

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 16 June 2021

Public Authority: Thanet District Council
Address: Hawley Square
Margate
Kent
CT9 1NY

Decision (including any steps ordered)

1. The complainant has requested information concerning the findings of a review carried out by external solicitors into the handling of an employment matter by Thanet District Council. The Council provided the complainant with some of the information requested but withheld some of the information within scope of the request under Section 42 (legal professional privilege) of the Freedom of Information Act 2000 (FOIA).
2. The Commissioner's decision is that Thanet District Council correctly applied section 42 to the withheld information and that the balance of the public interest test supports maintaining the exemption. However, the Commissioner has found that the Council breached section 1(1) of the FOIA in that they failed to identify some information within the scope of the request.
3. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation:
 - Disclose to the complainant the name of the other firm of solicitors instructed and how much money the Council paid for that legal advice.
 - Disclose to the complainant the names and job titles of Council employees who have been provided with a copy of the legal advice from this other firm of solicitors, and the names of elected members who have been provided with a copy of the same.

4. The Council must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Background

5. The complainant's request to Thanet District Council (the Council) of 20 November 2019 was prompted by a statement made by the Council as reported by the Municipal Journal on 12 November 2019. The complainant's request was also a follow-up request to an earlier information request which he made to the Council on 13 July 2019 and which is the subject of the Commissioner's decision in IC-47916-V8H9.
6. On 4 September 2019, The Isle of Thanet News reported that the GMB Union was calling for the Council to overhaul its way of dealing with bullying complaints against top officers¹. The article reported that the call had come after grievances being brought by two officers, one of whom had *'named both Chief Executive Madeline Homer and Director of Operational Services Gavin Waite in a list of 10 grievances'*. The article stated that the officer had lodged an appeal over the way their grievance was dealt with, *'including being unable to see an independent investigator's report, having the case handled by a current TDC top officer, and no formal action being taken despite one grievance of bullying and harassment being partly upheld, one of a breakdown of working relationship being upheld, and one of suffering work-related stress due to the situation being upheld'*.
7. The GMB Regional Organiser expressed his confidence that senior elected members of the Council would conclude, like the GMB, *'that the current system of dealing with bullying and harassment complaints against senior officers has been compromised beyond any further use'*. He contended that *'not recognising this and not replacing it will undermine and threaten the good running and integrity of the Council. GMB has experience of new independent systems in other councils for dealing with bullying and harassment complaints against senior officers that are much better'*.

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<https://theisleofthanetnews.com/2019/09/04/gmb-union-call-for-thanet-council-to-overhaul-way-of-dealing-with-bullying-complaints-against-top-officers/>

8. The article reported that an appeal against the grievance decision had been submitted to the Council's Deputy Chief Executive, Mr Tim Willis, who had not been involved in the original grievance, *'but he was suspended from his role last month'*.
9. A Council spokesperson stated that, *'In dealing with these matters the Council follows an agreed formal process. That process protects the right to a fair hearing for both those bringing the grievance and those who are subject to the complaint. Public comments on the matter could either prejudice the process or potentially influence the outcome'*.
10. On 10 October 2019, The Isle of Thanet News reported that Mr Willis who had been suspended in August over gross misconduct allegations, had been cleared on all counts². The article reported that the Deputy Chief Executive had been reinstated following protests from councillors and community groups. Councillors on the General Purposes Committee had unanimously cleared Mr Willis of all seven gross misconduct allegations laid out in a report by the Council's Chief Executive, Ms Madeline Homer.
11. On 12 November 2019, the Municipal Journal reported that *'an investigation into alleged bullying and harassment found 'substantial evidence' to support some claims made against two senior Thanet DC officers, it has emerged. In May, Thanet's [name redacted], alleged harassment, bullying, intimidation, victimisation and humiliation by chief executive, Madeline Homer, and director of operations, Gavin Waite³.*
12. The Council was reported as having given the following public statement:

'Given the seniority of those involved, the monitoring officer's draft report on the outcome of the grievance and his draft recommendations were reviewed by external employment solicitors to provide an independent check – in order to ensure that his report and recommendations were both fair and objective'.
13. On 3 September 2020, The Isle of Thanet News reported that the head of East Kent Internal Audit Partnership, Ms Christine Parker, had written to the Chair and Vice Chair of TDC's governance committee to advise that *'action is needed at Thanet District Council to address the cultural*

² <https://theisleofthanetnews.com/2019/10/10/top-thanet-council-officer-unanimously-cleared-of-gross-misconduct-charges/>

³ <https://www.themj.co.uk/Two-senior-officers-implicated-after-bullying-claims/216128>

*and governance failures that stem from the very top of the organisation*⁴. The article reported that Ms Parker highlighted concerns over senior officer relationships and *'blurred reporting lines'*, as well as raising the issue of grievance procedures that have not been brought to a conclusion. Ms Parker advised that, *'in my view, this is all about people, their relationships, behaviours and attitudes, and I only experience this culture at Thanet DC, not the other councils that I work for'*.

