

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 September 2022

Public Authority: Channel Four Television Corporation
Address: 124 Horseferry Road
London
SW1P 2TX

Decision (including any steps ordered)

1. The complainant has requested all documents held by Channel Four Television Corporation (Channel 4) relating to any decisions regarding the implementation of Channel 4's Supplier Code of Conduct, its policy on Viewer Trust, bullying; or the 'Speak Up' process in relation to a particular organisation within a specified timeframe. Channel 4 cited section 41(1) and section 40(2) as its reasons for withholding some of the requested information. It also cited section 40(5A) to neither confirm nor deny whether some of the requested information is held.
2. The Commissioner's decision is that Channel 4 has correctly cited section 41(1) and section 40(2) to the withheld information. He has also decided that Channel 4 appropriately cited section 40(5A) to neither confirm nor deny whether it held certain information. However, Channel 4 breached section 10(1) FOIA by providing a small amount of information outside the legislative time frame and section 17(7)(b) by not providing details of the complainant's right to complain to the Commissioner when it provided its refusal notice.

3. The Commissioner does not require the public authority to take any further steps.

Request and response

4. On 27 September 2021 the complainant wrote to Channel 4 and requested information in the following terms:

"Under the Freedom of Information Act, please could you send me all documents held by Channel 4 relating to any decisions regarding:

the implementation of Channel 4's Supplier Code of Conduct; C4's policy on Viewer Trust; bullying; or the 'Speak Up' process - in relation to [redacted] since 23.03.21

As C4 is publicly-owned, I believe it is a matter of public interest that the Supplier Code of Conduct, Viewer Trust policy and the Speak Up committee itself function as designed. And so it is in the public interest that documents and processes leading to decisions or conclusions made regarding these be revealed. I know I do not have to provide you with a reason for making this request, but I have evidence the Speak Up committee were sent and relied on an inappropriate document in deciding whether [redacted] were in breach of C4's Supplier Code of Conduct. I believe it is important that the entire decision-making process of the Speak Up Committee in this matter be made available for public scrutiny. I also believe it would be in the public interest to know of any previous investigations or decisions by C4 in connection to [redacted] in this regard.

I can appreciate there will be documents that reveal confidential information or personal data that it would not be appropriate to disclose, but I do think where possible these should be redacted as necessary, and if none of the document is suitable for release, then at least the name or description of the document included in your response, in line with data protection law. The volume and nature of evidence the Speak Up Committee assessed, or didn't, is very relevant.

In light of the above, but in line with data protection considerations, could I please request that you provide:

- all communications between C4 and [redacted] regarding bullying, viewer trust, C4's supplier code of conduct or the 'Speak Up' process since 23.03.21

- any documents received, held or consulted by C4 in relation to [redacted] regarding bullying, viewer trust, C4's supplier code of conduct or the 'Speak Up' process since 23.03.21
 - any internal C4 communications, memos, notes or minutes discussing relating to regarding bullying, viewer trust, C4's supplier code of conduct or the 'Speak Up' process since 23.03.21
 - for now, please could you also notify me whether you hold any documents that would fit the above criteria prior to 23.03.21, or if this is prohibitive to research, perhaps you might be able to let me know if [redacted] has been the subject of any previous investigations at C4 relating to bullying, viewer trust issues, the Supplier Code of Conduct or the Speak Up process since 2014..."
5. On 22 October 2021 Channel 4 provided its refusal notice to the complainant. It cited section 41 (information provided in confidence) regarding the requested information. Channel 4 did not cite section 40 at that time because it had made the assumption that the complainant had excluded personal data.
 6. The complainant asked for an internal review on 23 October 2021, disputing Channel 4's application of section 41. They also reiterated that they were not asking for personal data and that it could be redacted. The complainant provided some further argument on the same day. This was acknowledged by Channel 4 on 25 October 2021.
 7. The complainant clarified their 27 September 2021 request on the same date:

"Dear C4 FOI, I just thought I would specify that I believe this would include any relevant communications with representatives of [redacted] including:[redacted names of individuals] but does not have a [redacted] email address."
 8. The complainant also corrected what they believed to be a factual error on 24 October 2022 concerning the provision of personal data regarding the 27 September 2021 request, suggesting that they had not excluded all third party personal data. They also noted the following:

"...that my request specifies it covers information regarding the 'volume and nature' of the evidence assessed by Speak Up in relation to [redacted].
Please ensure that any documents whose contents are exempt in their entirety are still identified such that they provide any such information to the fullest extent possible. This should include details

such as, but not limited to, the time and date if originally knowable, format (email, text, WhatsApp, document etc) if obscured by redaction, number of pages, and even give some indication of the length of any content redacted.”

