

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 June 2018

Public Authority: Colchester Borough Council

Address: Rowan House
33 Sheepen Road
Colchester
CO3 3WG

Decision (including any steps ordered)

1. The complainant has requested information about the identities of any parties who have threatened or commenced legal action about a parking order. Colchester Borough Council ("the Council") withheld the information under section 41(1) of the Freedom of Information Act 2000 ("the FOIA"). The complainant disputed the application of this exemption.
2. The Commissioner's decision is that the Council has correctly withheld the information under section 41(1). However, the Council breached the requirement of section 17(7) by failing to inform the complainant of his right to complain to the Commissioner.
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. On 2 December 2017, the complainant wrote to the Council (in its role of 'lead authority' for the North Essex Parking Partnership) and requested information in the following terms:

Please provide the names of the organisations or individuals who have threatened or commenced legal action relating to the controlled parking zone in High Beech Road, Smarts Lane or Forest Road in Loughton.

5. The Council responded on 5 December 2017. It stated that the information was withheld but did not cite under which exemption.
6. Following an internal review the Council wrote to the complainant on 6 December 2017. It confirmed that the information was withheld under section 41(1).

Scope of the case

7. The complainant contacted the Commissioner on 9 December 2018 to complain about the way his request for information had been handled, and specifically that the Council had incorrectly applied section 41(1).
8. The Commissioner considers the scope of the case to be the determination of whether the Council has correctly applied section 41(1).

Reasons for decision

Section 41(1) – Information provided in confidence

9. Section 41(1) of the FOIA states that:

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.*

Was the information obtained from another person?

10. 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).
11. In her enquiries to the Council, the Commissioner asked it to identify which parties had provided it with the withheld information.
12. The Council has confirmed to the Commissioner the credentials of those parties who had provided the information. The Commissioner is therefore satisfied that this limb is fulfilled.
13. 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 the FOIA), would constitute a breach of confidence 'actionable' by that or any other person.

Would disclosure constitute an actionable breach of confidence?

14. Whilst it is not the only test for establishing confidence, the Commissioner finds that the appropriate test for this case is that which is set out in the case of *Coco v Clark [1969] RPC 41*. According to the decision in that case a breach of confidence will be actionable if:
 - a. The information has the necessary quality of confidence;
 - b. The information was imparted in circumstances importing an obligation of confidence; and
 - c. There was an unauthorised use of the information to the detriment of the confider.
15. All three elements must be present for a claim to be made. However, 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.

The 'necessary quality of confidence' (a.)

16. Information will have the necessary quality of confidence if it is more than trivial and not otherwise accessible.
17. Any party who submits a concern to the Council must provide their identity as part of the necessary process for taking such matters forward. The Commissioner is satisfied that such information is not trivial.

18. 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.
19. The Council has informed the Commissioner that the information is not known to be readily available. The information was provided directly to the Council within correspondence, and not through any other action by which a party may expect their identity to become public (such as the issuing of legal proceedings). The Council has explained that correspondence was received outside the public consultation period for the parking order, and after the parking order had been implemented. If correspondence had been received during the consultation as a formal objection, it would have been published but with the associated identities redacted.

The 'obligation of confidence' (b.)

20. Even if information is to be regarded as confidential, a breach of confidence will not be actionable if it was not communicated in circumstances that created an obligation of confidence. An obligation of confidence may be expressed explicitly or implicitly.
21. The Council has informed the Commissioner that correspondence was submitted outside the public consultation period. The Council considers that, in such a situation, any party who contacts it to raise a concern will have done so in the expectation that their identity will not be made public.
22. Having considered the Council's explanation, the Commissioner accepts that there is an obligation of confidence in the case.

The 'detriment of the confider' (c.)

23. Having concluded that the information withheld in this case has the necessary quality of confidence, and was imparted in circumstances giving rise to an obligation of confidence, the Commissioner has proceeded to consider whether unauthorised disclosure could cause detriment to the confider.
24. The Commissioner's guidance explains that, where the information relates to a personal or private information matter, a public authority won't be required to demonstrate that the confider would suffer any tangible detriment from disclosure (such as financial loss).
25. In the circumstances of this case the Commissioner considers that information relates to personal or private information matters. Any party

who submits a concern to the Council is unlikely to expect their identity to be made public. It is also evident to the Commissioner that the identity of such parties will represent personal data under the terms of the Data Protection Act 1998 ("the DPA"), and on this basis alone, it is likely that such parties would hold a strong expectation of confidence.

26. Having considered the circumstances of the withheld information, the Commissioner accepts that its disclosure would cause detriment to the confider.

Is there a public interest defence?

27. Although section 41(1) is an absolute exemption, and does not need to be qualified by a public interest test under section 2 of the FOIA, case law suggests that a breach of confidence will not be actionable in circumstances where a public authority can rely on a public interest defence.
28. The Commissioner has therefore considered whether there is a public interest defence available should the Council disclose the information. The duty of confidence public interest defence assumes that the information should be withheld unless the public interest in disclosure exceeds the public interest in maintaining the confidence.
29. The complainant has informed the Commissioner that he has specifically requested this information to identify, and contact, any potentially interested parties in respect of a Judicial Review that he is considering.
30. The Council argues that there is limited public interest defence. Any party who submits a concern to the Council will hold a strong expectation that their identity will be held in confidence, and the Council is not aware of any possible defence in this case that would override its duty of confidence. The Council considers that should the identities of such parties not be held in confidence, it would dissuade the public from communicating their concerns to it.
31. Having considered the circumstances of this case, the Commissioner has concluded that there would be a limited public interest defence in disclosing the information. Any party who raises a concern with the Council within correspondence is highly unlikely to expect their identity to be publically disclosed. It is also highly relevant that such information will represent personal data under the DPA, and such parties will clearly expect the Council to handle their personal data in accordance with that Act. Whilst the complainant's reason for seeking the information has been noted, the Commissioner does not consider that this represents a clear public interest that outweighs the Council's duty of confidence. On

this basis the Commissioner finds that section 41(1) has been correctly engaged.

Section 17(7) – refusal of request

32. Section 17(7) of the FOIA specifies that, when refusing a request, a public authority must inform a requestor of their right to complain to the Commissioner.
33. In this case the Council did not inform the requestor of this right. The Council therefore breached section 17(7).

Other matters

34. Whilst the Commissioner has determined that section 41(1) is engaged in respect of the withheld information, she has also identified that such information will represent personal data under the terms of the DPA. In the event of any future such cases, the Commissioner reminds the Council of the exemption provided by section 40(2) of the FOIA, which provides an exemption for the personal data of third parties. The Commissioner's guidance for this section can be accessed at:

<https://ico.org.uk/media/for-organisations/documents/1213/personal-information-section-40-and-regulation-13-foia-and-eir-guidance.pdf>

35. The Commissioner has identified that the Council did not inform the complainant of his right of appeal to the Commissioner. The Commissioner refers the Council to her guidance on this subject:

<https://ico.org.uk/media/for-organisations/documents/1624144/section-45-code-of-practice-request-handling-foia.pdf>

Right of appeal

36. 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@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

37. 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.
38. 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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