

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 February 2023

Public Authority: East Riding of Yorkshire Council

Address: County Hall
Beverley
East Riding of Yorkshire
HU17 9BA

Decision (including any steps ordered)

1. The complainant has requested a copy of a report and associated correspondence. East Riding of Yorkshire Council (the council) provided some information but refused to provide the report under section 41(1) of the FOIA – Information provided in confidence.
2. The Commissioner's decision is that the council was correct to refuse the report under section 41(1) of the FOIA.
3. The Commissioner does not require any steps.

Request and response

4. On 24 June 2022 the complainant made the following information request to the council:

"I would like to have a copy of the report submitted to Caroline Lacey in autumn 2021 from [named consultant] into lessons learned about bullying.

I would also like copies of all correspondence between the council and the peer reviewers from the 2021 peer review and most specifically the draft report and any correspondence or emails that led to and changes in the final report"

5. The council responded on 21 July 2022 refusing to provide a copy of the report citing section 41(1) of the FOIA – Information provided in confidence. For the second part of the request the council provided the information it held.
6. The complainant requested an internal review on 25 July 2022 with regards to the council's refusal to provide a copy of the requested report.
7. The council provided its internal review on 23 September 2022 upholding its refusal.

Scope of the case

8. The complainant contacted the Commissioner on 27 September 2022 to complain about the council refusing to provide the requested report.
9. The scope of the case is for the Commissioner to determine whether the council is correct to rely on section 41(1) of the FOIA to refuse to provide a copy of the report into lessons learned about bullying.

Reasons for decision

Section 41(1) of the FOIA – Information provided in confidence

10. Section 41(1) of the FOIA provides that information is exempt if, under subsection (a) the public authority obtained it from any other person and, under subsection (b), disclosure would constitute a breach of confidence actionable by that person or any other person.
11. This exemption is absolute and therefore not subject to a public interest test
12. The council has advised the Commissioner that the requested report was commissioned by the Chief Executive, from an Independent Consultant in October 2021, and was an independent review to focus on workplace cultures and practices.
13. The council has told the Commissioner that it contains staff members comments and opinions that they shared on the understanding that they would not be shared widely and would remain confidential. This was due to the nature and context of what was discussed. The report was given to the Chief Executive and shared with the Director of People Services with recommendations being extracted and shared with some members of staff to implement and undertake actions.
14. It has also explained to the Commissioner that the staff who provided information to the Independent Consultant can be identifiable from the report because it details their roles, so that even with redactions it is likely that staff who participated will still be identified. The report was not widely shared. The information provided by staff was in good faith in the belief that their anonymity would be maintained.
15. The council has told the Commissioner that although the report is not a published document, information arising out of it was shared and informed part of the Peer Review¹ which is publicly available.
16. The council has advised the Commissioner that this peer review highlighted the need for a cultural shift within the organisation. The withheld report has informed part of an overall improvement plan, which

¹ <https://www.local.gov.uk/our-support/council-assurance-and-peer-support/peer-challenges-we-offer/corporate-peer-challenge-60#43-governance-and-culture>

includes empowering staff to raise concerns. It is of the view that if the report was to be shared into the public domain, there is a high risk that the confidence given to staff to share information would be undermined given their understanding that information would be treated confidentially.

17. The Commissioner has gone on to consider the two parts of section 41(1)

a) Was the information obtained from another person?

18. The Commissioner, on reviewing the above, is satisfied that the information in this case was obtained from another person, that being the staff members who gave their opinions and experiences in order for the report to be produced. The Commissioner is therefore satisfied that the condition under section 41(1)(a) has been met.

b) Would disclosure constitute an actionable breach of confidence?

19. In considering whether disclosing the information constitutes an actionable breach of confidence the Commissioner must consider the following:

- whether the information has the necessary quality of confidence
- whether the information was imparted in circumstances importing an obligation of confidence; and
- whether disclosure would be an unauthorised use of the information to the detriment of the confider.

20. **Necessary quality of confidence:** The Commissioner considers that information will have the necessary quality of confidence if it is not otherwise accessible, and if it is more than trivial.

21. The council has confirmed that the withheld information is not accessible elsewhere and that staff members were of the expectation that their responses would be kept confidential. The Commissioner is satisfied that the information in this case is more than trivial, as it is staff members personal responses to a report in which they were able to share their concerns, views and opinions.

22. **Circumstances importing an obligation of confidence:** This limb is concerned with the circumstances in which the confider of information passed the information on. The confider may have attached specific conditions to any subsequent use or disclosure of the information (for example in the form a contractual term or the wording of a letter). Alternatively, the confider may not have set any explicit conditions but

the restrictions on use are obvious or implicit from the circumstances (for example information a client confides to their counsellor).

23. The council has told the Commissioner that the staff gave their interviews on the understanding that it would be kept confidential. The Commissioner is satisfied that, given the nature and context of the interviews, there would be an implied expectation of confidence.
24. **Detriment to the confider:** the council has argued that the public disclosure of the report would clearly be detrimental to the staff who responded.
25. The Commissioner recognises that detriment could be caused, for example, through possible repercussions for staff members (exacerbating already strained working relationships) or through harm to staff members' physical health (for example through self-harm) and mental health.
26. The Commissioner is satisfied with the council's position that disclosure would cause detriment to those staff who were interviewed for the report.

Is there a public interest defence for disclosure?

27. As has been noted, section 41 of the FOIA is an absolute exemption and therefore not subject to the public interest test. However, 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 (and is the reverse of that normally applied under the FOIA).
28. The complainant has told the Commissioner:

"...the information contained within the report is information I and others shared and we should have the right to have sight of the report that was produced to respond to the information. To keep the report confidential in its entirety is not in keeping with public transparency and prevents the public, employees and elected members from holding senior managers to account for the action or inactions."
29. The council has referenced decision notice² IC-94518-V8B0 and how section 41 was similarly applied in that decision, to withhold an

² <https://ico.org.uk/media/action-weve-taken/decision-notices/2021/4019010/ic-94518-v8b0.pdf>

employee survey response, and it found there to be a stronger public interest in maintaining the obligation of confidence than in disclosing the report.

30. The council reasons this to be similar in this case because the nature and content of the report and the need to maintain confidence outweighs the public interest in the matter. As the Peer Review, referred to earlier in the decision notice, highlights issues that need to be addressed and are in the public domain, the matters and issues to be addressed are well documented in a way that is suitable for the public domain.
31. The council concludes that disclosure would undermine its work to promote an open and safe culture to work with staff. Whilst there is a public interest in openness and accountability about public authorities culture and its operating models, in this case, there is a wider public interest in preserving the principle of confidentiality and the need to protect relationships with those that agreed to provide information in confidence..
32. The Commissioner has considered the circumstances of the case, and the nature of the information that has been withheld under section 41(1) of the FOIA. He has concluded that the public interest in maintaining the exemption outweighs the public interest in disclosing the information. Therefore the Commissioner finds that the condition under section 41(1)(b) is met, and that the council was correct to refuse the report under section 41(1) of the FOIA.

Right of appeal

33. 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

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

34. 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.
35. 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

Daniel Perry
Senior Case Officer
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