

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

### **Decision notice**

**Date:** 27 August 2024

**Public Authority:** Mid Sussex District Council

**Address:** Oaklands  
Oaklands Road  
Haywards Heath  
West Sussex  
RH16 1SS

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

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1. The complainant requested information about proposals relating to Clair Hall in Haywards Heath. Mid Sussex District Council (the "Council") withheld the information under the exemption for information provided in confidence (section 41).
2. The Commissioner's decision is that the Council was correct to refuse the request under section 41(1) of the FOIA.
3. The Commissioner does not require further steps.

## **Request and response**

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4. On 21 December 2023 the complainant wrote to Mid Sussex District Council (the "Council") and requested the following information:  
  
"The council asked for proposals for the future of Clair Hall and have received a number of them. I would like a copy of each proposal and all related documents, communications and details."
5. The Council responded on 19 January 2024 and confirmed that it was withholding the information under the exemptions for information intended for future publication (section 22) and information provided in confidence (section 41).
6. Following an internal review the Council wrote to the complainant on 18 March 2024. It confirmed that it was maintaining its position.

## **Scope of the case**

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7. On 18 March 2024 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
8. During the Commissioner's investigation the Council dropped its reliance on the exemption in section 22 and confirmed that it was maintaining its position in relation to the application of section 41.
9. The Commissioner made attempts during his investigation to resolve the complainant's concerns informally. As part of this process the Council agreed to publish a report setting out details of its considerations in respect of Clair Hall.
10. Following the publication of this report the complainant confirmed that they wanted the Commissioner to investigate whether the Council correctly withheld the information identified in their original request.

## **Reasons for decision**

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### **Section 41 – information provided in confidence**

11. 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.

### **Was the information obtained from another person?**

12. The withheld information in this case relates to proposals for the future of Clair Hall, a site with longstanding community connections. The information consists of consultation responses provided by parties external to the Council and associated correspondence. The Commissioner is satisfied that the proposals were obtained from another person.
13. If requested material contains a mixture of both information created by an authority and information given to the authority by another person, then, in most cases, the exemption will only cover the information that has been given to the authority.
14. However, authorities must also consider whether the disclosure of the information it creates would reveal the content of the information it obtained from the other person. If it would then the exemption may also cover the material it generated itself.
15. This could occur if the authority's own analysis, interpretation or comments are very specific to the information received from that person. In the circumstances of this case, the Commissioner is satisfied that the requested associated correspondence, which refers to and comments on the proposals, is inextricably linked to the proposals and also falls within the scope of the exemption.

### **Would disclosure constitute an actionable breach of confidence?**

16. 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.
17. **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.
18. The Council has explained that one of the parties submitting a proposal requested specifically that the proposal was treated in a confidential

manner. The Council confirmed that it subsequently informed all parties that their proposals would be treated confidentially. The Council has confirmed that it is satisfied that this meant the parties understood that their proposals would be treated confidentially.

19. The Council has explained that the information contained in the proposals is unique to each party making the proposal and contains their estimates, calculations, assumptions and business modelling to support the proposals. In view of this, the Council considers that this information is non-trivial, is not otherwise available and that it has the quality of confidential information.
20. **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).
21. In view of the Council's explicit confirmation to those submitting proposals that the information would be kept confidential, the Commissioner is satisfied that, given the nature and context of the information, there would be an implied expectation of confidence.
22. **Detriment to the confider:** The Council has argued that disclosing the information to the public (and consequently the other parties) would be likely to provide an unfair advantage to other parties with an interest in the process. The Council has explained that the level of detail in the information, which includes references to business modelling, is such that disclosure would be prejudicial to submitting parties' wider interests, including commercial interests.
23. The Commissioner is satisfied with the Council's position that disclosure would be prejudicial to the interests of those submitting proposals, namely the confiders of the information.
24. Although section 41 is an absolute exemption, it's accepted that if there is an overriding public interest in disclosure, this can be used as a defence against any breach of confidentiality that might be brought against a public authority disclosing information under FOIA. In other words, the Commissioner must balance the public interest in the information with the inherent public interest in preserving the principle of confidentiality.