14. Ms Parker referenced the independent investigator's report that had been leaked into the public domain and warned that, *'with these matters unresolved, it insidiously affects the culture of the Council and is hugely damaging. If good governance is not demonstrated at the top then the rules of good governance do not apply further down the layers of the organisation'*.
15. Council leader Mr Rick Everitt said that the Council were aware of concerns and that he and the Chief Executive had asked the Local Government Association to instigate a peer review to carry out an independent assessment. Speaking to the Municipal Journal, Mr Everitt stated that, *'We hope it will also look at the evident damaging practice of leaking internal correspondence among some individuals within the Council and why it is they are doing that'*.
16. In response, Thanet Green Party issued a statement:

'We are disappointed with the Council Leader's response as quoted in the Municipal Journal, which appears to focus more on the alleged leak rather than on the problems the report highlights. We would respectfully point out that if this matter had been dealt with when the auditor first raised it earlier in the summer, there would have been no scope for any sort of leak. We believe there is an urgent need for greater transparency at Thanet District Council. We are deeply concerned that our councillors are having difficulty assessing the information they need to fulfil their duties – even to the extent of one of our members having to resort to Freedom of Information requests. We believe that no council that is operating properly should have anything to fear from sharing information and allowing external bodies to scrutinise its work'.
17. On 10 September 2020, The Municipal Journal reported that the Council's Chief Executive, Ms Homer, had written to Ms Parker and

⁴ <https://theisleofthanetnews.com/2020/09/03/whistleblowing-concerns-and-cultural-and-governance-failures-at-thanet-council-raised-by-senior-auditor>

rejected her concerns, contending that her letter was '*not balanced or fair*'⁵.

18. The Commissioner notes that the situation was discussed at the Council's meeting on the same date, with the published minutes recording the Leader of the Council as having stated that, '*Since the serious allegations of bullying and harassment have been reproduced in the press, Members need to have confidence that that is not an accurate characterisation of the Council as a whole, and Council Members and Officers need to be able to tell an independent authority the truth*'.
19. On 4 December 2020, The Isle of Thanet News reported that the Council's use of non-disclosure agreements was under scrutiny by external auditors⁶. The article noted that an FOI request had showed that £446,503 was spent on such orders between April 2015 and the end of August 2019, payments having been made to more than 30 staff during that time period.
20. On 1 February 2021, The Isle of Thanet News reported that the Council's Monitoring Officer, Mr Tim Howes, had been suspended, although the reason for his suspension had not been made public⁷.

Request and response

21. On 20 November 2019, the complainant wrote to the Council and requested information in the following terms:

'According to an article published by the Municipal Journal on 12 November, a Council spokesperson is reported as stating, in relation to allegations of bullying by senior employees, Madeline Homer and Gavin Waite, that:

'Given the seniority of those involved, the monitoring officer's draft report on the outcome of the grievance and his draft recommendations were reviewed by external employment solicitors to provide an

⁵ <https://themj.co.uk/Council-chief-claims-auditor-not-balanced-or-fair/218576>

⁶ <https://theisleofthanetnews.com/2020/12/04/external-auditors-to-examine-thanet-council-gagging-order-pay-outs-complaint/>

⁷ <https://theisleofthanetnews.com/2021/02/01/top-thanet-council-officer-remains-suspended-from-role/>

independent check – in order to ensure that his report and recommendations were both fair and objective’.

Please tell me:

- 1) The name of the external employment solicitors who conducted the review.*
 - 2) How much money the Council paid for the review.*
 - 3) A copy of the instructions/terms of reference for the conduct of the review, provided by the Council to the external employment solicitors. Any other documents, emails etc, exchanged between the Council and the external employment solicitors, concerning the scope of the review.*
 - 4) The names and job titles of Thanet Council employees who have been provided with a copy of the external employment solicitors findings in relation to the review.*
 - 5) The names of elected members who have been provided with copies of the external employment solicitors findings in relation to the review.*
 - 6) A copy of the external employment solicitors findings in relation to the review’.*
22. The Council responded to the request on 2 December 2019. They provided the complainant with (some of) the information requested in parts 1 and 2 of his request, informing him that the external employment solicitors were Wilkin Chapman LLP and that the Council paid £5,730 (incl. VAT) for their review. The Council also provided (some of) the information sought in parts 4 and 5 of the request, informing the complainant that the legal advice from Wilkin Chapman LLP had been provided to Mr Timothy Howes, the Council’s Monitoring Officer and Director of Corporate Governance, and that no elected members had been provided with a copy of the external legal advice received.
23. However, in respect of the information requested in parts 3 and 6 of the request (i.e. copy of the instructions/terms of reference of the review and copy of the review itself) the Council advised that the information was subject to legal professional privilege (LPP) and was therefore exempt from disclosure under section 42 of the FOIA.
24. The Council stated that their ability to speak freely and frankly with their legal adviser in order to obtain appropriate legal advice, is a fundamental requirement of the English legal system. The Council advised that the concept of LPP protects the confidentiality of

communications between a lawyer and client and that the external solicitors had given advice to the Council in a legal context. The Council stated that the advice '*was about legal rights, liabilities, obligations or remedies*'.

