

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 18 August 2021

**Public Authority:** East Cambridgeshire District Council  
**Address:** The Grange  
Nutholt Lane  
Ely  
CB7 4EE

#### **Decision (including any steps ordered)**

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1. The complainant requested information from East Cambridgeshire District Council (ECDC) about enforcement action in relation to a breach of planning control.
2. The request related to an active prosecution case which was being pursued by South Cambridgeshire District Council (SCDC), partially on behalf of ECDC. The complainant submitted a request to SCDC for the same information, which was refused, and the Commissioner upheld the refusal in that case. In this case, ECDC applied section 42 to withhold the information (legal professional privilege).
3. Given the overall context of the requests and the overlap in withheld information with the SCDC case, the Commissioner has used her own discretion and decided that the exemptions in section 31(1)(b) and 31(1)(c) are applicable to the information held by ECDC. She has also decided that the public interest rests in the exemptions being maintained.
4. The Commissioner does not require the council to take any steps.

## Request and response

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5. On 1 May 2020 the complainant made the following request for information under the FOIA for:

*"(i) The document(s) recording the decision to proceed with the prosecution, the reasons for the decision, the date of the decision and the identity of the officer who made the decision.*

*(ii) All correspondence (including emails) between South Cambridgeshire, Huntingdonshire District Council and East Cambridgeshire District Council concerning the decision to prosecute.*

*(iii) All records of the consideration given, if any, to alternative enforcement action.*

*(iv) All records of consideration of the Proceeds of Crime Act ('POCA') as part of the decision to prosecute.*

*(v) Copies of all policies relevant to the enforcement of advertising control promulgated by East Cambridgeshire District Council."*

6. On 1 June 2020 the Council responded. It refused to provide the requested information citing section 42 of the FOIA – legal professional privilege – as its basis for doing so.
7. The complainant requested an internal review on 3 June 2020. The Council sent the outcome of its internal review on 1 July 2020. It said that in relation to question (iv), no information was held, and for question (v) it supplied a copy of the Council's relevant enforcement policy. For question (i)-(iii) it maintained its reliance on section 42 of the FOIA.

## Scope of the case

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8. The complainant contacted the Commissioner on 22 July 2020 to complain about the way his request for information had been handled. He did not consider that legal professional privilege applied, but in the event that there was any legal advice in the withheld information, it could be redacted. He also explained that he did not wish to challenge the council's response to point (iv) and (v) of the request. The Commissioner has therefore considered the council's response to parts (i) to (iii) of the request in this decision notice.

9. The Commissioner notes that in respect of parts (i) to (iv) of the request, the complainant submitted an identical request to South Cambridgeshire District Council (SCDC). SCDC withheld the information under section 30(1)(b) – investigations and proceedings. The Commissioner has issued her decision in the SCDC complaint under reference IC-90287-W9X5, finding that the council applied section 30(1)(b) correctly to withhold the information.
10. Given that the withheld information in the SCDC case is the same information which has been requested from ECDC in this case, and given the nature of the information, the Commissioner has exercised her discretion to consider whether any exemptions may be applicable beyond the section 42 exemption cited by the council.
11. The following analysis therefore considers the application of the exemptions in section 31(1)(b) and (c) to parts (i)-(iii) of the request.

## **Background**

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12. The complainant is acting on behalf of an advertising company. The request relates to a prosecution taken forward by SCDC which alleged breaches of planning regulations by the company. At the time the request was made, the case was awaiting a hearing in the magistrate's court and was therefore a live case. In addition to the prosecution, SCDC also applied for, and obtained, restraining orders against one party under the Proceeds of Crime Act 2002 (POCA).
13. SCDC was the prosecuting authority, acting for itself, as well as Huntingdonshire District Council and ECDC.
14. ECDC informed the Commissioner that on 10 March 2020 the complainant sought information from the councils via a disclosure hearing at a Magistrates Court. They asked for the disclosure of documents which they believed to be held by the three Councils. The Magistrates court did not order a disclosure of the information withheld in this case, however. The reasons for this are clearly explained within Decision notice IC-90287-W9X5. In effect its decision was that the information was irrelevant to the matter it was considering, and the complainant did not take issue with this at the time. The judge did not therefore order this information to be disclosed at the disclosure hearing.

15. Following the court decision, the complainant submitted identical FOI requests to all three councils for the documents refused in the disclosure hearing. This decision notice relates to the request which was made to ECDC.