9. On 22 November 2021, Channel 4 provided its internal review where it maintained its position regarding section 41 and also cited sections 40(2) (third party personal information) and 40(5A) to neither confirm nor deny whether some of the requested information is held.
10. Channel 4 apologised for not making it clearer that its refusal notice had included the clarification that had been made, and attached the policy 'Respect at Work'. It concluded that the right to have a review had been included in its refusal notice and included details of how to complain to the ICO in its review.

Background

11. Channel 4 provided the Commissioner with some background information regarding this complaint.
12. Prior to the request that is the subject of this complaint, the complainant submitted a separate but related request. This request was for the same information that was withheld under this request. Channel 4 neither confirmed nor denied that it held this information.
13. Therefore, at the time Channel 4 responded to that request it had already explained that section 40(5A) was engaged.
14. The Commissioner notes that Channel 4 describes 'Speak Up' as follows:

“Our Speak Up facility provides people working at Producers and other third parties with a confidential process whereby they can escalate concerns to senior Channel 4 management. We are committed to dealing with everything that is reported to us promptly, fairly and confidentially, in accordance with this guidance.”¹

¹ [Speak Up Facility | Channel 4](#)

Scope of the case

15. The complainant initially contacted the Commissioner on 24 October 2021 to complain about the way their request for information had been handled procedurally by Channel 4 because no reference had been made to their rights. They complained again on 26 November 2021 because they were not satisfied with the internal review outcome.
16. During several pieces of correspondence the complainant also raised matters pertaining to their request that related to the substantive issues of the exemptions cited and whether Channel 4 had considered the "volume and nature" part of their request.
17. The Commissioner wrote his investigation letter to Channel 4 and subsequently asked further questions about its use of section 40(5A) and the "volume" of information that the complainant stated that they had requested but that Channel 4 had not addressed. The Commissioner did not explore the complainant having asked for the "nature" of the information held because his view is that this would fall under the exemptions cited by Channel 4.
18. Channel 4 responded on 5 September 2022 stating that, having reviewed the correspondence, it did not consider that the complainant had specifically requested the "volume and nature" of the evidence it had assessed, though it had been referred to in that correspondence.
19. The Commissioner considers that the scope of this investigation is Channel 4's citing of section 40(2)(personal information), section 40(5A) (neither confirm nor deny) and section 41 (information provided in confidence). He will also look at any procedural matters that may have occurred.

Reasons for decision

Section 41 – information provided in confidence

20. Section 41(1) of FOIA provides that –

"(a) Information is exempt information if 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".

21. The Commissioner's advice on section 41 states that
- "information will be covered by Section 41 if –
- it was obtained by the authority from any other person,
 - its disclosure would constitute a breach of confidence.
 - a legal person could bring a court action for that breach of confidence, and
 - that court action would be likely to succeed."²
22. Channel 4 explained that, in applying section 41 FOIA to the withheld information it had considered previous decisions of the Commissioner, specifically: [FOIA decision notice template \(ico.org.uk\)](https://ico.org.uk/foia/foia-decision-notice-template)

Was the information obtained from any other person?

23. Section 41(1)(a) states that the information must have been obtained from "any other person".
24. Channel 4 explains that the information provided to the Commissioner consists of a complaint and information derived from that complaint in the course of Channel 4's investigation. It further explains that instances of communications and documents not generated by the individual who made the complaint, are records that reflect the substance of the complaint and that this is the confidential information. Channel 4 states that the situation is analogous to that described in paragraph 12 of the decision notice referred to in paragraph 22 above:

"Defra argues that the concerns were derived from the whistleblower, but that the investigative areas and actions originated from Defra's analysis. Although the investigative areas and analysis were not generated by another person, it contends that disclosure of those areas will infer the content from which it was derived. The Commissioner takes this to mean that any disclosure has the potential to reveal some of the confidential information it was derived from."

