accept that the 'third party' being referred to in this appeal is the Councillor, and no other person. In listing the information held in relation to the request, the Respondents omitted to include that document of 22 August 2014. However, the Appellant has been informed as to the category of information this document falls into. We accept as a fact in this case that the Council holds no other information in relation to the request. This is because we have been given no reason to doubt this and have seen nothing in the material presented to us that suggests that the Council holds other information. It is unfortunate that the response of 1 April 2015 was inaccurate in its loose use of language, but as such things happen, we accept that this was simply an error and that there is no attempt to conceal further information. We do not consider this matter further in this appeal.
- ii. **Issue 2: Personal Data Exemption:** The Appellant states that the only person who fears disclosure is the Councillor.
- iii. The Appellant has further explained that he would like to see what the Councillor wrote because he believes that if he claimed something had occurred which had not, the Council's decision would be flawed.

## The Law

15. So far as is relevant to this appeal, the FOIA provides:

*"1. (1) 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...*

*(6) In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as "the duty to confirm or deny". "*

*2. (1) Where any provision of Part II states that the duty to confirm or deny does not arise in relation to any information, the effect of the provision is that where either –*

*(a) the provision confers absolute exemption, or*

*(b) in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the public authority holds the information,*

*section 1(1)(a) does not apply.*

(2) In respect of any information which is exempt information by virtue of any provision of Part II, section 1(1)(b) does not apply if or to the extent that—

- (a) the information is exempt information by virtue of a provision conferring absolute exemption, or
- (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

(3)... the following provisions of Part II (and no others) are to be regarded as conferring absolute exemption—

- (a) section 21, ...
- (f) in section 40 - (i) subsection (1), and (ii) subsection (2) so far as relating to cases where the first condition referred to in that subsection is satisfied by virtue of subsection (3)(a)(i) or (b) of that section,
- (g) section 41."

16. In other words, a person making an information request to a public authority is entitled to be informed in writing whether the public authority holds the requested information under section 1(1)(a), unless exemptions apply. This is known as the 'duty to confirm or deny'. The requester is entitled to have it communicated to him under section 1(1)(b), unless it is exempt from disclosure under the Act.
17. The exemptions are set out in Part II of the Act. IC relies on section 40(5) so as to exempt the Council from the duty to confirm or deny. The Council relies on sections 21, 40(2), and 41. The exemptions relied on by the Council are known as 'absolute exemptions'.

#### **Section 21: Accessible by other means**

18. Section 21 provides:

*"21.(1) Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information."*

#### **Section 40(2): Personal information**

19. 'Personal data' is defined in s.1(1) DPA. This provides:

*'personal data' means data which relate to a living individual who can be identified - (a) from those data, or (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual.'*

20. So far as is relevant to this appeal, section 40(2) FOIA provides:

*"40(2) Any information to which a request for information relates is also exempt information if-*

- (a) it constitutes personal data which do not fall within subsection (1), and*
- (b) either the first or the second condition below is satisfied"*

*Emphasis added*



21. The first condition is:

*'(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene -  
(i) any of the data protection principles...'*

*Emphasis added*

22. The first data protection principle has been identified in this appeal as of relevance. This provides that:

*"1. Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless -*

*(a) at least one of the conditions in Schedule 2 is met..."*

*(See para. 1 of Schedule 1 of the Data Protection Act 1998 ('DPA')).*

*Emphasis added*

23. The conditions in Schedule 2 DPA include: (a) where the person to whom the personal data relates has given consent to disclosure (See para 1, Sched. 2 DPA); or the disclosure is:

*"necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject."*

#### **Section 40(5) Duty to confirm or deny**

24. So far as is relevant to this appeal, section 40(5) provides:

*"40(5) The duty to confirm or deny –*

*...(b) does not arise in relation to .. information if or to the extent that  
... (i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 ...."*

#### **Section 41 Information provided in confidence**

25. So far as is relevant to this appeal, section 41 provide:

*"41.—(1) Information is exempt information if— (a) it was obtained by the public authority from any other person*

*(including another public authority), and*

*(b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person."*

#### **Submissions**

## Section 21

26. The Council relies on s.21 FOIA so as to withhold the minutes and budget for 2014 to 2015. These had been part of the requested information as they had been part of the Councillor's response. It has explained that both the minutes and the budget would have been available to the Appellant in his role as a councillor at the time the request was made. The IC accepted these arguments in his Decision Notice.