## Reasons for decision

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### Section 31

16. As noted above, the Commissioner has used her discretion to consider whether other exemptions beyond that claimed by the council might be applicable in this case. Given the nature of the withheld information and the circumstances behind the request she considers that the relevant exemptions are sections 31(1)(b) and 31(1)(c) of the FOIA.
17. Due to the identical wording and similar circumstances behind the requests, and the overlap in the withheld information, the Commissioner notes that the arguments which are explained within the analysis in IC-90287-W9X5 are relevant to the application of the exemptions in this case, albeit that the applicable exemption in that case was section 30.

### Section 31(1)(b)

18. Section 31(1)(b) provides that:

*"Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice—the apprehension or prosecution of offenders"*

19. The prejudice test involves a number of steps:
  - One of the law enforcement interests protected by section 31 must be harmed by the disclosure.
  - The prejudice claimed must be real, actual or of substance. If any harm caused would only be trivial, the exemption will not be engaged.
  - The public authority must be able to demonstrate a causal link between the disclosure and the harm claimed.
  - The public authority must take into account the likelihood of the harm actually occurring, i.e., would it occur, or is it only likely to occur.

20. The Commissioner considers that this exemption may be applicable as a disclosure of the information, which both the court and the Commissioner in the SCDC case found should not be disclosed, would be likely to prejudice SCDC's prosecution case before the courts.
21. A disclosure of the withheld information would disclose information to the public (including the complainant and the party and his clients), outside of the court's management of the disclosure of information under the Civil Procedure Rules (the CPR).
22. At the time that the request was received by the council the prosecution was still ongoing. Disclosing the information would undermine the court decision in the disclosure hearing. This would be likely to interfere with the council's prosecution arguments and undermine its ability to obtain a successful prosecution following its investigation.
23. The Commissioner has considered the tests which she has set out in paragraph 19 above.
  - The withheld information clearly relates to the apprehension and prosecution of offenders. In essence, a prosecution was ongoing before the court, the information had already been considered for disclosure over an abuse of process argument submitted by the defendants, and the court had decided that the information was not relevant to this point.
  - The prejudice identified does relate to the ability to successfully prosecute in this instance. A disclosure of the information would undermine the decision of the court not to order the disclosure of the information. The court order was based upon an independent reviewer's opinion that it was irrelevant to the matter in the disclosure hearing, and on the defendant's failure to argue against this decision at the time.
  - Given the court decision not to order the disclosure of the information the Commissioner is satisfied that there is a causal link between the disclosure and the harm she has foreseen.
  - Finally, and again given the court decision, together with her decision in the SCDC case, she considers that the prejudice foreseen would be likely should the information be disclosed.
24. The Commissioner is therefore satisfied that a disclosure of the information would be likely to prejudice the apprehension or prosecution of offenders.
25. She therefore considers that section 31(1)(b) is engaged by the information in this case.

The public interest

26. As the Commissioner has decided that the exemption in section 31(1)(b) is engaged she must therefore consider the application of the public interest test as required by section 2(2)(b). The test is "*whether, in all of the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information*".

*The public interest in the exemption being maintained*

27. The public interest in the exemption being maintained must relate to the purposes behind the exemption in question. In this case, to prevent prejudice to the apprehension and prosecution of offenders.
28. The complainant's request in this case relates to the same information as in the disclosure hearing of 10 March 2020. The court decided not to order the disclosure of the information as it was irrelevant to the question it was considering, and the defendants did not take issue with this decision at that time.
29. The Commissioner places a very strong weight on the fact that the court's reasoning in deciding not to order the disclosure of the information revolves around ensuring that the hearing, and future hearings relating to the case, are carried out on a fair basis, and proceedings carried out on a level playing field. This is an essential tenet of the process and administration of the law in English and Welsh Courts, and therefore the Commissioner places an appropriately strong weight on this argument. It is in the public interest that this basic principle of English law is protected and the court's ability to manage cases as it sees appropriate is maintained.
30. The Commissioner considers that the appropriate means of the complainant seeking access to the information would have been to challenge the decision of the reviewer during the disclosure hearing. In that way the Judge could have given appropriate consideration to the potential for the information to be disclosed.

*The public interest in the information being disclosed*

31. Balanced against the need to protect the work of law enforcement agencies and the ability of the courts to manage proceedings there is a public interest in disclosing information that holds bodies to account and increases transparency about how they perform their functions. Without such information the public may lack confidence and trust in these bodies.

32. The Commissioner recognises that the complainant's interests in the disclosure of the requested information in this case primarily relate to the private interest of his clients. However, there is a general public interest in ensuring that decisions taken by authorities are transparent and open to scrutiny.
33. A disclosure of the information would also mean that the wider public would also be better informed of the actions of local authorities in carrying out their regulatory and enforcement functions and would provide a degree of confidence in the actions they take.

