



**First-tier Tribunal  
(General Regulatory Chamber)  
Information Rights**

**Appeal Reference: EA/2020/0197(P)**

**Decided without a hearing on: 26 January 2021**

**Before**

**JUDGE SOPHIE BUCKLEY  
GARETH JONES  
ANDREW WHETNALL**

**Between**

**STEPHEN WATTERS**

Appellant

**and**

**THE INFORMATION COMMISSIONER**

Respondent

**MODE OF HEARING**

The parties and the Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 Chamber's Procedure Rules. The code for the form of remote hearing is P.

**DECISION**

1. For the reasons set out below the appeal is dismissed.

## REASONS

### **Introduction**

1. This is an appeal against the Commissioner's decision notice FS50806635 of 14 May 2020 which held that Newcastle City Council ("the Council") was entitled to rely on s 41 (information provided in confidence) of the Freedom of Information Act 2002 (FOIA). She did not require the Council to take any steps.

### **Factual background to the appeal**

2. The request relates to a decision by Newcastle City Council to remove from Newcastle City Library an exhibition organised by the Palestine Solidarity Campaign remembering the Nakba of 1948.

### **Request and Decision Notice**

#### *The Request*

3. Mr. Watters made the request which is the subject of this appeal on 17 July 2019:

In Mark's email of 3.6.19 to John, he referred to receiving "a small number comments about the content....we need to take seriously".

I request copies of comments received in writing whether that be letter, email, handwritten note and received verbally but the notes taken by staff of such verbal comments. All personal data to be redacted of course.

I would expand the meaning of comments to include complaints, etc, anything negative with regard to the content of the exhibition.

I request copies of communications regarding the exhibition between staff and externally, before, during and after the exhibition.

Whose decision was it to take down the exhibition?

Also in Mark's email, he stated, "On reflection some content contravened our Public Information and Display Policy..." Please specify which of content? If we removed this content others were unhappy with, are we permitted to exhibit what remains?

#### *The Response*

4. The Council responded on 13 August 2019. It withheld the information requested on the grounds that it was made in confidence and that there was an expectation that the Council would not share other's emails. It provided a summary of the original comment ("The original comment was that it was felt

that the contents of the display were inflammatory and biased') and an explanation of the rationale behind the decision.

5. Mr Watters was unhappy with the response and as a result the Council carried out an internal review. By email dated 10 September 2019 the Council clarified that it relied on s 41 FOIA in relation to the part of the request relating to comments. In relation to the request for communications the Council disclosed any internal communications and withheld any external communications on the basis of s 41. The internal review also provided answers to the two questions included at the end of the request.
6. During the investigation by the Commissioner the Council provided the following further information about the reasons for withholding the information.
7. On receipt of the request the Council had contacted the complainant who had stated that they did not want their personal details or the content of the complaint shared with anyone. The Council stated that the public interest in transparency was outweighed by the public interest in making sure that the general public were not discouraged from using the complaints process by the release of confidential complaints by the Council.

#### *The Decision Notice*

8. In a decision notice dated 14 May 2020 the Commissioner decided that the Council correctly applied s 41(1).
9. The Commissioner stated that the withheld information was a complaint by a third party to the Council about the Nakba exhibition. She was satisfied that it was information obtained from an "other person".
10. The Council had told the Commissioner that the third party had made it clear to the Council that they did not want their name, details or the content of their complaint to be shared with anyone, and that it is implied that complaints will remain confidential.
11. The Commissioner decided that the information was imparted to the Council with an expectation that it would be held under a duty of confidence, so the necessary obligation of confidence was present. She was satisfied that the information had the necessary quality of confidence because it was not trivial or otherwise available to the public. The release of the information would cause the confider a degree of damage or distress. The Commissioner accepted that disclosure would be to the confider's detriment.

12. The Commissioner considered whether the public authority would be able to rely on a public interest defence to an action for breach of confidence. The Commissioner took the view that a duty of confidence should not be overridden lightly. Disclosure undermines the principle of confidentiality. She considered that people would be discouraged from confiding in public authorities if they did not have a degree of certainty that such confidence would be respected. It is therefore in the public interest that confidences should be respected. If there was a risk of disclosure of confidential complaints without a compelling reason, there is a real risk that potential complaints may not be submitted.
13. The Commissioner appreciated that Mr Watter's concerns are of considerable importance to him. She found that there was also a wider public interest in understanding the reasons for the display being withdrawn, but it was not sufficient to override maintaining the duty of confidence, given that the Council had explained its reasons for withdrawing the exhibition in terms of its policy on displays. The Council demonstrated its accountability by answering Mr Watter's questions where it was able to do so.
14. The Commissioner considered that it would be difficult to make redactions without disruption to the nature of the complaint, because there is confidential, identifiable or sensitive information throughout the complaint.
15. On balance she concluded that the public interest in disclosing the withheld information did not outweigh that in maintaining the confidence and, therefore, the Council could not have relied on a public interest defence in an action relating to a breach of confidence.

### **Grounds of Appeal**

16. The Grounds of Appeal in essence are that:
  - 16.1. The Commissioner was wrong to conclude that the information had the quality of confidence.
  - 16.2. The fact that some people would be deterred from making complaints is a result of FOIA being enacted not as a result of this disclosure.
  - 16.3. The public interest favours disclosure. The complaint was the foremost reason for stopping the exhibition. Transparency and freedom of speech and expression favour disclosure.
  - 16.4. The tribunal should satisfy itself that the complainant had given explicit written notice that they did not want the information shared.