## **Our Findings**

27. It is noted that the Appellant's grounds do not appear to raise any objection to the Council's reliance on section 21 and he has not provided arguments in relation to it such that he does not appear to contest that this material is accessible by other means or that he has received this information. Accordingly, we do not find it necessary to consider this point further and accept that the minutes and budget for 2014 to 2015 were provided to the Appellant.
28. (It is noted that the Council made a similar point and in its Response invited the Tribunal to clarify this and other matters further with the Appellant. We do not consider it proportionate to seek further arguments from the Appellant. He would have received the Council's Response and been able to address the matters they had raised if he had wished to do so. In cases where parties have opted for the appeal to be decided on the papers, it is for the parties to put before the panel all the evidence and submissions they wish it to consider in order for it to be able to decide the matter on the hearing day allotted to it. (See rules 2(1), 2(2) and 2(4) of the Tribunal Procedure (First-tier Tribunal) (General Regulatory Chamber) Rules 2009) ('the Rules'.)

## Section 40(2)

29. The Council relies on s.40(2) FOIA so as to withhold the Councillor's letter and document of 22 August 2014. Its submissions include:
  - a) The information contains data relating to the Councillor who is identifiable from that data, such that it constitutes personal data and its disclosure would breach the first data protection principle. It argues that the Appellant seems to accept that disclosure would cause the Councillor distress (but considers the distress would be warranted), and it maintains that the distress would be unwarranted, for the reasons set out in the IC's decision notice. The Councillor refused consent to the release of the information.
  - b) FOIA sections 40(3)(a) and (b) refer to disclosure '*otherwise than under this Act*'. Therefore the test for whether the exemption is engaged is not whether disclosure under FOIA would contravene DPA principles (or section 10 of the DPA), but whether disclosure to a member of the public outside of FOIA would do so. This is because the duty to provide information under FOIA does not in itself provide any exemption from the DPA principles.
30. The Appellant's arguments so far as they might be said to relate to whether this exemption was correctly applied might be summarised as:

- a) the only person who would fear disclosure was the Councillor; and
- b) he would like to see whether the Council's decision was flawed, by being based on the Councillor saying something had occurred that had not occurred.

## Our Findings

31. We accept that section 40(2) was appropriately relied on so as to withhold the requested information for the reasons set out below:

### A. *Is the Requested Information Personal Data?*

- a) If the information is not personal data, then section 40(2) cannot be relied on. However, the requested information is clearly personal data. Personal data is defined under section 1(1) DPA as data which relates to a living individual who can be identified from that data, or from that data and other information which is in the possession of the person holding the information. The Councillor is identifiable to the Appellant from the information, and even if his name were redacted, he would know the Councillor's identity such that the remaining information would still constitute the individual's personal data.
- b) Even though the material relates to the individual's work rather than personal activities, it relates to a complaint made against the Councillor's behaviour and the Council considered whether the behaviour contravened its Code of Conduct. As such, the information is clearly of personal in nature, in the same way that an individual's annual appraisal report can be considered to be personal data.

### B. *Would disclosing it contravene the first data protection principle?*

- a) Having found that the requested material is personal data, we must consider whether its disclosure would breach any of the data protection principles. The Council relies on the arguments in the Decision Notice to make its case. This reasoned that disclosing the requested material would breach the first data protection principle where none of the conditions set out in Schedule 2 of the DPA were met. (*See para.s 19 to 23 above.*)
- b) Condition 6 in Schedule 2 is the only condition cited to us as of relevance here. This states that the disclosure of information would need to be:
 

*'necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.'* (*See para 6, Sch. 2 DPA.*)
- c) There are various stages to deciding if Condition 6 applies. First, we must consider if the disclosure is 'necessary' for the purpose of the interests

pursued by the Appellant.<sup>6</sup> The Appellant is interested in finding out what material the Council considered in order to come to the conclusion it did in its investigation. This might also be said to be an interest in due process in understanding what factors the Council had taken into account. Accordingly, the disclosure would be necessary to do so.

- d) We then consider the rights and freedoms or legitimate interests of the Councillor and whether disclosure would be unwarranted by reason of prejudice to these rights, freedoms and interests. In assessing this, we take into account that the disclosure under FOIA is considered to be a disclosure to the world at large and not only to the Appellant. We find disclosure would be unwarranted:
- Notwithstanding that the Councillor held a public office and the withheld information related to the Councillor's public function rather than private life, we accept that information relating to complaints against individuals carries a very strong general expectation of privacy. This is due to the likelihood that disclosure could cause the individual distress and potential damage to future prospects and general reputation. Even where the investigation exonerates the individual, the matter can be potentially distressing or stressful if it is thought in time that it might be revealed to the world. Likewise, as the IC stated, even if the complaint is unmeritorious, its existence can be potentially damaging to an individual. It is foreseeable for some to conclude 'there's no smoke without fire'.
  - We have not taken into account that the 'Code of Conduct Complaint Process' specifically noted that written replies by a respondent were provided in confidence. This is because we were not guided to anything in the Bundle of papers to substantiate this point. Nevertheless, we do accept that the Councillor would have had a legitimate expectation of privacy based on our finding that material provided in relation to an investigation into conduct is inherently highly personal in nature and the Councillor's rights and interests in the privacy of his data need to be respected.
  - We have not taken into account that the Councillor had made clear that he considered the matter closed and did not wish for it to be re-opened leading to unnecessary public debate. We agree with the Decision Notice that this might not of itself lead to a reasonable expectation that the information would remain confidential.
  - We do not think it relevant that neither the requester or Councillor were any longer in office, since they might seek to be in future. The Decision Notice seemed inconsistent on whether there was a