*The conclusion on the public interest test*

34. The Commissioner has considered the arguments above. Her decision is that the public interest in the information being disclosed in this case is outweighed by the public interest in protecting the ability of the council to bring forward and present its case on a fair and balanced basis under the management of the court. The case was ongoing at the time that the request was received, and the Commissioner views it as not in the public interest to undermine the decisions of the court as regards the disclosure decisions it makes in managing the cases before it.
35. Taking these arguments into account her decision is that the public interest in the disclosure of the information is outweighed by the public interest in the exemption being maintained.
36. The Commissioner's decision is therefore that section 31(1)(b) applies, and she does not require the council to disclose the withheld information.

**Section 31(1)(c)**

37. Section 31(1)(c) provides that:

*"Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice—the administration of justice,"*

38. The council explained to the Commissioner that the Judge in the decision on 10 March 2020 did not order the disclosure of the withheld documents. The withheld information is the same information which was withheld by the Magistrate's Court during the disclosure hearing.
39. The same tests outlined in paragraph 19 are also applicable in relation to section 31(1)(c).

40. The Commissioner recognises that a disclosure of the information would effectively undermine the court's management of the case. The independent reviewer's reasons for recommending that the information should not be disclosed were given during the proceedings, and the defendants did not seek to argue the point at that time.
41. The CPR are in place to ensure a level playing field between the parties and that a fair trial can occur. A disclosure of information which a court has already considered and decided should not be disclosed therefore relates to the administration of justice.
42. The Commissioner is satisfied that the prejudice which she has foreseen would be caused by the disclosure of the information.
43. The Commissioner has again considered the tests which she has set out in paragraph 19 above as regards the application of section 31(1)(c).
  - The withheld information relates to the administration of justice
  - The prejudice identified relates to the ability of the court to manage the disclosure of information between the parties, and as a result, for the parties to present their arguments on a level playing field.
  - Given the court decision not to order a disclosure of the information, the Commissioner is satisfied that there is a causal link between the disclosure and the harm she has foreseen. A disclosure of the information would contradict the court's earlier decision not to order a disclosure of the information.
  - Finally, the Commissioner considers that the prejudice she has foreseen would occur if the information was disclosed.
44. The Commissioner's decision is therefore that the withheld information engages the exemption in section 31(1)(c) of the Act.

#### The public interest

##### *The public interest in the information being disclosed*

45. The Commissioner notes that the public interest arguments she has outlined in regard to the application of section 31(1)(b) are equally relevant to her consideration of section 31(1)(c).



*The public interest in the exemption being maintained*

46. The Commissioner recognises that the central reason for maintaining the exemption in this case revolves around the protection of the ability of the court to properly manage cases and the disclosure of information between parties during the course of the proceedings.
47. The CPR provide a managed approach to the disclosure of information between parties during the course of proceedings. The court manages the disclosure of information under these rules to ensure that parties have access to the information which they are entitled to, and should have access to, in order for the hearing to be decided on a fair basis.
48. The Commissioner considers that the FOIA was not intended to provide an alternative information access regime to the managed exchange of information and documents relevant to an ongoing prosecution case under the CPR. Allowing it to be used in such a way would undermine the court's ability to manage the cases before it.

*The balance of the public interest*

49. There is a strong public interest in a proper and controlled approach to the disclosure of information between parties during the course of a legal case. This facilitates the smooth administration of justice.
50. There is a very strong public interest in protecting the court's decision in cases where it has already made a judgement on the disclosure of information. A disclosure of information which the courts have already decided should not be disclosed, during the course of proceedings, would undermine the court's management and administration of justice and potentially tip the balance of a case away from the level playing field it is intended to be.
51. Should the defendant or the complainant wish to access the information the proper course of action would have been to set out their arguments for the disclosure of the information before the courts during the disclosure hearing. Alternatively, the Commissioner notes that there were other cases ongoing at the time of the request involving the parties. The Commissioner therefore considers that the complainant could have sought a disclosure under the CPR during these proceedings at the appropriate time.

52. The Commissioner places a very strong weight on the protection of the ability of the court to manage disclosure during proceedings. She is not fully aware of all of the facts of cases which are ongoing, and therefore the body best placed to make decisions over the disclosure of information would be the court. It will have the benefit of oversight over the circumstances surrounding the prosecution as a whole and is the body which is tasked with the management of such proceedings.
53. The Commissioner's decision is therefore that the public interest in the exemption being maintained outweighs that in the information being disclosed.
54. The Commissioner's decision is therefore that section 31(1)(c) is applicable to the information, and the public interest rests in the exemption being maintained.

## Right of appeal

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

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

56. 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.
57. 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 .....**

**Ian Walley**  
**Senior Case Officer**  
**Information Commissioner's Office**  
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