

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 September 2018

Public Authority: Office of the Police and Crime Commissioner for Wiltshire and Swindon

Address: Police Headquarters
London Road
Devizes
Wiltshire
SN10 2DN

Decision (including any steps ordered)

1. The complainant has requested a copy of a valuation report from the Office of the Police and Crime Commissioner for Wiltshire and Swindon (the "OPCC"). The OPCC refused to provide it on the basis that it was exempt from disclosure under section 41(1) (information provided in confidence) of the FOIA. The Commissioner's decision is that the OPCC has failed to evidence that the exemption is engaged. The OPCC is therefore required to disclose the requested information.
2. The OPCC must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Background

3. The request relates to the proposed sale of Salisbury Divisional HQ in Wilton Road, Salisbury. As a result of an earlier information request on the same subject the complainant was advised:

"The [O]PCC was approached by Wiltshire Council for the use of the Wilton Road site by the University Technical College. A disposal was then agreed and the purchase price settled based upon a joint valuation, which was commissioned by the [O]PCC and Wiltshire Council".

4. The complainant was also advised that there had been one valuation and that had valued the area of land concerned at £2 million.

Request and response

5. Following earlier correspondence, on 6 June 2018 the complainant made the following information request:

"Please provide a copy of the valuation obtained for the Salisbury Divisional HQ prior to its disposal".

6. On 13 July 2018 the OPCC responded. It refused to provide the requested information citing section 41 (information provided in confidence) of the FOIA as its basis for doing so.
7. Following an internal review, the OPCC wrote to the complainant on 8 August 2018. It maintained its position.

Scope of the case

8. The complainant contacted the Commissioner on 9 August 2018 to complain about the way his request for information had been handled. He was dissatisfied with the citing of section 41 and stated:

"The information requested is in the public interest given that it is public money involved and the property should have been placed on the open market. There should never have been a confidential agreement with the valuer especially as he acted for both parties".

9. The Commissioner will consider the citing of section 41 below. She has viewed the withheld information.

Reasons for decision

Section 41 – information provided in confidence

10. Section 41(1) of the FOIA provides that –

"(a) Information is exempt information if 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".

11. To properly engage section 41, disclosure of the requested information must give rise to a possible actionable breach of confidence. This requires the information to have the necessary quality of confidence. The information must therefore be more than trivial and not be otherwise accessible.

Was the information obtained from another person?

12. The first step is for the Commissioner to consider whether the information was obtained by the OPCC from any other person in order to satisfy the requirement of section 41(1)(a).
13. In this case the information was provided to the OPCC by the company providing the valuation.
14. 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.

Actionable claim for breach of confidence

15. 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 this case a breach of confidence will be actionable if:
 - the information has the necessary quality of confidence;
 - the information was imparted in circumstances importing an obligation of confidence; and
 - there was an unauthorised use of the information to the detriment of the confider.
16. 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.

Necessary quality of confidence

17. For information to have the necessary quality of confidence it must be more than trivial and not otherwise accessible. The OPCC has not provided any arguments in this regard. However, the Commissioner is

satisfied that the information in this case, being a valuation for a significant sum of public money, is not trivial.

18. 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. Again, the OPCC has provided no arguments. However, having conducted online searches, the Commissioner accepts the details of the valuation report are not otherwise accessible and she also considers it would not be generally expected for this type of report to be made routinely available. She therefore accepts that the withheld information in this case has the necessary quality of confidence.

Obligation of confidence

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 Commissioner notes that there is a confidentiality clause within the terms of engagement for the valuation report and also within the report itself. This says that it is confidential to the client, ie the OPCC and Council, and that it shouldn't be made available to a third party without written approval from the valuer. No reasoning for this or details of any related sanctions if disclosure were made are included in the terms. In addition, it is noted that there is no reference to the FOIA included in the terms although both clients are public authorities.
22. The OPCC has not specifically referred to the content of the confidentiality clause, merely advising that the valuer has declined to disclose the report. It is not entirely clear who is owed the obligation of confidence from reading the wording as permission to disclose needs to be sought from the valuer.

Detriment to confider

23. Having considered whether the information in this case was imparted in circumstances giving rise to a duty of confidentiality, and had the necessary quality of confidence, the Commissioner must also consider whether unauthorised disclosure could cause detriment to the confider.
24. The OPCC has not stated who would be disadvantaged by disclosure of the requested information. No arguments have been provided.

The Commissioner's view

25. In this case, the information sought by the complainant is a valuation report prepared prior to the disposal of one of its properties. The OPCC evidenced that it had written to the valuer concerned seeking consent to disclose and that the valuer had responded and not given consent – although no reasons were given as to why this was refused.
26. In its initial refusal notice the OPCC advised the complainant that the third party had declined its request to release the valuation report and it was therefore exempt under section 41(1). It did not provide any further explanation following its internal review.
27. When responding to the Commissioner's enquiries the OPCC simply said:

"Disclosure of the valuation without [the valuer]'s consent would have been a breach of the confidentiality clause in the Appointment letter".

This was not expanded on in any way.

28. The report has been commissioned by two parties, namely the OPCC and Wiltshire Council. The eventual sum of the disposal has been disclosed, ie £2 million, and it is unclear to the Commissioner where the possibility of an actionable breach of confidence would come into play. The two public authorities have entered the agreement together and the Commissioner cannot envisage how one would take action against the other. If it is envisaged that the valuer may take action then this has not been explained and it is not obvious to the Commissioner why this would be a potential outcome.
29. On commencing her investigation, the Commissioner asked the OPCC to explain why disclosure of the withheld information to the public would constitute an actionable breach of confidence. The OPCC failed to provide any response to this point.
30. The Commissioner also advised that, 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. On this basis she asked the OPCC to explain the public interest arguments it had considered in this case and tell her why it had concluded that there was not a sufficient public interest in disclosure of the information in order to defend any actionable breach. The OPCC failed to provide any response to this point.
31. It is not clear to whom any obligation of confidence is owed and there have been no arguments presented to explain any perceived detriment. It is not for the Commissioner to supply arguments on behalf of the OPCC or to speculate further as to what these might be. She has

therefore concluded that the OPCC has not sufficiently demonstrated that there is any obligation of confidence or that there would be any detriment to any confider. Therefore, the Commissioner considers that the test of confidence fails on these points and section 41 does not apply in this case.

Right of appeal

32. 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

33. 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.
34. 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

Carolyn Howes
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