² <https://ico.org.uk/media/for-organisations/documents/1432163/information-provided-in-confidence-section-41.pdf>

25. It states that there are two categories of third party supplying the information: the individual who made the complaint and staff at the organisation named in the request.
26. The Commissioner has seen the withheld information and accepts that it was obtained from another person.
27. Having established that the withheld information was obtained from another person, the Commissioner must next consider whether or not its disclosure to the public (otherwise than under FOIA), would constitute a breach of confidence 'actionable' by that or any other person.

Would disclosure constitute an actionable claim for breach of confidence

28. The usual test for section 41 cases is set out in the case of *Coco v Clark* [1969] RPC 41 which sets out three elements which must be present in order that a claim can be made. According to the decision in this case a breach of confidence will be actionable if:
 - the information has the necessary quality of confidence;
 - the information was imparted in circumstances importing an obligation of confidence; and
 - there was an unauthorised use of the information to the detriment of the confider.

However, for that claim to be 'actionable' within the meaning of section 41(1)(b) of FOIA, a public authority must establish that an action for breach of confidence would, on the balance of probabilities, succeed.

Does the information have the necessary quality of confidence?

29. In order for information to have the necessary quality of confidence, it must be more than trivial and not otherwise accessible. Channel 4 states that the information has the necessary quality of confidence, that the withheld information relates to some serious allegations that include allegations of bullying relating to a specific individual. These allegations could not be considered "trivial" and that none of the parties involved considered them to be trivial. The seriousness of the allegations is reflected in the tone and content of the withheld correspondence.
30. The Commissioner has read the withheld information and he accepts that it is more than trivial. The Commissioner has considered whether the information is otherwise accessible. Having carried out internet searches, the Commissioner has found that, although there is

information that refers to the withheld information, it has not been placed there by the third parties concerned and is not the actual information that was withheld by Channel 4. The Commissioner accepts that the withheld information therefore has the necessary quality of confidence.

Was the information imparted in circumstances importing an obligation of confidence?

31. The allegations such as those covered by the requested information are usually treated sensitively and it would be reasonable for any individual that had raised such allegations with an organisation to expect that the organisation would treat any investigation sensitively and confidentially, rather than publishing these allegations on an intranet site, for example.
32. Channel 4 underpins its argument by stating that, "...any individual against whom such allegations were raised would reasonably expect such allegations to be investigated sensitively and with an appropriate degree of confidentiality". They would not expect them to be placed in the public domain via an FOI request, particularly where an allegation was not upheld.
33. There was an obligation of confidence as the information was communicated in circumstances importing that obligation,

"Our Speak Up facility provides people working at Producers and other third parties with a confidential process whereby they can escalate concerns to senior Channel 4 management. We are committed to dealing with everything that is reported to us promptly, fairly and confidentially, in accordance with the guidance."³

Channel 4's view is that, although an obligation of confidence could be implicitly inferred whilst interacting with any whistleblowing facility, it is explicitly assured on Channel's 4's website. It actively advertises the confidential nature of the process and considers that it would be reasonable for both the confider and the individuals involved in assisting with the investigation to conclude that both the process and their input was confidential.

³[Speak Up Facility | Channel 4](#)

34. The complainant argues that if Channel 4 is able to hide behind confidentiality to protect whistleblowers to shutdown any attempts to scrutinise how they handle these types of complaints, or for complaints made by whistleblowers to be kept under lock and key, even if a whistleblower is prepared to waive anonymity,

“it leaves a very serious mechanism for ensuring standards are maintained dangerously opaque. That is not in the spirit of whistleblowing or in the spirit of the FOIA.”

Would disclosure be detrimental to the confider?

35. The complainant queried how the organisation concerned would be able to sue for breach of confidence if the requested information was placed in the public domain and also questioned what that detriment would be.
36. In this case Channel 4 argues that detriment would be caused to two groups of individuals. The first group would be those assisting in investigating a specific allegation raised via 'Speak Up' and those who had had allegations levelled against them. The second group is those that have raised allegations or have assisted in investigating allegations raised via 'Speak Up', including those individuals who might wish to use the facility in the future.
37. Channel 4 explains that the detriment in relation to the first group would be caused by their views and role being made public which includes those who may disagree with the outcome of the investigation. These individuals may be concerned about any retribution they may suffer as a result of their views being made public.
38. Detriment would be caused to individuals who have had allegations made that were not subsequently upheld. Putting such allegations into the public domain could be detrimental to those individuals' future careers and prospects and would be likely to cause them a great deal of distress and consternation. Regarding this second group, detriment will be caused by setting a precedent of Channel 4 publishing details of the substance of 'Speak Up' complaints and/or information that could be used to infer the identity of 'Speak Up' complainants by way of FOIA responses.
39. In terms of the future users of the service, if Channel 4 cannot guarantee confidentiality in relation to whistleblowing complaints, the entire facility would be undermined, making it difficult to continue to provide such a facility in future. This would leave the individuals with little option in terms of alternative means to raise such allegations involving Channel 4's suppliers.