25. In respect of the public interest test attached to section 42, the Council stated that there is '*a strong element of public interest inbuilt into the privilege itself*'. They contended that '*there are no at least equally strong countervailing considerations which have been adduced to override that inbuilt public interest*'. The Council stated that '*the advice was sought as part of a recent internal grievance process and the advice was sought to protect the rights of individuals. The matter affected a very small group of individuals*'. The Council correctly offered the complainant the facility of an internal review if he was unhappy with the way his request had been dealt with.
26. The complainant subsequently contacted the ICO and explained his concern that an internal review would not be appropriate in this case as his request related to serious allegations which had been made against the Council's Chief Executive. The Commissioner agreed that an internal review would not serve any helpful or useful purpose in this particular case and waived the usual requirement for the same.

Scope of the case

27. The complainant contacted the Commissioner on 10 February 2020 to complain about the way his request for information had been handled.
28. In his complaint, the complainant provided the Commissioner with various documentation, some of which was official and some of which was leaked material. The complainant provided a copy of an external investigator report which the Council had obtained for the purposes of the grievance process referred to in their response to this request. This report has not been made public by the Council and was a leaked copy obtained by the complainant. The complainant provided the Commissioner with an undated 'Whistle Blower Document' which appeared to have been copied from an email sent by the unnamed whistleblower to the Council's General Purposes Committee (GPC). The complainant also provided a copy of what appeared to be an email from Mr Howes to the individual whose grievance was the subject of the aforementioned investigator report, informing the individual of the outcome of their grievance. Finally, the complainant provided the Commissioner with an annotated copy of the Council's Dignity At Work policy.
29. During the course of her investigation, the Commissioner was provided with a copy of the withheld information by the Council, specifically,

email correspondence between Mr Howes and external solicitors concerning the review of the Monitoring Officer's draft report and draft recommendations in respect of the grievance.

30. Mr Howes, on behalf of the Council, provided the Commissioner with submissions on 2 July 2020. The Council advised that in addition to section 42 (LLP), they were also relying upon section 40(2)(third party personal data) in this matter.
31. Those submissions raised some questions and queries and the Commissioner sought further submissions from the Council. However, Mr Howes was subsequently suspended from his position within the Council and the Commissioner understands that he remains suspended at the time of writing. In his absence, the Council informed the Commissioner that they were unable to provide any further information as Mr Howes had dealt with the complainant's request and the Council's response to the Commissioner without discussing either with the Council's Information Governance Team. The Council accepted that they should be able to respond in full in Mr Howes' absence, but could not do so because of these circumstances. This very irregular and unsatisfactory state of affairs hampered the Commissioner's investigation and has prevented her from obtaining clarification on a number of points.
32. The Commissioner considers that the scope of her investigation is to determine whether the Council provided the complainant with all the relevant information held in respect of parts 1, 2, 4 and 5 of the request and whether they were correct to apply the stated exemptions to parts 3 and 6 of the request.

Reasons for decision

Information held – parts 1 and 2 of the request

33. In their response to the complainant's request of 2 December 2019, the Council stated that the external employment solicitors who conducted the review were Wilkin Chapman LLP and that the Council paid £5,730 for their legal advice.
34. However, without divulging the contents of the withheld information, it is apparent from the Commissioner's sight of the same that Wilkin Chapman LLP were not the only or indeed the first firm of external solicitors to be approached by the Council to carry out the review. The withheld information would appear to show that the Council (specifically the Monitoring Officer Mr Howes) originally obtained external legal advice in the matter from another firm of solicitors. The Commissioner notes that this firm of solicitors' website states that they advise 'in all

aspects of corporate governance, investigations, whistle blowing, employment law, discrimination, redundancy, restructuring and public law'. This firm was subsequently de-instructed and advice was obtained from Wilkin Chapman LLP.

35. The Commissioner would note that the Council are entitled to obtain external legal advice from whichever (and how many) solicitor firms they wish. However, in the context of the FOIA, it is important that the Council, where they choose to disclose information, does not do so in a partial or selective way (save where some of the information is exempt under one or more exemptions).
36. The Council's response to the request makes no mention of the external legal advice received from the other firm of solicitors. Anyone reading the response would therefore assume that Wilkin Chapman LLP, were the sole external legal advisers in this matter, and that consequently, their advice is the only external legal advice which the Council holds. The Council's response therefore, as it stands, is partial and misleading. The obtaining of advice from two external firms of solicitors also means that it is likely that the information disclosed by the Council in response to part 2 of the request (i.e. the amount paid for the advice) is not correct and that additional expenditure was incurred. If this presumption is correct then the Council will need to disclose the cost of obtaining the legal advice from the other firm of solicitors to the complainant.
37. Due to Mr Howes' aforementioned absence, the Council were unable to explain this discrepancy to the Commissioner. However, having seen the withheld information, the Commissioner is satisfied that the other firm of solicitors' advice falls within the scope of the complainant's request and that it is therefore also subject to the exemptions applied by the Council. The Commissioner has made more detailed observations in respect of the other firm of solicitors' advice in the Confidential Annex attached to this notice.
38. Section 1(1) of the 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*'.
39. By failing to inform the complainant that they had obtained external legal advice from another firm of solicitors (i.e. confirming external legal advice received from Wilkin Chapman LLP only) the Council breached section 1(1) of the Act.