### **The Commissioner's response**

17. The Commissioner relies on the reasoning in the decision notice. The additional points that she makes are, in summary, as follows.

18. The Commissioner considered the legal tests in the light of the withheld information in question. In relation to public interest, the Council has already explained to Mr Watters: who made the decision to take down the exhibition; that the Libraries Services were in discussion with the person that originally requested to put the display up with a view to exhibiting again, providing possible dates and how they might ensure that the content is balanced; that there were no specific examples of specific content that contravened the Public Information and Display Policy, but it was the general tone and balance along with the addition of several leaflets that contained information that could be considered inflammatory or political.

## Evidence

19. We have read an open and a closed bundle of documents, which we have taken account of where relevant.

## Legal framework

### *S 41 – information provided in confidence*

20. S 41 provides, so far as relevant:

#### *S 41 – Information provided in confidence*

(1) Information is exempt information if –

(a) it was obtained by the public authority from any other person (including another public authority), and

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

21. The starting point for assessing whether there is an actionable breach of confidence is the three-fold test in **Coco v AN Clark (Engineers) Ltd** [1969] RPC 41, read in the light of the developing case law on privacy:

21.1. Does the information have the necessary quality of confidence?

21.2. Was it imparted in circumstances importing an obligation of confidence?

21.3. Is there an unauthorised use to the detriment of the party communicating it?

22. The common law of confidence has developed in the light of Articles 8 and 10 of the European Convention on Human Rights to provide, in effect, that the misuse of ‘private’ information can also give rise to an actionable breach of confidence. If an individual objectively has a reasonable expectation of privacy in relation to the information, it may amount to an actionable breach of confidence if the balancing exercise between article 8 and article 10 rights comes down in favour of article 8.

23. S 41 is an absolute exemption, but a public interest defence is available to a breach of confidence claim. Accordingly there is an inbuilt balancing of the public interest in determining whether or not there is an actionable breach of confidence.

### The Task of the Tribunal

24. The tribunal's remit is governed by s 58 FOIA. This requires the tribunal to consider whether the decision made by the Commissioner is in accordance with the law or, where the Commissioner's decision involved exercising discretion, whether she should have exercised it differently. The tribunal may receive evidence that was not before the Commissioner and may make different findings of fact from the Commissioner.

### **Issues**

25. The issues we have to determine are as follows:

#### *Information provided in confidence*

4. Was the information provided by a third party?
5. Would disclosure amount to an actionable breach of confidence in that:
  - 5.1 The information has the necessary quality of confidence, and
  - 5.2 It was imparted in circumstances importing an obligation of confidence, and
  - 5.3 There was an unauthorised use to the detriment of the party communicating it, or
  - 5.4 There is a misuse of 'private' information such that there would be an actionable breach of confidence in accordance with the common law developed in the light of the European Convention on Human Rights.
6. Would the public interest defence apply such that there would be no actionable breach of confidence?

### **Discussion and conclusions**

26. We find that the withheld information has the necessary quality of confidence, in that it is not otherwise accessible and is more than trivial, and was imparted in circumstances importing an obligation of confidence. Given the content and context of this particular complaint to the Council we find that a reasonable person in the position of the recipient of the information would have realised that it was provided in confidence. We find that this applies to the entire complaint. It is a short complaint and a redacted version would carry no meaning – it is not possible to sensibly separate 'confidential' from 'non-confidential' information.

27. We note that the decision notice contains a factual error – the indication from the complainant that they wished their personal details and the content of the complaint to remain confidential was made over the phone, and not in writing. This is not material to the Commissioner’s decision. It does not matter in what form the objection is made.
28. In the light of the objection by the complainant we find that disclosing the information would amount to an unauthorised use to their detriment.
29. Although s 41 is an absolute exemption, the existence of a public interest defence to an action for breach of confidence, requires us to consider whether the public interest favours disclosure.
30. There is a public interest in transparency in general, and an increased public interest in transparency where a decision is taken to take down an exhibition of this nature. We note the Appellant's arguments that the complaint led to the taking down of the exhibition, and that this could happen again, to the detriment of exhibitors' rights, if undisclosed and confidential complaints are allowed to have such consequences without the opportunity for the organisers to respond or amend exhibition content. This could in other contexts add to the public interest in disclosure. However we find that the public interest in disclosure in this case is limited for a number of reasons as follows.
31. The Council have already disclosed the substance of the complaint. Having reviewed the complaint in the closed bundle, there is nothing else substantive said about the exhibition which would illuminate either the reasons for the objection or the Council’s reasons for removing the exhibition.
32. Further, the Council have explained the thinking behind their decision, and have opened up discussions as to how the exhibition can be remounted, taking account of their concerns.
33. In the light of the above, we find that the substantial public interest in maintaining confidences in general and the interest in not undermining the public’s trust in the Council maintaining confidences is not outweighed by the public interest in disclosure.

### *Conclusion*

34. For the reasons set out above the appeal is dismissed.

Signed Sophie Buckley

Judge of the First-tier Tribunal

Date: 25 February 2021