

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 15 January 2021

**Public Authority:** Nottinghamshire County Council  
**Address:** County Hall  
West Bridgford  
Nottingham  
NG2 7QP

#### Decision (including any steps ordered)

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1. The complainant requested from Nottinghamshire County Council ("the Council") information relating to the closure of a footpath at South Nottinghamshire Academy. The Council withheld some of the information under section 42 (legal professional privilege) and partly disclosed information, but redacted some of it under sections 40 (personal data) and 41 (information provided in confidence) of the FOIA.
2. The Commissioner's decision is that the Council correctly applied sections 42 and 41 to the withheld information. She has therefore not gone on to consider the application of section 40 of the FOIA. The Commissioner does not require the Council to take any steps as a result of this decision.

#### Background

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3. The Council provided the Commissioner with background to the complaint, and explained the following:

*"It relates to a decision made by the Academy Trust who hold the freehold interest in the site of South Nottinghamshire Academy, to restrict use of a pedestrian route across the site within school hours for safeguarding reasons.*

*The route had previously been used by parents and children of the adjoining Radcliffe-on-Trent Infant School as the link from Cropwell*

*Road across the Academy site as it provided a shorter route than parents and children walking around the roads to the infant school.*

*The opening hours of the schools do not match, and the Academy took the view that they could not maintain the security of their school during their working day if the footpath remained open as it offered immediate access for the public into the Academy grounds.*

*On 12 August 2019 the Council liaised with the Infant School headteacher who confirmed they agreed with the measures the Academy had taken to close the school gates based on tightening up their safeguarding duties to their school pupils. Given the Infant School's response, there was no basis upon which the Council could proceed to act against the Academy as this would have been futile in the circumstances."*

## **Request and response**

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4. On 15 October 2019, the complainant wrote to the Council and requested information in the following terms:

*"Can you please supply information you hold on the status of the legal action you are pursuing against the South Notts Academy following their closure of the footway providing access to the Radcliffe on Trent Infant and Nursery School via Glebe Lane. This action is mentioned in the Minutes of the Family of Schools meeting on Tuesday 4<sup>th</sup> June 2019, and was made available to me under a previous FOI request to the school.*

*If you are no longer pursuing this action can you please supply information you hold on why the action was discontinued, and what alternative course of action you are taking. If you have already reached an agreement with the school, please provide information about that agreement.*

*You will be aware that the outcome of this closure by the school still causes inconvenience to users and information on the current status will be of public interest to the residents of Radcliffe on Trent who have school age children."*

5. On 25 October 2019 the Council responded. It provided an update and the Council's conclusion regarding the actions taken about the matter in question.
6. On 28 October 2019 the complainant wrote to the Council and expressed his dissatisfaction with its response to the request.

7. On 11 November 2019 the Council asked the complainant to supply it with a copy of *"the additional FOI request"* which he referred to in his email. With regards to its response to his original query, the Council confirmed its position in this matter.
8. On 8 December 2019 the complainant submitted to the Council a further FOI request of the following description:

*"Could you please supply information, copies of internal documents, meeting minutes, notes of telephone conversations, correspondence with outside parties including schools, emails and any other existing information relating to the Council's change of approach from suing the South Notts Academy for the illegal closure of the footway in the morning peak to your current stated position of allowing the Academy to continue their restriction in contravention of their obligations set out in the land transfer agreement.*

*Why was this decision taken, and by whom, as it neglects to consider the interests of the public using the footway and favours the interests of a third party who are committing an illegal act."*
9. On 30 December 2019 the Council responded. With regards to the first part of the request, the Council said that it required the complainant to specify exactly what information he needed as it considered the request as *"too vague to answer"*. With regards to the final part of the request, the Council stated that the question falls outside the scope of the FOIA.
10. On 15 January 2020 the complainant contacted the Information Commissioner's Office (the ICO) and complained about the Council's handling of his request.
11. On 4 February 2020 the complainant asked the Council for an internal review of the responses to two of his FOI requests – 15 October and 25 October 2019.
12. On 19 March 2020 the Council provided its internal review response and confirmed that the majority of the information was held. The Council withheld the information as it considered it as being confidential communications between lawyers and client, and applied section 42 (legal professional privilege) of the FOIA.
13. However, the Council disclosed some information but redacted parts of it under sections 40 (personal data) and 41 (information provided in confidence) of the FOIA.

## Scope of the case

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14. The complainant contacted the Commissioner on 17 April 2020 to complain about the way his request for information had been handled. Specifically, the complainant disagreed with the Council's refusal to provide the information, and indicated that there could be involvement of potential maladministration.
15. The following analysis focuses on whether the exemptions at sections 42, 41 and 40 of the FOIA were cited correctly.