40. As the Council has given no reason for the Commissioner to believe that the costs of obtaining the legal advice from the other firm of solicitors would be exempt from disclosure (the Council having previously disclosed the costs of obtaining the external legal advice from Wilkin Chapman LLP), they will now need to provide the complainant with the information detailed in the steps in paragraph 3.

Information held – parts 4 and 5 of the request

41. In respect of the legal advice received from Wilkin Chapman LLP, the Commissioner is satisfied that the Council has provided the complainant with the information requested in these parts of his request as they confirmed in their response of 2 December 2019 that the legal advice obtained from Wilkin Chapman LLP had been provided to Mr Timothy Howes, the Council's Monitoring Officer and Director of Corporate Governance, and that no elected members had been provided with a copy of the advice received. However, the Council has not provided the complainant with this information in respect of the legal advice received from the other firm of solicitors. Consequently, as detailed in the steps in paragraph 3, the Council will now need to provide the complainant with this information.

Information held – parts 3 and 6 of the request

42. As noted, in respect of the information requested in the above parts of the request (i.e. copy of the instructions/terms of reference of the review and copy of the review itself), the Council have withheld this information under section 42 of the FOIA.

Section 42(1) – Legal Professional Privilege

43. Section 42 of the FOIA provides that information is exempt from disclosure if the information is protected by legal professional privilege and this claim to privilege could be maintained in legal proceedings.
44. There are two categories of legal professional privilege: advice privilege and litigation privilege.
45. In this case the Council is relying on advice privilege. This privilege is attached to confidential communications between a client and its legal advisers, and any part of a document which evidences the substance of such a communication, where there is no pending or contemplated litigation. The information must be communicated in a professional capacity, and consequently not all communications from a professional legal adviser will attract advice privilege. For example, informal legal advice given to an official by a lawyer friend acting in a non-legal capacity or advice to a colleague on a line management issue will not attract privilege. Furthermore, the communication in question also needs to have been made for the principal or dominant purpose of

seeking or giving advice. The determination of the dominant purpose is a question of fact and the answer can usually be found by inspecting the documents themselves.

46. In submissions to the Commissioner the Council (specifically Mr Howes) advised the Commissioner that the Council *'initially sought advice by telephone, from Wilkin Chapman LLP, on or about 15 July 2019 about a grievance against senior council officers, where I was the Commissioning Officer'*. The Council advised that the advice centred around the process for the grievance; receiving a 'second opinion' on the grievance outcome letter, and advice on the process of any appeal. The Council stated that Wilkin Chapman LLP gave advice in a legal context, about legal rights, liabilities, obligations or remedies, and also advised on draft documentation and draft correspondence in relation to the grievance generally. The Council advised that Wilkin Chapman LLP were chosen because they have particular expertise in local government and governance matters along with expertise in HR matters.
47. The Council advised that from 15 July 2019 there were confidential communications between the client (the Council) and legal adviser (Wilkin Chapman LLP) made for the dominant purpose of seeking or giving legal advice. *'This included telephone calls, emails, draft documents and notes of telephone calls. None of this information has been put into the public domain'*.
48. In submissions to the Commissioner, the complainant contended that the Council had misapplied section 42 to the withheld information. The complainant cited the Court of Appeal decision in *Civil Aviation Authority v R Jet2.com Limited* [2020] EWCA Civ 35, where the Court found that a claim for legal advice privilege requires the party claiming the privilege to show that the relevant document/communication was created or sent for the dominant purpose of obtaining legal advice.
49. By contrast, the complainant noted that in their public statement the Council had stated that the Monitoring Officer's draft report on the outcome of the grievance and his draft recommendations *'were reviewed by external employment solicitors to provide an independent check – in order to ensure that his report and recommendations were both fair and objective'*. The complainant therefore contended that the dominant purpose of the external solicitors review was not, as the Council stated in their refusal notice of 2 December 2019, *'about legal rights, liabilities, obligations or remedies'* but was rather to provide an independent check on the quality of the Monitoring Officer's report and recommendations relating to the bullying allegations and to ensure that his report and recommendations were both fair and objective.
50. In short, the complainant contended that the external solicitors *'were commissioned to mark the Monitoring Officer's homework'*. He believed

that process would have included very little advice about legal rights, liabilities, obligations or remedies and would instead have focussed upon the Monitoring Officer's evaluation and interpretation of evidence and the fairness and robustness of the judgements he then went on to make.

