

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 December 2016

Public Authority: Eastbourne Homes Limited
Address: 1 Grove Road
Eastbourne
East Sussex
BN21 4TW

Decision (including any steps ordered)

1. The complainant has requested an independent report prepared by an agent regarding work which was carried out on a property by Eastbourne Homes, together with the actions of other parties (including council staff) who were involved in this process. The council applied section 41 (information provided in confidence) to the report however it did disclose the recommendations from the report to the complainant together with an action plan as to how it intended to address the recommendations.
2. The Commissioner's decision is that council has correctly applied section 41 to the information.
3. The Commissioner does not require Eastbourne Homes Limited to take any steps.

Request and response

4. On 6 April 2016, the complainant wrote to Eastbourne Homes and requested information in the following terms:

"Could you please ask your Freedom of Information Officer to send me Eastbourne Homes' Investigation Report on [address redacted], conducted by [name of agent redacted], following stage 3 of my complaint."

5. The Eastbourne Homes responded on 6 May 2016. It stated that the report was exempt under section 41 of the Act.
6. Following an internal review the council wrote to the complainant on 25 May 2016. It stated that the majority of the report was exempt under section 41 however it had decided that the final page of the report, containing the recommendations, could be disclosed. It also disclosed an Action Plan which did not itself fall within the scope of the request however the council considered that it would be helpful to the complainant to disclose this.

Scope of the case

7. The complainant first contacted the Commissioner on 7 June 2016 to complain about Eastbourne Homes Limited's initial response. Her view was at the least some of the report could be disclosed if redactions were made to any sensitive sections of the information. Following the councils review she maintains this position.
8. The complaint is therefore that the council has wrongly applied section 41 to the report, or at the least part of it.

Reasons for decision

Is EHL a public authority

9. The first question which the Commissioner considered is whether EHL is a public authority for the purposes of the FOI Act. EHL's website states that it is a limited company working in partnership with the council to deliver housing services to the area covered by the council.
10. Section 3 defines public authorities which fall under the scope of the Act. Section 3(1)(b) finds that publicly owned companies fall under the scope

of the Act if they fall within the definition provided in section 6 of the Act.

11. The definition of a 'publically owned' company provided in section 6 includes companies which are wholly owned by a public authority. Section 6(2) defines 'wholly owned' as

"(b) a company is wholly owned by a public authority other than a government department if it has no members except—

(i) that public authority or companies wholly owned by that public authority, or

(ii) persons acting on behalf of that public authority or of companies wholly owned by that public authority."

12. The description of EHL's constitution on its website demonstrates that EHL is wholly owned by Eastbourne Council. The Commissioner therefore considers that EHL is a public authority for the purposes of the Act.
13. The Commissioner notes however that EHL works in association with Eastbourne Council, who effectively took over the complaint at the review stage.

Section 41

14. Section 41 provides that information is exempt if it was obtained from another person and disclosure would give rise to a breach of confidence, actionable by that or any other person.
15. As to whether disclosure would give rise to an actionable breach of confidence, the Commissioner's view is that a breach will be actionable if the following test is met:
- i. The information has the necessary quality of confidence.
(Information will have the necessary quality of confidence if it is not otherwise accessible and if it is more than trivial; information which is of importance to the confider should not be considered trivial.)
 - ii. The information was communicated in circumstances importing an obligation of confidence. (An obligation of confidence can be expressed explicitly or implicitly. Whether there is an implied obligation of confidence will depend upon the nature of the information itself, and/or the relationship between the parties.)
 - iii. Unauthorised disclosure would cause a specific detriment to either the party which provided it or any other party.

All three elements must be present for a claim to be made.

Does the information have the necessary quality of confidence

16. The report has not been published by EHL or the council, although as noted above, the recommendations were disclosed to the complainant in response to her request. The full report is therefore has not been disclosed outside of the council. Further to this the council said that access to the report has been limited even for its, and EHL's own staff. The report is also not trivial.

Was the information communicated in circumstances importing an obligation of confidence?

17. The report was drafted by a third party agent who was tasked to consider the issue of how the various parties provided or managed the service provided to the individual. The council argues that it owes this third party agent a duty of confidence on the report. In addition, the council argues that the information contained within the report was provided to the agent by the interviewees who would also expect that the information they provided would be held in confidence.
18. The agent was hired by EHL to carry out the report. EHL asked the agent for its view as to the confidentiality of the report and its reply was provided by the council to the Commissioner. The agent said that *"The work was commissioned on a strictly private and confidential basis by the then Chief Executive. Our interviews were conducted and the report was written on that basis – not for public or internal circulation."*
19. The Commissioner considers that the information was provided to EHL on the basis of the contractual agreement with it to investigate the facts of the case and to produce a report on the agent's findings. The report itself is headed with the words *'Strictly Private and Confidential'*.
20. In this regard the Commissioner has considered whether the Agent would have any course of action against either EHL or the council if it disclosed the report. On the face of it, the report was drafted at the behest of, and on behalf of EHL. Ultimately it is a product which is owned by EHL to do with as it wishes.
21. However the Commissioner recognises that the Agent would have relied upon the fact that the report was to be retained in confidence when carrying out the interviews. Effectively he would not be able to provide any assurances of confidentiality if these had not been provided to him initially, and if he could give no such assurances then his ability to seek full and frank responses from the interviewees would be curtailed.