## Reasons for decision

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### Section 42 – Legal professional privilege

16. Section 42(1) of the FOIA states that information in respect of which a claim to legal professional privilege could be maintained in legal proceedings is exempt information.
17. Legal professional privilege (LPP) protects the confidentiality of communications between a lawyer and client. It has been described by the Information Tribunal in the case of *Bellamy v The Information Commissioner and the DTI* (EA/2005/0023) ("Bellamy") as:  
  
*"...a set of rules or principles which are designed to protect the confidentiality between the client and his, her or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and [third] parties if such communication or exchanges come into being for the purpose of preparing for litigation."*
18. There are two categories of LPP - litigation privilege and legal advice privilege. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Legal advice privilege may apply whether or not there is any litigation in prospect but where legal advice is needed.
19. In both cases, the communications must be confidential, made between a client and professional legal adviser acting in their professional capacity and made for the sole or dominant purpose of obtaining legal advice. Communications made between adviser and client in a relevant legal context will therefore attract privilege.

20. The Commissioner's view is that for legal professional privilege to apply, information must have been created or brought together for the dominant purpose of litigation or for the provision of legal advice. With regard to legal advice privilege, the information must have been passed to or emanate from a professional legal adviser for the sole or dominant purpose of seeking or providing legal advice.
21. With regard to litigation privilege, the information must have been created for the dominant purpose of giving or obtaining legal advice, or for lawyers to use in preparing a case for litigation.
22. In this case, the Council confirmed that it considered the withheld information (content of the legal file) to be subject to litigation privilege. The information relates to the decision to restrict the use of a pedestrian route across the site within school hours.

*Litigation privilege*

23. The Council explained to the Commissioner that Legal Services were included in correspondence from the Corporate Director for Children and Young People's Service to an elected member of the Council. The correspondence confirmed that they would look into a query about the South Nottinghamshire Academy's decision to close a walkway used by parents to deliver their children to the infant school. The Council said that *"This instigated our internal legal examination of the Council's legal title and the legal rights reserved over the accessway between the two school sites. Legal Services provided initial legal advice to the Corporate Director in response."*
24. The Council further explained that Legal Services acting through its solicitors and paralegals, had engaged in exchanges of emails with the Council's Property Services, Children and Young People's Service, Health and Safety Team, counsel chambers, the schools concerned, legal advisors in Corporate & Environmental Law team, and the Civil Litigation team. The purpose of this correspondence, the Council said, was to *"gather key information required for the legal advisors to be able to consider and advise the clients on the relevant legal issues arising from the earlier closure of the school gates."*

25. The Council stated that all the documents exist for the sole purpose of examining the facts of the case for the legal advisors to be able to properly advise the clients. The Council referred the Commissioner to a specific document that is professionally legally privileged, and said that the Council's ability to seek and receive legal advice would be seriously harmed if legal privilege was not retained. The Council considers that this would impact on its ability to hold open and free discussions with its clients. It also believes that it would hamper and disadvantage the Council in the discharge of its duties and said *"as clients exercise caution over seeking advice."*
26. The Council stated that the withheld information consists of the legal file which was opened in response to a complaint made regarding the decision. The Council considers that it was at least 51% likely that litigation was contemplated.
27. The Council confirmed that the information – all of the documents, exist for the sole purpose of examining the facts of the case for the legal advisors to be able to properly advise the clients. The communication was therefore, between a professional legal adviser and their client, made for the sole purpose of obtaining and providing legal advice, and that the information had been communicated in the legal adviser's professional capacity.
28. The Council stated that following the initial advice on the case, Legal Services progressed the file as a litigation case. It collated the key information needed to consider and advise on the legal options available, and merits of each option with a view to pursuing any legal action, deemed necessary by its clients. The Council said *"until we receive instructions from our clients, we need to manage our case in such a way that all the options presents are viable for them to pursue in light of the advice given. It remains the case that the documents held on our case file will continue to be held on file with a view to reviving the anticipated litigation, if instructed to do so by our clients, to preserve the rights reserved in the future."*
29. The Commissioner notes that the withheld information includes correspondence from the solicitor to the Council regarding legal matters.
30. The Commissioner is satisfied that the communications are covered by LPP since they were made between a professional legal adviser and his client, with the dominant purpose of obtaining and providing legal advice.

*Loss of privilege*

31. The Council was asked by the Commissioner to confirm whether the privilege attached to the withheld information had been lost. The Council confirmed that the advice had been restricted to be shared with its inhouse clients only, and that it is not aware that this has been shared wider than the post holders to whom they were sent. Therefore, the documents held on its case file remained confidential and privileged.

*Is the exemption engaged?*

32. Having viewed the withheld information, the Commissioner notes that it constitutes communications between a legal advisor and their client, and that it clearly relates to legal matters. She also notes that the communications were made for the dominant (main) purpose of seeking or giving legal advice.
33. The Commissioner therefore accepts that the information attracts LPP on the grounds of litigation privilege and that on this basis, section 42(1) of the FOIA is engaged.