51. The Commissioner is mindful that consideration of the dominant purpose test requires not just analysis of the document(s) or communication(s) but also the context in which they came to be created or received. The Commissioner agrees with the complainant that the dominant purpose of the external solicitors review obtained by the Council was perhaps more accurately described in the Council's public statement than the refusal notice. However, this does not alter the fact that in seeking the review from external solicitors, the Council were clearly relying on the expert legal advice which the employment solicitors would provide via that review. The Commissioner accepts that the external solicitors were essentially being asked to advise whether the Monitoring Officer's report and recommendations were fair and objective, but that advice was clearly given in a legal context (i.e. a grievance involving serious allegations) and from a legal perspective (i.e. advising the Council whether the process followed was appropriate and legally sound). It was precisely the legal expertise of the external solicitors which made their review and advice of value and importance to the Council.
52. The Commissioner has had sight of the information which the Council is seeking to withhold on the basis of section 42(1) of the FOIA. Having had sight of that information, and in keeping with the reality of the position as detailed above, the Commissioner is satisfied that the information constitutes communications between a lawyer and their client, the dominant purpose of which was the provision of legal advice.
53. However, section 42 is a qualified exemption and therefore the Commissioner must consider the public interest test and whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest test

54. In submissions to the Commissioner, the complainant stated that the alleged bullying of staff by the Council's Chief Executive and its Director of Operational Services had been the subject of wide public debate on social media and in the local press. The complainant noted that the independent investigator's report, the Monitoring Officer's evaluation and recommendations for action based on that report and a document produced by a whistle-blower, had all been widely circulated on social

media. The complainant noted that all of these '*official documents*' had been in the public domain at the time of his request to the Council and the Council had taken no action to prevent their circulation.

55. The complainant contended that, '*this abundance of official information, the quality of information, and the extensive public comment about the bullying allegations, activates the concept of 'related information' in the public domain and the public interest argument in providing a 'full picture'*'. The complainant cited the Commissioner's guidance on Information in the Public Domain⁸, which states that related information (to information requested from a public authority) might be some other information on the same subject, or similar information on a similar subject. The complainant contended that, '*there can be no doubting the fact*' that the above information, which was in the public domain at the time of his request, '*amounts to other information on the same subject*' to that information which the Council were withholding in this case.
56. In addition, the complainant cited the Commissioner's guidance on the public interest test⁹, which notes (paragraph 38) that '*there is always an argument for presenting the full picture and allowing people to reach their own view*'. The complainant also advanced as support, paragraph 39 of the same guidance, which states that:
- 'If information that is already in the public domain (rather than the requested information) is misleading or misrepresents the true position, or does not reveal the full picture, this may increase the public interest in disclosure. For instance, where part of some legal advice has been disclosed, leading to misrepresentation or a misleading picture being presented to the public, there may be a public interest in disclosing the full advice'*.
57. The complainant also noted that paragraph 65 of the Commissioner's above advice, states that, '*if the requested information contains new material that would help inform public debate, then the weight of the specific public interest argument is not reduced. Moreover, there is always some weight in the general argument for transparency and having the 'full picture'*'.
58. The complainant contended that, '*clearly, considerable, high quality, and very detailed, official information related to the withheld information was in the public domain at the time of my FOI request*'. However, the

⁸ <https://ico.org.uk/media/1204/information-in-the-public-domain-foi-eir-guidance.pdf>

⁹ https://ico.org.uk/media/for-organisations/documents/1183/the_public_interest_test.pdf

complainant contended that, *'some of the withheld information'*, would, if disclosed, provide a much fuller picture of how the Council decided what to do about very serious allegations of bullying by very senior members of staff.

59. The complainant advised the Commissioner that the Council's Monitoring Officer (who had reviewed the independent investigator's report and made recommendations for action) is line managed by the Chief Executive, *'one of the alleged bullies'*. The complainant advised the Commissioner that many people, including himself, had *'suggested on social media that the relationship between the Monitoring Officer and the Chief Executive is likely to have created a conflict of interest which may have influenced his review of the independent investigator's report and the recommendations for action he made'*. The complainant submitted that the decision by the Council to have Wilkin Chapman LLP review the Monitoring Officer's evaluation of the independent investigator's report and his recommendations for action, *'was clearly key to ensuring that the Monitoring Officer's conflict of interest did not influence his recommendations'*. The complainant noted that the Council's public statement on the matter (para 12 above) supported this proposition.
60. Referencing the Commissioner's guidance on the public interest once again, the complainant noted that paragraph 9 of that guidance states that *'there is a public interest in good decision making by public bodies, in upholding standards of integrity, in ensuring justice and fair treatment for all'*. The complainant asserted that the case for disclosure of the Wilkin Chapman LLP report *'falls firmly within the ambit of the above public interest argument'*. Indeed, the complainant stated that he would go further in contending that, *'due to the seriousness of the allegations, the seniority of those implicated, and the possibility of a conflict of interest in the handling of the matter by the Monitoring Officer, the Commissioner should attach enhanced weighting to this particular public interest argument'*.
61. The complainant provided the Commissioner with a copy of the Council's Dignity at Work policy (dated January 2017), which states that the Council *'will not tolerate any form of victimisation, bullying or harassment'*. The complainant highlighted a number of paragraphs contained within this policy. Paragraph 2.1 states that the policy *'covers bullying and harassment of, and by, managers (including senior managers, statutory officers and the Chief Executive)'*. Paragraph 3.2 of the policy stipulates that *'Managers have a particular responsibility to set a good example by their own behaviour; ensure that there is a supportive working environment; intervene to stop bullying or harassment'*.