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<sup>6</sup> We consider this approach of considering the Appellant's own interests in this stage to be consistent with para. 29 of the Upper Tribunal decisions in *Farrand v the Information Commissioner and the London Fire and Emergency Planning Authority* [2014] UKUT 310 (AAC) and para.s 23 and 24 of the *Information Commissioner v (1) CF and (2) Nursing and Midwifery Council (Information rights : Data protection)* [2015] UKUT 449 (AAC) (10 August 2015).

further recourse of action that could be taken with the complaint and we have not considered it a decisive factor in this case.

- We have not taken into account any other arguments relating to there being a considerable number of complaints about councillors and that the release of data would be detrimental to the Councillor and lead to unnecessary debate, reigniting ill feeling. □ This is because we were not provided with sufficient evidence on the point.
- The Appellant's argument that the only person who has anything to fear from disclosure is the Councillor does not help his case. Our view is that the Councillor has a legitimate interest and right to have his personal data withheld from the public because the subject matter attracts a right to privacy.
- We accept that the 'legitimate interests' in disclosing the requested information included generic interests in accountability and transparency and specific interests in understanding better how the complaint against the Councillor had been handled and due process. We accept that elected members of local government, councillors should be open to scrutiny and accountability.
- However, the collective weight of interest in disclosure is vastly outweighed by the Councillor's rights and freedoms or legitimate interest in not disclosing to the world at large material related to a complaint about his conduct where the Council did not find the complaint to be merited.

#### **Section 40(5)**

32. The IC invited the Tribunal to issue a substitute Decision Notice on the basis that section 40(5) applied. It considered that:
- a) The act of confirming or denying that complaints about the Councillor were held or not would reveal personal information about him; disclosure would be detrimental to him; and cause him unwarranted damage or distress.
  - b) Disclosure would be detrimental to the named councillor and cause unwarranted damage or distress to the councillor
  - c) There are no public interest factors of sufficient weight to demand that the Council confirms or denies that it holds this personal data, and thus whether a complaint against the Councillor exists. The Appellant's request was prompted by his concerns about the handling of the complaint related to the Code of Conduct Complaint process. However, he could make a complaint to the Local Government Ombudsman if he felt that the complaint had not been properly dealt with, such confirmation or denial was not needed to meet the Appellant's interest in this case, and so confirmation or denial would contravene the first data protection principle.
33. We received no arguments from the other parties in relation to the IC's position.

#### **Our Findings**

34. We have not found it necessary to make a finding on the substance of the IC's case. This is because we think it is implicit from the Council's replies to the Appellant of 1 April 2015 and 10 August 2015 that they hold the requested information. The Decision Notice then states what information is held. (*See for instance paragraph 10 of the Decision Notice.*) On this basis, addressing whether the Council would have been correct to rely on section 40(5) so as to neither confirm nor deny the information is held seems academic and not proportionate within the meaning of rule 2 of the Rules.
35. We note that having considered our directions after the hearing the Council raised no objection to disclosing to the Appellant that the document of 22 August 2014 was also held. We consider this appropriate in the context that otherwise the Appellant would have been inadvertently misled by the Decision Notice as to what was held.
36. We note that the IC did not address whether section 40(5) is an exemption, or whether section 2(1)(a) applied.

#### **Section 41**

37. The Council did not advance extensive submissions in relation to this exemption. However, as we have found that the information was rightly withheld on the basis of other exemptions, we do not consider this further.
38. The Code of Conduct Complaints process provides that respondents are entitled to rebut complaints made against them. This process is undertaken in confidence. If for any reason the full details of member complaints and the consequential rebuttals are released to the world in response to requests for information, all confidence in the process would be lost. The process and regime would be undermined by a resultant lack of candour in complained about Member's responses to complaints and, potentially, in the detail and context of complaints made against them. Therefore it is important that this process remains confidential.
39. Our decision is unanimous.

**Judge Taylor**

7 November 2016

Amended Decision promulgated 8 November 2016