**Public interest test**

34. Section 42(1) is a qualified exemption, subject to the public interest test as set out in section 2(2)(b) of the FOIA. Having found that the exemption is engaged, the Commissioner has gone on to consider the balance of the public interest. Although the Commissioner has found that section 42(1) is engaged, the information may still be disclosed if the public interest in maintaining the exemption does not outweigh the public interest in disclosure.

*Public interest arguments in favour of disclosing the information*

35. In the complainant's submissions to the Commissioner, he argued that there is a public interest in the information. The complainant referred to a letter of concern from a resident about the *"increased dangers and inconvenience faced by children and parents on the alternative route due to increased vehicle movements, parking, road crossings and general obstruction to buses on the route."* He said that he had written several times to the Council expressing his concern about the footpath closure and knows that there is *"strength of feeling in the village."* The complainant considers that information concerning this matter and how the Council made its decision should be released. He said that information on the current status on the outcome of the closure of the footpath will be of public interest, specifically to the residents of Radcliffe-on-Trent that have school age children.



36. The Council accepts that disclosure of the information is in the public interest to know what involvement and responsibility the Council has and is taking, in order to ensure the closure of the footpath is legal.
37. The Commissioner considers that some weight must always be given to the general principles of accountability and transparency which are achieved through the disclosure of information held by public authorities.
38. She recognises that disclosure of the withheld information could assist the public in understanding the basis of how the Council made its decision. The Commissioner accepts that the disclosure of the documents may assure the public that the Council is acting lawfully and is considering in detail its legal position relating to the footpath in question.
39. The Commissioner fully accepts that disclosure of the withheld information would result in more detailed understanding of the decisions taken by the Council following its receipt of the advice. A disclosure of the advice would also allow the public to consider the quality of that advice and see if, and how, the Council acted on it.

*Public interest arguments in favour of maintaining the exemption*

40. The Council argued that disclosure of the information would prejudice potential enforcement activities of the Council. It believes that the confidential information between the Head Teacher and the Council was openly communicated in the supposition it would remain confidential.
41. The Council considered that there was a strong public interest in maintaining LPP, specifically in safeguarding openness in all communications between client and lawyer. This, the Council said, is to ensure access to full and frank legal advice, which in turn is fundamental to the administration of justice.

*Balance of the public interest*

42. The Commissioner acknowledges that where material covered by LPP is concerned there is always going to be very strong public interest arguments in favour of maintaining the exemption due to the long standing and important principle of LPP and the clear and important need for all to have access to free, frank and candid legal advice. Only in very exceptional circumstances can this be overridden when considering where the public interest lies. This may include instances where:
  - Large amounts of money are involved;
  - 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.
43. In this case, the Commissioner has considered those arguments favouring disclosure of the withheld information against maintaining LPP. She has also had regard to the content of the withheld information.
44. The Commissioner recognises that care should be taken to ensure that freedom of information principles do not undermine the well-established common law right to LPP, which enables a client to put all relevant facts before their legal advisers, and to receive advice based on them, without fear that either facts or advice will be disclosed to others without their consent.
45. Having considered the factors, the Commissioner's view is that the very strong public interest in maintaining the principle of legal professional privilege outweighs the factors in favour of disclosure of the withheld information.
46. The Commissioner has concluded that the public interest in maintaining the exemption outweighs the public interest in disclosing the information. Therefore, the Council was not obliged to disclose the requested information and section 42(1) of the FOIA was correctly applied.

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

47. Section 41(1) of the FOIA states that information is exempt from disclosure 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."*

48. The Commissioner's guidance<sup>1</sup> on section 41 states that a public authority wishing to rely on the exemption should consider the test of confidence set out in *Coco v A N Clark (Engineers) Limited [1968] FSR 415* in assessing whether a disclosure would constitute an actionable breach of confidence.

*Was the information obtained from another person?*

49. The withheld information in this case is correspondence from the Head of South Nottinghamshire Academy to the Leader of the Council.
50. The Commissioner is satisfied that the Council obtained this information from another person.

*Would disclosure constitute an actionable breach of confidence?*

51. In considering whether disclosure of information constitutes an actionable breach of confidence, the Commissioner will consider the decision in *Coco* which suggested that three elements were usually required:

- the information must have the necessary quality of confidence,
- it must have been imparted in circumstances importing an obligation of confidence, and
- there must have been an unauthorised use of the information to the detriment of the confider.

*Does the information have the necessary quality of confidence?*

52. Information will have the necessary quality of confidence if it is more than trivial, and is not otherwise accessible.
53. In this case, the Commissioner has reviewed the withheld information. She notes that the information relates to a legal file concerning legal action against South Nottinghamshire Academy, following closure of a footpath.