22. The complainant, who took part in the interviews, says that she was not told that the information she was providing would be held in confidence by the agent prior to the interview. She has also named two other individuals who took part in them, including a councillor, and said that they were also not informed that their contributions would be retained in confidence. Countering this, the agent stated that "Furthermore, people who took part in our interviews did so on the basis of their input being treated in confidence by Eastbourne Homes Limited." He did not however explain whether this had been explained to individuals prior to the interviews.
23. Nevertheless the Commissioner considers that, given the nature of the issues which were in question, it would have been relatively obvious that the information being provided would need to be retained in confidence. Although the issue primarily related to the performance of the relevant authorities, this was specifically regarding services which had been provided to aid an individual with mobility issues. A duty of confidence can be created implicitly and the Commissioner considers that this is the case in this instance.
24. The Commissioner therefore considers that the information contained within the report would have been obtained in confidence by the agent, and that the expectation was that the information would be held in confidence by EHL/the council.

Would an unauthorised disclosure would cause a specific detriment to either the party which provided it or any other party.

25. The council argues that a disclosure of the information would cause a detriment to a number of parties. The Commissioner has considered this and agrees that this is the case.
26. A disclosure would provide detailed information on the services provided to a private individual which relate to her health and mobility. As disclosures under the Act are considered to be to the whole world it would result in a significant intrusion into her privacy, including disclosing some details of the help and services which EHL/the council provides to her.
27. Secondly, a disclosure of the information would risk reputational damage to the agent. He has sought full and frank interviews from the parties involved on the basis that the information would remain confidential, and provided a full and frank report to the council on the situation. If that information were to subsequently be disclosed any professional assurances which he provided to those he interviewed, or any unspoken expectations of the parties would be undermined. This would negate the expectation of confidentiality under which the information was provided,

which could provide significant difficulties to the agents interviewers in the future because they could not, honestly be able to provide assurances of confidentiality for any information provided to them in the future when working with the council on similar matters.

28. Thirdly the report is full and frank in respect of how all parties could have done things better. This in itself is unsurprising in that such an analysis is the primary reason for reports of this nature. They analyse the how services were provided and consider how these might have been done better. An associated issue with such an analysis is that there is always the risk of reputational damage to some parties through the publication of a report of this nature if any failings are identified.
29. Fourthly, the report provides a full and frank response on the issues which occurred. If the duty of confidence is broken and the report disclosed risks reputational damage to one or more parties there is the risk that some individuals/parties will be less full and frank if they consider that there is a possibility that the information will be disclosed in the future. This would significantly reduce the ability of the council to obtain information necessary to make informed decisions using this approach.

Would a disclosure of the report be actionable by any party?

30. For a 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.

Public interest defence

31. Although section 41 is an absolute exemption, the law of confidence contains its own built in public interest test with one defence to an action being that disclosure is in the public interest.

The public interest in the information being disclosed

32. The council identified the following points in favour of confidence being overturned:
 - The public interest in enabling individuals to understand decisions made by the council affecting their lives and, in some cases, assisting individuals in challenging those decisions.
 - The public interest in facilitating accountability and transparency in the spending of public money.

- The public interest in promoting openness and transparency and informing the public of any wrongdoing.
 - The length of time since the report was written.
33. The central public interest in the information being disclosed relates to creating greater transparency on both the provisions of services by EHL and the council, and on the effectiveness of combined services or service providers and the interaction between them. It also relates to creating greater transparency on the use of public money.
34. The report was drafted in 2010 and so the issues under discussion have for the most part been fully considered, and presumably acted upon. The Commissioner notes however that the council disclosed both the recommendations and the action plan to the complainant in response to her request and a disclosure of the remainder of the report would not provide information on whether the action plan was met and services improved.

The public interest in confidence being maintained

35. The council also took into account the following factors in favour of the exemption being maintained:
- Disclosure may be likely to risk the frankness and candour of future debate between the council and stakeholders and would also risk limiting the openness with which other third parties would share information with the council.
 - Disclosure of the information may undermine the principle of confidentiality. People would be discouraged from confiding in the council if they do not have a degree of certainty that such confidences would be respected.
 - The public interest in maintaining trust and preserving a free flow of information to the council and in preserving the principle of confidentiality.
 - The expectation by the confiders in this case that the information they supplied would not be disclosed to a wider audience and disclosure may have a negative impact on their relationship with the council.
36. The council is of the view that there was a strong public interest in maintaining the duty of confidence in this case even though the report dates from 2010. It is generally considered that confidences should be maintained in the absence of any wider disclosure by other means, such as steps taken by the confider. For instance a duty of confidence owed

to an individual can and does continue beyond their death for some information.

37. The courts have taken the view that the grounds for breaching confidentiality must be valid and very strong, since the duty of confidentiality is not one which should be overridden lightly.
38. The Commissioner notes that there was no suggestion that a disclosure of the information would reveal evidence of misconduct, illegality or gross immorality (such as misfeasance, maladministration or negligence). These factors would provide a strong public interest in favour of disclosure which can sway the balance towards the disclosure of confidential information however they are not applicable to this case.
39. In the absence of these factors, and given the nature of the information the Commissioner decision is that the public interest rests in maintaining the duty of confidence in this instance.

Right of appeal

40. 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

- 41. 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.
- 42. 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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