25. This test doesn't 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.
26. Any disclosure of confidential information will to some degree, undermine the principle of confidentiality and the relationship of trust between public authorities and confiders of information. Individuals and organisations may be discouraged from confiding in public authorities if they don't have a degree of certainty that this trust will be respected.
27. The complainant has argued that there is significant local interest in decisions associated with Clair Hall and they have suggested there are suspicions of wrongdoing on the part of the Council. They also consider that there was an understanding that the proposals would be made public.
28. The Council has confirmed that it is satisfied that the release of the information would constitute an actionable breach of confidence and that the public interest in withholding the information (because of the adverse effects upon the parties, particularly in relation to commercial factors) outweighs the public interest in disclosure. The Council considers that this is particularly the case, given that it has subsequently published a report and decision by Cabinet relating to these proposals. In the Council's view, this means that the public interest in the background information is significantly diminished.
29. The Commissioner notes that the Council appears to have sought community engagement on this matter and has published updates on its website<sup>1</sup>. The Commissioner accepts that, as part of its decision making process, the Council was reliant on proposals from external parties and that the effectiveness of this process was contingent on parties being able to make submissions confidentially. He accepts that there is a public interest in facilitating effective decision making and that disclosure of the information would, therefore, be likely to prejudice this.
30. The Commissioner accepts that, in the current economic climate with attendant restraints on public spending, there is an enhanced need for

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<sup>1</sup> <https://engage.midsussex.gov.uk/clair-hall>

public authorities to make effective decisions. This might include decisions about the most effective way to deliver community facilities.

31. It is not the Commissioner's role to investigate or to reach any conclusions on the question of whether the Council has mishandled decisions associated with Clair Hall. Moreover, it is not clear how disclosure of the information would assist the complainant in pursuing this specific line of enquiry.
32. The Commissioner recognises that the complainant has a genuine interest in matters relating to Clair Hall and that there are others in the local community with similar concerns. However, in view of the nature of the information and the context within it was provided to the Council, he does not consider that there is a clear public interest defence for breaching confidence in this case.
33. 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 withhold the information under section 41(1) of the FOIA.

## Other matters

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34. Although they do not form part of this decision notice the Commissioner would like to note the following matters of concern.

### Internal reviews

35. The code of practice issued under section 45 of the FOIA (the "Code") sets out recommendation practice for authorities handling requests for information.

36. In relation to the handling of internal reviews, paragraph 5.8 of the Code says:

"The internal review procedure should provide a fair and thorough review of procedures and decisions taken in relation to the Act."<sup>2</sup>

37. Paragraph 5.4 of the Code confirms that internal reviews should usually be completed within 20 working days.

38. In this case the Council's internal review comprised a sentence which reaffirmed its initial decision. The Commissioner considers that it is, therefore, unlikely that, in this case, the Council's internal review conformed to the recommendations of the Code. In future he expects the Council's reviews will provide evidence of a proper reconsideration of the request under review.

39. In addition, in this case the complainant submitted their request for review on 19 January 2024 and the Council provided its response on 18 March 2024, significantly outside the timeframe recommended by the Code. The Commissioner expects that the Council's future reviews will confirm to the Code's recommendations in respect of timeliness.

### Application of exemptions

40. Where requested information is being withheld, section 17 of the FOIA requires authorities to issue a refusal notice which cites the exemption(s) being relied on and explains the grounds for their application.

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/744071/CoP\\_FOI\\_Code\\_of\\_Practice\\_-\\_Minor\\_Amendments\\_20180926\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/744071/CoP_FOI_Code_of_Practice_-_Minor_Amendments_20180926_.pdf)

41. In this case the Council initially cited the exemption for information intended for future publication (section 22) in refusing the request. Whilst the Council subsequently dropped its reliance on section 22, it is clear to the Commissioner that, given the Council's parallel reliance on the exemption in section 41 to withhold the information, there could be no simultaneous intention to publish the information.
42. Misapplying exemptions can suggest that a request has not been properly considered and/or that an authority does not understand its obligations under the FOIA. In future the Commissioner expects that the Council will carefully consider the implications before applying exemptions.



## **Right of appeal**

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43. 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)

44. 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.
45. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Christopher Williams**  
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**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
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