

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 12 January 2021

**Public Authority:** Surrey Heath Borough Council  
**Address:** Surrey Heath House  
Knoll Rd  
Camberley  
GU15 3HD

#### Decision (including any steps ordered)

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1. The complainant requested information from Surrey Heath Borough Council (the Council), namely an unredacted copy of the investigation report into the payment of an additional duties allowance to the then Chief Executive.
2. The Council refused to provide the requested report, citing sections 40 (personal information), 41 (information provided in confidence) and 36 (prejudice to effective conduct of public affairs) of the FOIA.
3. The Commissioner considered the Council's application of section 41 to the withheld information.
4. The Commissioner's decision is that the Council correctly applied section 41 to the withheld information.
5. The Commissioner requires no steps to be taken as a result of this decision.

#### Background

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6. The background to the request in this case is the Council's publication of a report, following the independent investigation into the payment of an additional duties allowance to the then Chief Executive.

7. The Commissioner acknowledges an entry on the Council's website, dated 17 April 2020<sup>1</sup>, which states:

*"Following the independent investigation into the payment of an additional duties allowance to the then Chief Executive Karen Whelan, Surrey Heath Borough Council (SHBC) has published a redacted copy of the report, in accordance with the Freedom of Information Act 2000. SHBC has taken independent legal advice to ensure the redactions in the report are balanced between public interest and the employment and data protection rights of those named in the report".*

## Request and response

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8. On 23 April 2020, the complainant wrote to the Council and requested information in the following terms:

*"As the report was published with redactions being justified under the Freedom of Information Act we request a review of those redactions in line with the Act and the FOI Code of Practice".*

9. The letter contained further points, numbered (2) – (20), some of which requested information, while others asked questions or suggested actions that should be taken.
10. The Council interpreted the complainant's request for 'a review of those redactions' as a request for an unredacted copy of the report.
11. The Council responded on 13 May 2020 to the complainant. It explained that the report contains significant amounts of personal data that was exempt from disclosure by virtue of section 40 (personal information) of the FOIA. The Council also addressed points (2) – (20) of his correspondence.
12. Following an internal review of its handling of point (1) of the request, the Council wrote to the complainant on 26 May 2020. It confirmed its view that the redactions had been correctly applied, and that no further

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<sup>1</sup> <https://www.surreyheath.gov.uk/news/report-independent-investigation-payment-additional-duties-allowance-released>

information could be released. However, it revised its position regarding the exemptions it considered applied, additionally citing:

- section 36(2)(b)(ii) and section 36(2)(c) (prejudice to effective conduct of public affairs); and
- section 41 (information provided in confidence).

## Scope of the case

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13. The complainant contacted the Commissioner on 28 May 2020 to complain about the way his request for information had been handled.

14. He told the Commissioner:

*"We understand that personal information must be kept confidential. However, there must clearly be important information that has been redacted that goes well beyond data that would be exempt from publication".*

15. He disputed the Council's consideration of the public interest test:

*"... given the weight of the public interest element and the critical nature of the information in being able to hold the council to account".*

16. He told the Commissioner:

*"...this matter remains live and is of significant and legitimate public interest".*

17. The complainant told the Commissioner that he was most interested in the disclosure of two key elements of the report, namely the primary recommendation and the time-line. However, he confirmed that his request relates to the whole of the report.

18. It is accepted that a redacted copy of the report under consideration in this case is available on the Council's website. During the course of her investigation, the Council provided the Commissioner with an unredacted copy of the report.

19. For the purposes of this decision notice the Commissioner will refer to the requested information as 'the unredacted report'.

20. In light of the complainant's comments about personal information within the report, the analysis below considers the Council's application of sections 36 and 41 of the FOIA to the unredacted report.

## Reasons for decision

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21. The Council confirmed it considers that both exemptions apply to the unredacted report. The Commissioner first considered its application of section 41.

### *Section 41 information provided in confidence*

22. Section 41 sets out an exemption from the right to know where the information was provided to the public authority in confidence.

23. Section 41 of the FOIA states that:

'(1) Information is exempt information 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.'*

24. Therefore, for this exemption to be engaged, two criteria have to be met: the public authority has to have obtained the information from a third party and the disclosure of that information must constitute an actionable breach of confidence.

25. In her guidance on section 41<sup>2</sup>, the Commissioner acknowledges:

*"[Section 41] is designed to give those who provide confidential information to public authorities, a degree of assurance that their confidences will continue to be respected, should the information fall within the scope of an FOIA request".*

*Was the information obtained by the Council from another person?*

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<sup>2</sup> <https://ico.org.uk/media/for-organisations/documents/1432163/information-provided-in-confidence-section-41.pdf>

26. Section 41(1)(a) requires that the requested information must have been obtained by the public authority from another person. In her guidance on section 41, the Commissioner acknowledges that, in this context, the term 'person' means a 'legal person'. This could be an individual, a company, another public authority or any other type of legal entity.
27. The Commissioner acknowledges that there is an entry on the Council's website, dated 4 September 2019, which states<sup>3</sup>:

*"Following the Extraordinary Council Meeting held tonight, the Terms of Reference have been released for the independent investigation into the payment of an additional duties allowance to the Chief Executive.*

*Legal firm Browne Jacobson has been appointed to carry out the investigation".*

28. The Commissioner is satisfied that Browne Jacobson was appointed by the Council to conduct an independent investigation and produce a written report. During the course of the Commissioner's investigation, the Council confirmed that the report under consideration was provided to it by Browne Jacobson Solicitors.
29. From the evidence she has seen, the Commissioner is satisfied that the unredacted report was obtained by the Council from another person and therefore met the requirements of section 41(1)(a).