40. However, it is the first group identified as suffering detriment from disclosure which would make it an actionable breach but might lead to further actionable breaches with regard to the second group.

Is there a public interest defence for disclosure?

41. Channel 4 recognises that there is a general public interest in ensuring that public bodies operating whistleblowing facilities and carrying out investigations do so fairly and comprehensively.
42. There is a very strong public interest in ensuring that any such whistleblowing facility is carried out confidentially and that the identity of whistleblowers are protected. As FOIA is applicant blind, Channel 4 argues that disclosing information in one request would mean that it will be required to disclose the same information in relation to any other request, for example, if it was requested by the individual the accusation was levelled against.
43. The overriding public interest is in ensuring that individuals have a means of raising concerns to Channel 4 and in having those concerns thoroughly investigated, in confidence.
44. The complainant argues that there is some public interest in scrutinising Channel 4's 'Speak Up' facility. They state that there has been interest in the media and questions raised about this facility and the investigations it conducts. The complainant also states that the Broadcasting, Entertainment, Communications and Theatre Union had written to Channel 4 voicing concerns that had been raised by its members about 'Speak Up'. The complainant's view is that
- "...there is a strong case that Channel 4's reluctance to release information under the FOIA...is part of a concerted and deliberate effort on their part to avoid issues with the Speak Up facility being exposed by proper scrutiny."
45. They go on to say that a supplier's policy was not provided until the internal review stage because it was considered to be incriminating. The complainant has provided some detail in support of their complaint but the Commissioner is unable to reproduce it here.
46. The complainant considers that the investigation had "major flaws" and that it should be scrutinised for that reason. They contend that Channel 4 applied section 41 as a blanket exemption "without any attempt to assess either the information requested or ICO guidance".

The Commissioner's view

47. The question here is whether Channel 4 would have a public interest defence if it disclosed this information. Channel 4 assured individuals that its 'Speak Up' facility provided confidentiality. The disclosure of confidential information undermines that assurance and undermines trust. To disclose the information might well discourage other individuals from reporting concerns to 'Speak Up'. In all the circumstances of the case, the Commissioner does not consider that a strong enough public interest defence would be available to Channel 4.

Section 40 personal information

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

Is the information personal data?

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

"any information relating to an identified or identifiable living individual".

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

⁴ As amended by Schedule 19 Paragraph 58(3) DPA.

54. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
55. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
56. Having reviewed the withheld information, Channel 4 explained that it was littered with the names and opinions of employees of both Channel 4 and the employees of the organisation named in the request. The Commissioner notes, however, that their "opinions" were not withheld under section 40(2) but under section 41 and that the Commissioner's understanding is that Channel 4 did not want their names to be set against their "opinions". Channel 4 contends that in instances where only a first name is used, the first name combined with the contextual information implicit in the documents about their place of work and/or scope of their role would render the individuals identifiable. Channel 4 does not consider that any of the personal information is special category data.
57. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to various data subjects and contains their names, either in whole or in part. He is satisfied that this information both relates to and identifies the individuals concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
58. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
59. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

60. Article 5(1)(a) of the UK GDPR states that:

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

61. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.

62. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.

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

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

64. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

"processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child"⁵.

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

- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
- ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;

⁵ Article 6(1) goes on to state that:-

"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA and by Schedule 3, Part 2, paragraph 20 the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019) provides that:-

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

- iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
66. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

67. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
68. Channel 4 argues that there is no lawful basis for disclosure of third-party personal data in this instance. It does not consider that there is any legitimate interest in disclosing the names of the individual members of staff at the organisation concerned and Channel 4 in relation to any 'Speak Up' investigation. Channel 4 denies that naming any individual involved in investigating any allegation raised via 'Speak Up' would contribute to the public's understanding of how allegations more generally are considered and dealt with. It describes how Channel 4's dedicated 'Speak Up' website refers to the "Evaluation Group" and explains that its dedicated Speak Up website provides their job titles:

[Speak Up Facility | Channel 4](#)

69. Channel 4 does not consider that there is any further public interest that would be satisfied by publishing these names in response to an FOIA request. Channel 4 reiterates that the affected party was notified of the results of the 'Speak Up' investigation in June 2021. The 'Speak Up' website states:

"Channel 4 will not tolerate any retaliation against an individual for raising a concern, making a report or assisting in an investigation."