62. Finally, the complainant cited the Commissioner's guidance on Requests for Personal Data about Public Authority Employees¹⁰, which informs public authorities (page 12) that *'it is reasonable to expect that you disclose more information about senior public authority employees than more junior ones. Senior employees should expect their post to carry a greater level of accountability, since they are likely to be responsible for major policy decisions and the expenditure of public funds'*.
63. Therefore, in addition to the 'full picture' argument, the complainant contended that there is another, *'very powerful, public interest argument based upon the greater transparency and accountability required of senior Council employees, and the special duties placed upon them to implement the Council's Dignity at Work policy, which adds weight to my request for disclosure of the withheld information'*. The complainant submitted that this public interest in favour of disclosure was strengthened even more *'by the fact one of the alleged bullies is the Council's Chief Executive and Head of Paid Service, who is ultimately responsible for the Council's disciplinary, grievance, appraisal processes and who is expected, as the Council's most senior officer, to lead by example'*.
64. In submissions to the Commissioner the Council noted that the Information Tribunal explained the balance of factors to consider when assessing the public interest test attached to section 42 in *Bellamy v Information Commissioner & the Secretary of State for Trade and Industry* [EA/2005/0023]. The Tribunal stated that *'there is a strong element of public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest'*.
65. The Council contended that it is *'quite plain'* from a series of decisions beginning with the Bellamy case, that some clear, compelling and specific justification for disclosure must be shown, *'so as to outweigh the obvious interest in protecting communications between lawyer and client, which the client supposes to be confidential'*. The Council also noted the Commissioner's guidance that additional weight may be added to the above factor if the legal advice is recent and concerns a live issue.
66. The Council submitted that the Commissioner should also consider the additional weight, *'where maintaining the exemption protects the rights of individuals'*. The Council contended that the impact on the rights of

¹⁰ https://ico.org.uk/media/for-organisations/documents/1187/section_40_requests_for_personal_data_about_employees.pdf

individuals *'should carry great weight in this matter, especially in relation to personnel matters'*. As grounds for supporting that view the Council advised that:

- The grievance had followed the Council's adopted process and is closed and completed;
 - Such matters are stressful for all the parties involved, and all parties have a right to move on with their lives;
 - That cannot happen if they have to be 'tried again' in the court of public opinion or be subject to prurient interest from those who have no legitimate interest in the matter;
 - There was no expectation from any of the parties that the information would be disclosed to the public at large.
67. The Council cited the Commissioner's decision in FS50652431 (2 May 2017) which concerned a request to Melborne Parish Council for a copy of a grievance report which had been discussed by the Council. The Council noted that in that case (which concerned section 40(2) and not section 42(1)) the Commissioner had recognised that information relating to investigations against individuals carries a strong general expectation of privacy due to the likelihood that disclosure could cause the data subjects' distress and could also cause permanent damage to their future career prospects and/or their reputation generally.
68. The Council further noted that in *Waugh v Information Commissioner and Doncaster College* [EA/2008/0038) the Tribunal had stated that *'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 employee and his employer in respect of disciplinary matters'*.
69. In stating that the concept of LPP protects the confidentiality of communications between a lawyer and client, the Council advised the Commissioner that their ability to speak freely and frankly with their legal advisers in order to obtain appropriate legal advice *'is a fundamental requirement of the English legal system'*.
70. The Council referenced the Commissioner's guidance on section 42¹¹ which states that additional weight may be added to the public interest in disclosure if the following issues are relevant in the particular case:

¹¹ https://ico.org.uk/media/for-organisations/documents/1208/legal_professional_privilege_exemption_s42.pdf

- Large amount of money involved;
 - Large number of people affected;
 - Lack of transparency in the public authority's actions;
 - Misrepresentation of advice that was given;
 - Selective disclosure of only part of advice that was given
71. It was the Council's contention that none of the above issues applied in this case as *'no money is involved'* and *'only those who are party to the grievance (three people) are affected'*. The Council stated that *'these are personnel matters which are never dealt with in the public realm'*. Nevertheless, the Council advised that *'there is already some transparency'* as they had placed in the public domain the fact that an independent investigation had been carried out and that *'additional independent safeguards were put in place to secure a fair and objective outcome'*. The Council stated that *'there has been no misrepresentation of advice that was given'* and *'there has been no selective disclosure of the advice that was given'*.
72. The Council contended that *'given the above clarity on the adopted processes which have been followed, together with an additional safeguard provided by Wilkin Chapman LLP, there is no public interest argument for releasing any of the requested information'*.
73. Although the Commissioner accepts that there is a strong element of public interest inbuilt into legal professional privilege, she does not accept, as previously argued by some public authorities, that the factors in favour of disclosure must be exceptional for the public interest to favour disclosure. In *Pugh v The Information Commissioner* [EA/2007/0055] the Information Tribunal clearly stated that:
- 'The fact there is already an inbuilt weight in the LPP exemption will make it more difficult to show the balance lies in favour of disclosure but that does not mean that the factors in favour of disclosure need to be exceptional, just as, or more, weighty than those in favour of maintaining the exemption'*.
74. Consequently, although there will always be an initial weighting in terms of maintaining this exemption, the Commissioner recognises that there are circumstances where the public interest will favour disclosing the information.
75. The Commissioner does not accept the Council's statement that only the three people who were parties to the grievance are affected. Whilst it is true that they may be the only individuals immediately affected by the grievance outcome, it is clear from the independent investigator's

report, and the circumstances surrounding the commissioning of that report, that this matter has implications that are potentially wider than the parties immediately affected by the grievance. Due to the sensitive nature of the information, the Commissioner is unable to provide details in this notice but these are contained in a Confidential Annex.