*Would disclosure of the information constitute an actionable breach of confidence?*

30. In considering whether disclosure would constitute an actionable breach of confidence, the Commissioner follows the test of confidence set out in *Coco v A N Clark (Engineering) Ltd [1968] FSR 415*. That judgment suggested that the following three-limbed test should be considered in order to determine if information was confidential:

- whether the information had the necessary quality of confidence;

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<sup>3</sup> <https://www.surreyheath.gov.uk/news/independent-investigation-terms-reference-released>

- 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.

31. Further case law has argued that where the information is of a personal nature it is not necessary to establish whether the confider will suffer a detriment as a result of disclosure.

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

32. For the information to have the necessary quality of confidence it must not be trivial and not otherwise available to the public. Information which is of a trivial nature, or already available to the public, cannot be regarded as having the necessary quality of confidence.

33. The Commissioner recognises that information should be worthy of protection in the sense that someone has a genuine interest in the contents remaining confidential.

34. In this case, the Council considered the information has the necessary quality of confidence for the following reasons:

- the matters relate to the conduct of employees;
- the individuals referred to in the report were interviewed on a confidential basis; and
- employees, and former employees, would expect matters relating to their employment to remain confidential.

35. It is not in dispute that there is a redacted copy of the requested report on the Council's website.

36. In the course of its correspondence with the complainant, the Council variously told him:

*"...the chronology is more than just a report of the factual steps that occurred leading up to the events investigated. The redacted section contains a great deal of personal data, including individuals' opinions and understanding of events";*

*"The Council is not able to release any information relating to the taking or not taking of disciplinary action";*

and

*"The investigation report was produced in confidence and contains personal data relating to employment matters".*

37. The Commissioner is mindful that the complainant specifically mentioned his concern that Appendix 1 of the report, relating to the chronology of events, had been redacted.
38. Having viewed the report in its entirety, the Commissioner is satisfied that the withheld information is more detailed, and contains information beyond that which is in the public domain.
39. The Commissioner is also satisfied, having considered the unredacted report, that it is more than trivial and not already in the public domain. She is satisfied that the individuals concerned would have a genuine expectation that the content of the unredacted report remains confidential.
40. The Commissioner is therefore satisfied that the withheld information in this case has the necessary quality of confidence required to sustain an action for breach of confidence, and as such she considers that this limb of the confidence test is met.

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

41. 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.
42. The Commissioner's guidance recognises that there are essentially two circumstances in which an obligation of confidence may apply:

*"The confider has attached explicit conditions to any subsequent use or disclosure of the information (for example in the form of a contractual term or the wording of a letter); or*

*The confider hasn't set any explicit conditions, but the restrictions on use are obvious or implicit from the circumstances. For example, a client in therapy wouldn't need to tell their counsellor not to divulge the contents of their sessions to others, it is simply understood by both parties that those are the rules".*

43. In this case, with regard to the second limb of the test, the Council considered that the report was provided in circumstances importing an obligation of confidence. In correspondence with the complainant, the Council confirmed that the report was produced by a third party and was marked confidential and not for circulation
44. The Commissioner acknowledges in her guidance that, while protective markings may provide a useful preliminary indication that information may be confidential, authorities should not rely on them to make final decisions. Nonetheless, the Commissioner accepts that the unredacted

report is clearly marked, on every page, as being '*Not for circulation, Strictly Confidential*'.

45. The Council also considered that an obligation of confidence was implicit due to the context in which the information was provided, namely an investigation, and due to the purpose of that investigation.
46. In support of its view, the Council told the complainant it had reviewed a decision taken by the Commissioner following a complaint under the whistleblowing policy (FOIA case reference FS50696135). It told him:

*"Whilst the facts of the case are different, it is clear to me that the case confirms that serious investigations into an organisation's failings are understood to be confidential in nature, particularly in relation to individuals that are the subject of, or relevant to, the investigation"*.
47. Having considered the '*reasonable person*' test used by Judge Megarry in the *Coco v Clark* case, and mindful of the circumstances in which evidence was gathered from individuals to produce the report in this case, the Commissioner is satisfied that there is an implied obligation of confidence. She accepts that there is an expectation that the information provided was shared in confidence and will not be disclosed to the public.
48. The Commissioner therefore accepts that there is an obligation of confidence in this case. As such she considers that this limb of the confidence test is met.