If Channel 4 was to publish the names of individuals alongside their opinions about any specific 'Speak Up' investigation, this could result in

retaliation against these individuals from anyone with specific knowledge of the investigation who does not agree with its outcome. Channel 4 considers that, conversely, disclosure of the names to individuals with no knowledge of any specific 'Speak Up' investigation would not provide any enlightening information about how 'Speak Up' complaints are investigated. Channel 4's view is that it would be largely meaningless. In terms of public understanding, the job titles reveal more about how complaints are treated than the disclosure of their names. Channel 4 does not consider that disclosing these names could serve any broader public or legitimate interest.

Is disclosure necessary?

70. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
71. For the avoidance of doubt, Channel 4 considers that disclosure of the information fails both the necessity and the balancing test and would be likely to dissuade individuals from freely and frankly engaging in 'Speak Up' investigations in future. Channel 4 is mindful of the assurances provided on its 'Speak Up' website in relation to it not tolerating any retaliation against an individual for "assisting in an investigation" Setting a precedent for the disclosure of the names of individuals would be detrimental to Channel 4's ability to maintain this assurance. It would furnish any individual looking to retaliate against individuals assisting with an investigation with the means to do so.
72. Although the complainant has accepted that some personal data could be subject to an exemption, they also made it clear to Channel 4 that they expected that personal information would be provided, where permissible. Therefore, although the complainant appears to accept that some personal data can be withheld, they have not accepted that this is the case for all the withheld personal information and that some of the information is necessary to them, though understandably they were unable to be specific.

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

73. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For

example, if the data subject would not reasonably expect that the information would be disclosed to the public under the FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.

74. In considering this balancing test, the Commissioner has taken into account the following factors:
 - the potential harm or distress that disclosure may cause;
 - whether the information is already in the public domain;
 - whether the information is already known to some individuals;
 - whether the individual expressed concern to the disclosure; and
 - the reasonable expectations of the individual.
75. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.
76. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
77. Channel 4 has explained that the withheld personal data relates to the data subjects' professional life, specifically, the role they have fulfilled in assisting a whistleblowing investigation.
78. Channel 4 underlines the "confidential process" and the fact that Channel 4 states that it will not tolerate any retaliation against an individual for "assisting an investigation". On this basis it believes that individuals would not expect their names to be published unless they were found guilty of some wrongdoing where it would be in the public interest and/or legally complaint for their personal data to be placed in the public domain. The individuals concerned have not consented to their data being published.
79. Channel 4 argues that the release of this information would set a precedent and dissuade individuals from freely and frankly engaging in 'Speak Up' investigations in future. It would severely impact on Channel 4's ability to operate a whistleblowing facility, if confidentiality was undermined. There is also a risk to the welfare of individuals who have previously raised concerns and assisted in investigations or those who may do so in the future.

80. The Commissioner agrees that the names of the individuals, internally and externally, who were expecting their contributions to remain confidential and have not consented to their disclosure should not be disclosed. It would leave them open to potential harassment from individuals not content with the outcome of investigations.
81. The Commissioner wishes to make clear that this comment is not directed at the complainant but information released under the FOIA is to the public generally, any one of whom may take this route.
82. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
83. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that he does not need to go on to separately consider whether disclosure would be fair or transparent.

The Commissioner's view

84. The Commissioner has therefore decided that Channel 4 was entitled to withhold the information under section 40(2), by way of section 40(3A)(a).

Section 40(5A) – Personal data of the applicant (or complainant)

85. Personal data of which the applicant (complainant) is the data subject is always exempt by virtue of section 40(1) FOIA.

86. Section 40(5A) of the FOIA states that:

The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1).