76. The Commissioner also does not accept that there has been no selective disclosure of information by the Council in this case. Whilst it is true that the Council have not publicly disclosed any of the actual legal advice which they obtained in the matter, in the response to the complainant's request the Council stated that they had obtained legal advice from Wilkin Chapman LLP but made no mention of their having originally obtained legal advice from the other firm of solicitors. The Council have not provided any explanation for this selective and misleading response to the complainant's request. The Commissioner has detailed her concerns about this transparency deficit in the Confidential Annex.
77. The Commissioner recognises, as the Council has contended, that there is a well established expectation of privacy where grievance and disciplinary matters are concerned. Indeed, where a public authority receives an information request which relates to any such matter, the Commissioner would usually expect to see a neither confirm nor deny (NCND) response (under the appropriate exemption) provided in response to the request.
78. The Council has stated that *'these are personnel matters which are never dealt with in the public realm'*, and has contended that the complainant *'has no interest or locus in the grievance per se'*. Given these statements, it is not clear why the Council (prior to the complainant's request) chose to publicly disclose (in a statement to the Municipal Journal) the grievance related information that they did, and then the further information which they provided to the complainant (and therefore the world at large) in their response to his subsequent information request.
79. The complainant and the public at large would not have been aware of the grievance or that an independent investigation had been carried out and independent safeguards (i.e. the obtaining of external legal advice) put in place, had the Council not chosen to disclose such information. The fact that the Council did publicly disclose such information, coupled with the Leader of the Council's subsequent comments at the Council meeting of 10 September 2020, clearly shows that the Council did recognise that the issues raised by the grievance *did* carry wider and legitimate public interest. Indeed, were it the case, as the Council have contended in submissions to the Commissioner, that no one, other than the parties to the grievance, had any legitimate interest or locus in the same, it would have been wrong and inappropriate for the Council to

have publicly disclosed information relating to a confidential grievance process.

80. In submissions to the Commissioner the Council confirmed that other than the statement given to the Municipal Journal, the aforementioned Council meeting minutes and the response provided to the complainant's information request, they have not made any further public statement in relation to the grievance investigation or its outcome.
81. To be clear, in view of the serious issues raised (i.e. bullying and harassment allegations against very senior Council officers) and the public interest carried by the same, the Commissioner is not critical of the Council's decision to disclose some information about the grievance investigation process into the public domain. On the contrary, in view of the serious allegations made, the Commissioner considers that such disclosure was appropriate and necessary to satisfy legitimate transparency and accountability. What the Commissioner is critical of, is that the Council's submissions in this case, have, as noted above, contradicted this approach.
82. The Commissioner is also critical of the Council's attempt (in submissions) to suggest that the Commissioner is supporting the complainant in any view which he may have as to the grievance outcome. Specifically, the Council stated that they recognised that *'the requestor has reviewed what information he has, and determined that the grievance should have had a different outcome and to some extent, the Commissioner is apparently supporting him in his view'*. The Council further stated that *'the Commissioner's role is not to adjudicate on the grievance'*.
83. As the Commissioner made very clear to the Council, her role and remit in this matter lies not in the grievance process or outcome, but in the public interest which the withheld information in this case may carry. Since the withheld information comprises external legal advice obtained by the Council in connection with a grievance investigation about which the Council has spoken publicly, it is wrong for the Council to suggest that it is inappropriate for the Commissioner to consider the public interest background and context of the withheld information.
84. The Commissioner accepts the argument advanced on a number of occasions by the Tribunal that as time passes the principle of LPP often diminishes. This is based on the concept that if advice is recently obtained it is likely to be used in a variety of decision making processes and that these processes are likely to be harmed by disclosure. However, the older the advice the more likely it is to have served its purpose and the less likely it is to be used as part of any future decision making process. In many cases the age of the advice is closely linked to whether the advice is still live. Advice is said to be live if it is still being

implemented or relied upon and therefore may continue to give rise to legal challenges by those unhappy with the course of action adopted on that basis.