*Would disclosure be of detriment to the confider?*

49. Having concluded that the unredacted report has the necessary quality of confidence, and was imparted in circumstances giving rise to an obligation of confidence, the Commissioner proceeded to consider whether unauthorised disclosure could cause detriment to the confider.
50. The Council's position is that disclosure would cause detriment to the individuals that are the subject of, or relevant to, the investigation.
51. The Commissioner's guidance on section 41 establishes that current case law suggests that "any invasion of privacy resulting from a disclosure of private and personal information can be viewed as a form of detriment in its own right". The guidance also highlights that case law has established that "information about an individual's private and personal life can be protected by the law of confidence, even if disclosure would not result in any tangible loss to the confider."
52. The Commissioner considers that the unredacted report relates to allegations of a personal nature. Additionally, she considers that



information provided under such circumstances may cause personal distress to the individuals, and potentially issues between employees. It is therefore not necessary for there to be any detriment to the confider(s) in terms of tangible loss, for this information to be protected by the law of confidence. Therefore the Commissioner has not considered this issue further.

*A legal person must be able to bring an action for breach of confidence*

53. Section 41(b) provides that the breach of confidence must be actionable by either the legal person who gave the information to the public authority, or by any other legal person.

54. The Council told the complainant that it considered that disclosure of further information would be actionable as a breach of confidence *"by those named in the report"*. It did not, however, provide any argument in support of that view.

55. In her guidance on the section 41 exemption, the Commissioner states:

*"It is not necessary for the authority to establish that a particular person would be likely to bring a claim for breach of confidence, only that a person would be able to do so"*.

56. Given the nature of the allegations in this case, the Commissioner is satisfied that those who gave information, in confidence, to the report writers, would be able to bring a claim for breach of confidence.

57. The final part of the test for engaging section 41 is whether the action of breach of confidence is likely to succeed.

*Is there a public interest defence for disclosure?*

58. Although section 41 is an absolute exemption, and does not need to be qualified by a public interest test under section 2 of the FOIA, case law on the common law of confidence suggests that a breach of confidence will not succeed, and therefore will not be actionable, in circumstances where a public authority can rely on a public interest defence.

59. In correspondence with the complainant, albeit in relation to a different exemption, the Council recognised that:

*"... there is a genuine public interest in understanding how the Council spends its funds, and how it responds to allegations of impropriety..."*.

60. In its submission to the Commissioner, the Council also made a case that the disclosure of information gained by way of confidential interviews

*"would no doubt significantly prejudice"* future investigations in terms of individual cooperation.

*The Commissioner's view*

61. In a case such as this, the test is whether there is a public interest in disclosure which overrides the competing public interest in maintaining the duty of confidence.
62. This test does not function in the same way as the public interest test for qualified exemptions, where the public interest operates in favour of disclosure unless outweighed by the public interest in maintaining the exemption. Rather, the reverse is the case. The test assumes that the public interest in maintaining confidentiality will prevail unless the public interest in disclosure outweighs the public interest in maintaining the confidence.
63. The Commissioner has considered whether there is any overriding public interest in the disclosure of the unredacted report that would justify an actionable breach of confidence.
64. The Commissioner understands that the complainant considers that disclosure would add to the public's understanding of the Council's response to the report and its ability to hold the Council to account.
65. The Commissioner recognises that some weight should always be afforded to the general public interest in ensuring that public authorities remain transparent, accountable and open to scrutiny. In that respect, she acknowledges that the Council proactively published a redacted version of the report on its website.
66. She has also taken into account the argument that disclosure of confidential information would undermine the relationship of trust between public authorities and confiders.
67. In weighing the above public interest arguments for and against disclosure, the Commissioner has been mindful of the wider public interest in preserving the principle of confidentiality and the impact of disclosure on the interests of the confider. She is mindful of the need to protect the relationship of trust between confider and confidant and not to discourage, or otherwise hamper, a degree of public certainty that such confidences will be respected by a public authority.
68. The role of the Commissioner is to regulate access to recorded information under the FOIA. Her role in this case is simply to consider if the public interest in disclosure outweighs the competing public interest in maintaining a confidence.

69. Having considered all the circumstances of this case, the Commissioner has concluded that there is a stronger public interest in maintaining the obligation of confidence than in disclosing the information. Therefore the Commissioner finds that the information was correctly withheld under section 41 of the FOIA.

*Other exemptions*

70. In light of the above, the Commissioner has not gone on to consider the Council's application of section 36 to the same information.

**Other matters**

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71. The Commissioner acknowledges that the complainant told her:

*"We understand that personal information must be kept confidential".*

72. The Commissioner's considerations in this case therefore focussed on the public authority's citing of section 41. However, with respect to the Council's application of section 40 (personal information) of the FOIA, and mindful of her role as Regulator of both FOIA and data protection law, the Commissioner would observe that the unredacted report includes a significant amount of personal information relating to identifiable individuals who would not expect their data to be disclosed in response to an FOI request.

## Right of appeal

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73. 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)

74. 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.
75. 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** .....

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