87. Therefore, where the information requested is the requester's own personal data within the meaning of section 40(1) FOIA, the effect of section 40(5A) is that a public authority is not required to confirm or deny whether it holds the information.
88. As previously referred to in paragraph 12 of this decision, prior to the request that is the subject of this complaint, the complainant had submitted a separate but related request. This request was for the same information that was withheld under this request. Regarding that request, Channel 4 states that it followed the Commissioner's guidance

in relation to section 40(5) to neither confirm nor deny whether it held this information and it responded in line with that guidance. Channel 4 provided further detail that cannot be reproduced here.

89. Therefore, at the time Channel 4 responded to that request it had already explained that section 40(5A) was engaged.
90. 'Personal data' is defined in sections 3(2) and (3) of the Data Protection Act 2018 and means 'any information relating to an identified or identifiable living individual'.
91. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
92. Channel 4 does not wish to confirm or deny under the FOIA whether it holds any personal data of which the complainant is the data subject in relation to this request.
93. Therefore, in neither confirming or denying that it holds relevant personal information, Channel 4 is neither confirming or denying whether it dealt with a complaint submitted by the complainant. Were it to do so, the complainant would be clearly linked to that information and identifiable via the request that they submitted. Therefore any information Channel 4 holds, if it holds any, would be the complainant's own personal data and potentially the personal data of third parties.
94. The Commissioner notes that the First Tier Tribunal in [Leo McAuley v Information Commissioner \(EA/2022/0018\)](#) recently upheld a decision notice in which the public authority had applied section 40(5A) regarding a request:

"We find that some of the report also relates to Mr McAuley, in that it contains information, opinions and allegations put forward by him. We agree with the Commission that, on the balance of probabilities, a motivated individual would have been able to identify Mr McAuley from the report and other information likely to be known by at least a section of the public. Further, Mr McAuley in his request refers to 'my whistle blowing complaint' so he would be identifiable from the request and the response taken together."

"We except that Mr McCauley has a legitimate interest in the disclosure of the report in that he has a legitimate interest in being

advised of the outcome of the investigation into his whistleblowing allegations.”

“In terms of the wider public interest in transparency, we do not except that it is reasonably necessary to disclose the full report of a particular independent review carried out to determine whether the University had complied with its disciplinary procedures in regard to how it handled a particular case of student misconduct. Having read the report there are no criticisms of the university which, in our view, are of such an extent or of such broad application that it is reasonably necessary to disclose this particular report to the public as a whole.”

95. The provisions of section 40(5A) FOIA mean that Channel 4 is not required to comply with the duty to confirm or deny whether the information is held, as the duty to confirm or deny does not arise in relation to information which is exempt information by virtue of subsection (1). Although unable to set out the majority of the arguments Channel 4 has provided to support its NCND refusal under this exemption, its broader arguments concern the present and future effects on its whistleblowing facility and any potential whistleblowers on confirmation or denial.
96. Having considered the arguments that Channel 4 has provided to the Commissioner that cannot be reproduced here, he accepts that Channel 4 has neither confirmed nor denied whether it holds this information appropriately.
97. Finally, the complainant has stressed their need for the quantity of information considered by Channel 4. Channel 4 considered that the complainant's request for the “volume” of information in the original request was a statement, rather than a specific request. However, it is clear from later correspondence that the complainant considered “volume” to be part of their request and this included the identification of those items, not just numbers of pages and so on. It is the Commissioner's view, therefore, that the “volume” of information considered can be included under this exemption.

Section 10 – time for compliance

98. Section 10 of the FOIA states that a public authority must comply with its duty under section 1(1) FOIA and communicate all non-exempt information,

“promptly and in any event not later than the twentieth working day following the date of receipt.”

99. The information request was received on 27 September 2021. However, Channel 4 did not disclose some information it held until the internal review on 22 November 2021.

100. The Commissioner therefore finds that Channel 4 breached section 10 of FOIA when handling the request.

Section 17 – refusal of request

101. Section 17(7) provides that –

“A notice under section (1), (3) or (5) must –
(a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and
(b) contain particulars of the right conferred by section 50.”

102. The complainant told the Commissioner that he had not been provided with any details as to his rights under section 50 of the Act as required by section 17(7)(b), specifically details of their right to complain to the Commissioner.⁶

103. The Commissioner has concluded that Channel 4 did not comply with section 17(7)(b), although he notes that the complainant was provided with these details at internal review.

⁶ [CoP FOI Code of Practice - Minor Amendments 20180926 .pdf \(publishing.service.gov.uk\)](#)

Right of appeal

104. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0203 936 8963
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

105. 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.

106. 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

Janine Gregory
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF