

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 24 June 2013

Public Authority: South Staffordshire Council
Address: Council Offices
Wolverhampton Road
Codsall
South Staffordshire
WV8 1PX

Decision (including any steps ordered)

1. The complainant has requested information in relation to a unilateral undertaking in respect of a specific property. The Commissioner's decision is that the council incorrectly applied the exemption for information provided in confidence but correctly applied the exemption for personal information. He does not require any steps to be taken.

Request and response

2. On 27 June 2012 the complainant wrote to the council and requested information in the following terms:

"I understand that a unilateral undertaking is to be /has been put in place in respect of [specific address] effectively to treat the certificate of lawfulness of proposed use as a children's [sic] home as if it had never been made.

Please could you confirm and send me a copy of this document and all relevant correspondence relating to it for circulation to interested parties on the old farm drive estate. Obviously disappointed at the lack of communication from the council on this given the level of public concern and the two meetings held with residents. Please also confirm the reasoning for this course of action given previous statements made by the council.

I would be grateful also for copies of all documentation relating to the use of 14 old farm drive as a business and proposed/ actual enforcement action in this regard.

Please treat this as an FOI request.”

3. The council responded on 26 July 2012 providing a copy of the Unilateral Undertaking and an explanation regarding the lack of communication from the council. However, the council refused to provide copies of the correspondence and the settlement agreement citing the exemption for information provided in confidence at section 41 of the FOIA. The council also stated that details of the enforcement action in relation to the use of 14 Old Farm Drive as a business would be sent separately by the Planning Enforcement Officer.
4. On the same day, the complainant requested an internal review of the decision to withhold the information under section 41 of the FOIA and stated that she was making a formal complaint in relation to the delay by the Planning Enforcement Officer.
5. On 31 July 2012 the council explained to the complainant that the planning enforcement case was not closed and it intended to issue a Planning Contravention Notice.
6. On 1 August 2012 the council informed the complainant that it would be dealing with the complaint in relation to the delay as part of the internal review.
7. The complainant wrote to the council chasing the internal review response on 20 September 2012, 16 October 2012 and 24 October 2012.
8. The council provided its internal review response on 29 October 2012. It stated that it had sought agreement of the relevant family to disclose the settlement agreement documentation but consent had not been provided. It maintained reliance on the exemption at section 41 of the FOIA and also relied on the exemption for personal data at section 40(2) of the FOIA.

Scope of the case

9. The complainant contacted the Commissioner on 20 November 2012 to complain about the way her request for information had been handled.
10. The Commissioner considers the council's application of section 41 and section 40(2) of the FOIA to the settlement agreement and relevant correspondence.

11. This decision notice does not cover the Planning Contravention Notice referred to in paragraph 8 as it is not information that was held at the time of the request.

Reasons for decision

Section 41 – Information provided in confidence

12. Section 41(1) provides that information is exempt if it was obtained by the public authority from any other person and the disclosure would constitute an actionable breach of confidence.

Was the information obtained from another person?

13. The first step is for the Commissioner to consider whether the information was obtained by the council from any other person in order to satisfy the requirement of section 41(1)(a).
14. The withheld information in this case is the settlement agreement and associated correspondence which includes emails sent to and from the council. The Commissioner's guidance on section 41¹ states that this exemption will not apply to information that the public authority has generated itself. This reflects the fact that the exemption is not just concerned with the sensitivity of the information but that it also requires the information be obtained from another party. Therefore section 41 cannot apply to the settlement agreement as it has not been obtained from another party; it was produced by the council. The exemption also cannot apply to a large proportion of the associated correspondence which constitutes emails sent by the council.
15. The Commissioner does however consider that some of the withheld information, that being the emails sent to the council, has been obtained from another party and has therefore gone on to consider whether the disclosure would constitute an actionable breach of confidence.

Actionable claim for breach of confidence

16. Whilst it is not the only test for establishing confidence, the Commissioner finds that the appropriate test for this case is that which
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[http://www.ico.gov.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/CONFIDENTIALINFORMATION_V4.ashx](http://www.ico.gov.uk/for_organisations/guidance_index/~/media/documents/library/Freedom_of_Information/Detailed_specialist_guides/CONFIDENTIALINFORMATION_V4.ashx)

is set out in the case of *Coco v Clark* [1969] RPC 41. According to the decision in this case a claim for breach of confidence can be established where:

"... three elements are normally required if ... a case of breach of confidence is to succeed. First, the information itself ... must 'have the necessary quality of confidence about it'. Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it..."

17. All three elements must be present for a claim to be made and, for that claim to be 'actionable' within the meaning of section 41(1)(b) of the FOIA, a public authority must establish that an action for breach of confidence would, on the balance of probabilities, succeed. This requires consideration of whether or not there would be a public interest defence to such a claim.

18. The council stated that;

"The negotiations leading up to the completion of the unilateral undertaking took place on a confidential basis. This was confirmed by Clause 12 in the Settlement Agreement. To disclose information in these circumstances without the consent of the [name redacted] family would have left the Council exposed to a potential action by them for breach of confidence and the Council therefore took the view the application of the section 41 exemption was appropriate.

The negotiations had to take place in a confidential context, because otherwise it is highly likely a successful conclusion would not have been reached, which would not have been in the best interests of the Council, the complainant or any other party. "

Obligation of confidence

19. As Clause 12 of the Settlement Agreement states;

"The terms of this agreement, and the substance of all negotiations in connection with it, are confidential to the parties and their advisors, who shall not disclose them to, or otherwise communicate them to, any third party without the written consent of the other party.....",

the Commissioner considers that the information in emails sent to the council has been imparted in circumstances importing an obligation of confidence.

Necessary quality of confidence

20. For information to have the necessary quality of confidence it must be more than trivial and not otherwise accessible.
21. The Commissioner is satisfied that the information in this case, that being correspondence relating to a settlement agreement, is not trivial.
22. However, as stated above, this alone is not sufficient to indicate that the material has the necessary 'quality of confidence'. Therefore the Commissioner has considered whether the information is otherwise accessible.
23. The council has not specifically confirmed that the information is not otherwise accessible. However, as it has stated that negotiations leading up to the completion of the unilateral undertaking took place on a confidential basis, and in the absence of evidence to the contrary, it is reasonable to deduce that the information is not accessible elsewhere.

Detriment to confider

24. Having considered whether the information in this case was imparted in circumstances giving rise to a duty of confidentiality and had the necessary quality of confidence, the Commissioner considered whether unauthorised disclosure would cause detriment to the confider.
25. The council did not provide any details of what the detriment to the confider would be or how the detriment would be experienced if the confidence was breached. Having viewed the withheld information, it is not apparent to the Commissioner what the detriment to the confider would be.
26. He has therefore concluded that the council has not sufficiently demonstrated that there would be detriment to the confider and therefore it has not been shown that there would be an actionable breach of confidence and the exemption at section 41 does not apply in this case.

Section 40 – Personal Information

27. Section 40(2) of the FOIA states that information is exempt from disclosure if it constitutes the personal data of a third party and its disclosure under the Act would breach any of the data protection principles or section 10 of the Data Protection Act 1998 ('the DPA').
28. In order to rely on the exemption provided by section 40(2), the requested information must therefore constitute personal data as

defined by the DPA. Section 1 of the DPA defines personal data as follows:

““personal data” means data which relate to a living individual who can be identified –

(a) from those data, or

(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual.”

29. 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 data protection principles under the DPA. The Commissioner notes in this case that the council argued that disclosure of third party personal data would not be fair on the individuals concerned and therefore the first data protection principle would be breached.

30. The first data protection principle states that:

“Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless -

(a) at least one of the conditions in schedule 2 is met, and

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.”

31. As explained above, the first consideration is whether the withheld information is personal data. The withheld information in this case is the settlement agreement and associated correspondence which includes emails sent to and from the council. The Commissioner is satisfied that this is the personal data of the family subject to the settlement agreement.

32. As the Commissioner is satisfied that the withheld information is personal data, he now needs to consider whether disclosure would breach the first data protection principle, as the council has claimed, i.e. would disclosure be unfair.

33. In deciding whether disclosure of this information would be unfair, the Commissioner has taken into account the nature of the information, the reasonable expectations of the data subjects, the consequences of

disclosure on those data subjects and balanced the rights and freedoms of the data subjects with the legitimate interests in disclosure.

Nature of the information and reasonable expectations

34. The information in this case relates to the settlement of a dispute regarding a lawful development certificate under section 192 of the Town and Country Planning Act 1990. The Commissioner considers that this information relates to the family's homes and personal finances, and by extension their private and family lives.
35. The council has stated that the family have a reasonable expectation that the council will keep information that is personal to them on a confidential basis and not disclose to the general public without their consent. It stated that negotiations had to take place in a confidential context which was confirmed by Clause 12 in the Settlement Agreement (see paragraph 19).

Consent

36. In its internal review response, the council stated that it sought permission from the family to release to the requested information but consent had been refused.
37. When considering the issue of consent, the Commissioner's view is that where the data subject consents to the disclosure of their personal data within the time for statutory compliance with the request, then this disclosure will generally be considered fair.
38. However, any refusal to consent is not determinative in the decision as to whether the data subject's personal data will be disclosed. Rather the Commissioner will take the data subjects comments into account insofar as they represent an expression of views of the data subject at the time of the request had the data subject given any thought to the issue at the time. These views help form the analysis of fairness. In this particular case, the Commissioner has not been made aware of any specific concerns held by the family.
39. The Commissioner is satisfied that the family in this case would have a reasonable expectation of confidentiality and privacy in relation to the withheld information, because of both the nature of the information itself and the expectation of confidentiality, reinforced by clause 12 of the settlement agreement.

Consequences of disclosure

40. In order to assess the impact of the consequence of disclosure on whether disclosure would be fair, it is necessary to consider whether

disclosure of the information would cause unwarranted damage or distress to the data subjects.

41. The council has not specified what the adverse consequences of disclosure would be in this case. However, the Commissioner considers that the unwarranted damage or distress to the data subjects in this case would be a breach of their privacy. He also considers it possible that disclosure could cause distress to the family as the complainant, in her request, specifically stated that the requested information would be circulated to interested parties on the old farm drive estate.

Legitimate interests in disclosure

42. The Commissioner accepts that in considering 'legitimate interests', such interests can include broad general principles of accountability and transparency for its own sake along with case specific interests.
43. The council has not provided the Commissioner with details of any legitimate interests in disclosure in this case. However, from the correspondence received on this case, the Commissioner understands that there has been public concern regarding the use of the family's property and considers that the specific interest in this case is understanding how the council and the family settled the dispute.
44. The Commissioner is aware that the unilateral undertaking in respect of the property has been disclosed and considers that this goes some way to meeting the legitimate interests in this case.

Conclusion on Section 40(2)

45. Taking all the above into account, the Commissioner concludes that it would be unfair to the family concerned to release the requested information as the family would not expect such information to be disclosed and disclosure of this type of information is likely to have a detrimental and distressing effect on them. He considers that their right to privacy outweighs the interests of the public in knowing how a dispute has been settled. The Commissioner has therefore decided that the council was entitled to withhold the information under section 40(2), by way of section 40(3)(a)(i).
46. As the Commissioner has decided that the disclosure of this information would be unfair, and therefore in breach of the first principle of the DPA, he has not gone on to consider whether there is a Schedule 2 condition, or in the case of sensitive personal data, a Schedule 3 condition, for processing the information in question.

Other matters

47. As he has made clear in his published guidance on internal reviews, the Commissioner considers that internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the FOIA, the Commissioner's view of a reasonable time for completing an internal review is 20 working days from the date of the request for review. In this case the Commissioner notes that complainant first requested an internal review on 26 July 2012 but the council did not provide an internal review response until 29 October 2012, 3 months later. The council should ensure that internal reviews are carried out promptly in future.

Right of appeal

48. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

49. 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.
50. 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

Andrew White
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