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<sup>1</sup> <https://ico.org.uk/media/for-organisations/documents/1432163/information-provided-in-confidence-section-41.pdf>

54. The Commissioner is satisfied that all the information withheld is more than trivial as it concerns the closure of a specific footpath. Also, to her knowledge, the information is not accessible elsewhere. Therefore, it has the necessary quality of confidence.

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

55. The Council explained that the withheld information is email correspondence from the Head of South Nottinghamshire Academy to the Leader of the Council following a meeting with Council officers. This was regarding the footpath closure and the Council potentially pursuing legal proceedings.
56. The Council said that South Nottinghamshire Academy had consulted their solicitors, and that this email was sent to the Leader of the Council in confidence and would not be accessible to other parties.
57. The Council also explained that further email correspondence was again between the Head of South Nottinghamshire Academy and the Corporate Director for Children's Services. It said that the sensitivity of this email was also marked confidential, and was regarding opinions of the consultation, closure times and safeguarding information, therefore, the Council would not expect this information to be shared more widely.
58. The Commissioner has considered the Council's position and the nature of the requested information. She is satisfied that the other person, the Head of South Nottinghamshire Academy, would expect that the information would remain confidential and would not be disclosed to the general public as part of an FOIA request. The Commissioner is therefore satisfied that the information being withheld was imparted in circumstances which give rise to a duty of confidence.

*Would disclosure be an unauthorised use of the information to the detriment of the confider?*

59. The Council deemed that sharing this information would constitute a breach of confidence for both parties involved, as the content consists of ongoing discussions about how the closure of the footpath had been initially handled, shared opinions, and proposed action being taken by both parties regarding the footpath. The Council considers that there could be detriment to both parties as the correspondence was provided in the trust that it would be explicitly confidential. Releasing this information, the Council believes, could undermine effective working relationships by discouraging frankness in communications.

60. The Commissioner has established the information that was provided to the Council by the Head Teacher at South Nottinghamshire Academy, constitutes information of a confidential nature. Disclosure may impact on both parties working relationships and cause distress if they were to become the focus of any proposed action. It is not necessary for there to be any detriment to the confider, therefore, the Commissioner is satisfied that disclosure would have a detrimental impact on the confider in this case.
61. The Commissioner has determined that the criteria at section 41(1) of the FOIA are met, and the withheld information was provided in confidence.

*The common law duty of confidence and the public interest*

62. While section 41(1) of the FOIA is an absolute exemption, and therefore not subject to the public interest test, the common law duty of confidence contains an inherent public interest test. This test assumes that information should be withheld unless the public interest in disclosure outweighs the public interest in maintaining the duty of confidence.
63. The complainant's view is that the public interest in these circumstances must require the decisions which were taken by the Council, should be opened to scrutiny. He believes that action should be taken to rectify any unjustified actions. He stated that the closure decision was unilaterally taken by South Nottinghamshire Academy with no consultation with users or the Council. He also said his complaint is that "*the closure was in contravention of the land transfer agreement*". The complainant's view is that the Council should reopen the matter, and to "*hold a meaningful consultation with users about the closure and act to support the views expressed.*"
64. The complainant clearly disagrees with how the Council handled the decision regarding the closure of the footpath, and he believes that the footpath should be restored to its former status.
65. The Commissioner acknowledges that there is always some public interest in a public authority conducting its business in a transparent manner. However, she is mindful of the wider public interest in preserving the principle of confidentiality and the need to protect the relationship of trust between confider and confidant.

66. Whether any public interest is sufficient to outweigh the duty of confidence, will depend on the circumstances of the case. For example, there would be greater public interest in disclosure in a case where there is evidence of any wrongdoing, or efforts to cover up the reason for a course of action.
67. The Council believes that the release of the information into the public domain would promote accountability and transparency on how the Council was taking its obligations seriously. However, the Council argued that disclosure of the information would not be in the public interest, and said that "*it was in its early stages*" when the discussions regarding the footpath had taken place. The Council also argued disclosure would have a detrimental effect on both parties as the information was provided in confidence.

### **The Commissioner's decision**

68. Having considered both the complainant's and the Council's arguments, the Commissioner has decided that the public interest in disclosing the information is outweighed by the public interest in maintaining the obligation of confidence than in disclosing the withheld information. She has also considered all the circumstances of this case and the withheld information, the Commissioner's decision is that the Council correctly withheld the information under section 41(1) of the FOIA.
69. As the Commissioner has found that section 41 is engaged, it has not been necessary to consider the Council's application of section 40 of the FOIA to the withheld information.

## Right of appeal

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70. 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](mailto:grc@justice.gov.uk).

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

71. 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.
72. 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 .....**

**Phillip Angell  
Group Manager  
Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**