85. The Commissioner is mindful that at the time of the complainant's request (20 November 2019) the withheld information was very recent (legal advice having been obtained only months earlier). In addition, whilst the grievance outcome had been reached prior to the complainant's request, and an opportunity for appeal provided, the information remained sensitive due to other related matters, such as an anonymous whistleblowing complaint into the grievance process which the Council advised the Commissioner had been independently investigated with no action being taken as a result of the complaint.
86. The Commissioner notes that it would appear, given the discussion which took place at the Council meeting on 10 September 2020, and subsequent articles in the press¹² that issues stemming from the grievance remain ongoing within the Council.
87. In FS50652431, the Commissioner recognised that information relating to investigations against individuals carries a strong general expectation of privacy due to the likelihood that disclosure could cause the data subjects' distress and could also cause permanent damage to their future career prospects and/or their reputation generally. Although the Commissioner's analysis in the Melbourne Parish Council case was in the context of section 40(2)(third party personal data), such considerations would clearly extend to legal advice provided in respect of a confidential grievance investigation/process and are therefore also relevant to section 42(1). Similarly, the Commissioner recognises the findings of the Information Tribunal in *Rob Waugh v Information Commissioner and Doncaster College*, as referenced by the Council in their submissions.
88. In the circumstances of this case, given the recent age of the withheld information at the time of the request, the fact that the legal advice relates to a confidential grievance process, and the fact that issues stemming from the grievance and its process were ongoing at the time of the request and indeed appear to still be ongoing within the Council at the time of writing, the Commissioner considers that there is a significant and weighty public interest in upholding the exemption.

¹² <https://theisleofthanetnews.com/2021/03/13/culture-review-at-thanet-council-held-up-due-to-numerous-outstanding-grievance-and-disciplinary-investigations/>

89. However, the Commissioner recognises that there is a legitimate and significant public interest in disclosure of the withheld information. The Commissioner has set out her detailed grounds for this view in the Confidential Annex. The Commissioner considers that the complainant has advanced strong and cogent public interest arguments for disclosure of the withheld information, citing pertinent parts of the Commissioner's guidance.
90. There is one important caveat, however. A central plank of the complainant's case for disclosure is that there is already a significant amount of 'official' information in the public domain and that disclosure of the withheld information would further such transparency by providing a 'full picture'. Whilst the Commissioner has no grounds to doubt the authenticity of the documents (most notably the independent investigator's report) which the complainant has submitted in support of his request, these documents and the information contained within them, had not, at the time of his request, been officially placed in the public domain by the Council. Rather, the documents had been 'leaked', prompting online speculation and comment, much of it highly prejudicial to the individuals involved. The Commissioner does not consider that it would be fair or appropriate for her to rely on such 'leaked' information as providing support for disclosure of the withheld information.
91. In submissions to the Commissioner the Council sought to downplay the public interest in the withheld information, instead describing it as '*prurient interest from those who have no legitimate interest in the matter*'.
92. As noted above, if no one other than the parties involved with the grievance had any legitimate interest in the matter, the Council would not have publicly disclosed any information concerning the grievance or the investigation process which was followed. It is not clear whether the Council sought consent from the parties before doing so, but in any event the Commissioner is satisfied that the Council made such public disclosures (both to the Municipal Journal and in response to the complainant's request) because they recognised, reluctantly or otherwise, that the matter, involving as it did, two of the most senior officers within the Council, was serious enough to necessitate some level of public transparency and accountability. Indeed, that need for such transparency and accountability was still apparent in the comments of the Leader of the Council at the Council meeting of 10 September 2020 which post-dated the complainant's request.
93. Whilst recognising that the Council has evidenced some degree of transparency in this matter, the Commissioner is concerned that aspects of this have been selective and misleading (for example the absence of any reference to the other firm of solicitors in response to the complainant's request and the Council's failure to account for this

omission). The Commissioner considers that disclosure of the withheld information would provide a significant and important degree of further transparency and accountability to the Council's approach and actions as regards the relevant grievance and investigation process. This specific public interest should not be understated or ignored.

94. The Commissioner also notes that there have been press articles reporting on allegations of bullying and harassment by very senior individuals within the Council (albeit through 'leaked' information rather than information officially disclosed into the public domain by the Council) and concerns expressed by the Head of East Kent Internal Audit Partnership about alleged cultural and governance failures stemming *'from the very top of the organisation'*. The Commissioner recognises therefore the legitimate public interest concerning the Council and its running, and considers that disclosure of the withheld information would shed further light on this.
95. However, given the recent age of the withheld information (legal advice), the fact that it concerns the approach taken in a confidential grievance investigation process (issues arising from which appear to be ongoing and unresolved), coupled with the strong and significant public interest in protecting LPP, the Commissioner considers that, on balance, the public interest favours, by an appreciable but not heavy degree, maintaining the exemption contained at section 42(1) of the FOIA.
96. Having found that the withheld information is exempt from disclosure under section 42(1), the Commissioner has not gone on to consider the Council's later application of section 40(2) to the same information.

Other matters

97. As noted, during the Commissioner's investigation the Council's Monitoring Officer was suspended. Whilst the Monitoring Officer had provided the Commissioner with the Council's submissions in this matter, those submissions prompted the Commissioner to make further enquiries and queries. However, the Council was unable to answer those questions and queries due to the Council's Information Governance Team having not been involved in the handling of the complainant's request and subsequent complaint to the ICO.
98. The Commissioner would emphasise to the Council the importance of ensuring that the Information Governance Team is aware of each and every information request received. The reputational risks posed by an inappropriate and irregular 'silo' approach as occurred in this case, are clear. The absence of any one individual within the Council, for whatever reason, should not leave the Council unable to provide the Commissioner with necessary information in any given case.

Right of appeal

99. 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: 0300 1234504
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

100. 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.

101. 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

**Gerrard Tracey
Principal Adviser FOI
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**