

# Information provided in confidence (section 41)

## Freedom of Information Act

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## Introduction

1. The Freedom of Information Act 2000 (FOIA) gives rights of public access to information held by public authorities.
2. An overview of the main provisions of FOIA can be found in [The Guide to Freedom of Information](#).
3. This is part of a series of guidance, which goes into more detail than the Guide, to help public authorities to fully understand their obligations and promote good practice.
4. This guidance explains to public authorities how the exemption in Section 41 works to protect information provided in confidence.

## Overview

- Section 41 sets out an exemption from the right to know where the information was provided to the public authority in confidence.
- Information will be covered by Section 41 if;
  - it was obtained by the authority from any other person,
  - its disclosure would constitute a breach of confidence.
  - a legal person could bring a court action for that breach of confidence, and
  - that court action would be likely to succeed
- When determining if disclosure would constitute a breach of confidence, the authority will usually need to consider;
  - whether the information has the quality of confidence,
  - whether it 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.
- If the information concerns the confider's private life, then the

authority won't have show detriment as this can be assumed.

- When determining if an action for breach of confidence would be likely to succeed, the authority will need to consider whether there would be a public interest defence to the disclosure.
- Section 41(2) provides an exclusion from the duty to confirm or deny whether information is held. This exclusion applies if confirming or denying that information is held would in itself give rise to a breach of confidence, actionable by any person, that would be likely to succeed.

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

## What FOIA says

7. Section 41(1) states:

**41.—(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.

8. In order for Section 41 to be engaged, the following criteria must be fulfilled:
  - the authority must have obtained the information from another person,
  - its disclosure must constitute a breach of confidence,

- a legal person must be able to bring an action for the breach of confidence to court, and
  - that court action must be likely to succeed.
9. Section 41(1)(b) stipulates that disclosure must constitute an actionable breach of confidence, 'otherwise than under this Act'. This means that an authority cannot rely on the FOIA as a justification for releasing confidential information if to disclose it under any other circumstances would give rise to an actionable breach of confidence.
10. We will now address the above criteria in more detail.

### The authority must have obtained the information from another person

11. Section 41(1)(a) requires that the requested information must have been given to the authority by another person.
12. 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.
13. It follows that the exemption won't cover information the authority has generated itself, although it may cover documents (or parts of documents) generated by the public authority if these record information provided in confidence by another person, for example:
- A transcript of the verbal testimony given by an employee at an internal disciplinary hearing.
  - A set of minutes that record the views expressed by a contractor during a meeting with the authority.
  - A written note detailing a conversation with a member of the public that took place over a confidential advice line.
  - A doctor's observations of a patient's symptoms, recorded during a consultation.
  - An x-ray image of a patient taken by a hospital.

### **Example**

In [Department for Business, Enterprise and Regulatory Reform \(DBERR\) v ICO and Friends of the Earth](#) (EA/2007/0072, 29 April 2008) the requester had requested material relating to meetings and correspondence between ministers/senior civil servants at DBERR and the CBI.

DBERR provided some of the information but applied Section 41 and several other exemptions to material about the meetings.

The Tribunal accepted that the records of the meetings contained information obtained from another party, even though the actual material itself was created by the DTi (DBERR's predecessor).

In reaching this conclusion, the Tribunal considered the implications of taking the opposing view - that information recorded from another party isn't covered;

*'...highly confidential information passed by an informant to a police officer would be protected if it was recorded in a letter sent to the police by that source, but would not be protected if the police officer met the source, had a conversation, and then recorded it in a memorandum or statement. This privileges the accident of form (or record) over content, and cannot be correct...'* (Para 78)

14. If the requested material contains a mixture of both information created by the 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.

### **Example**

A police authority sends a government department a copy of a confidential report.

Upon receiving the report, the department adds its own analysis, interpretation and comments to the document.

If the department was to receive an FOI request for this document then the content produced by the police authority

would be covered by Section 41(1)(a) by virtue of being obtained from 'another person'.

However, the department's added analysis, interpretation and comments would fall outside the scope of the exemption (subject to the paragraph's below) having been created by the department itself.

15. However, the authority must also consider whether the disclosure of the information it created 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.
16. This could occur if the authority's own analysis, interpretation or comments are very specific to the information received from that person. An example of this might be where the request is for medical or social care records. In these circumstances both the information about the patient's/client's symptoms **and** the relevant medical or social care professional's assessment of those symptoms may be deemed to have been obtained from the patient/client for the purposes of Section 41(1)(a).

### **Example**

An individual makes an FOI request to a psychiatric hospital for a copy of his daughter's medical records from her time at the institution.

The material caught by the request includes a psychiatrist's observations of his daughter's behaviour and his diagnosis of her condition, based on those observations.

In this case, both the psychiatrist's observations **and** the diagnosis would be caught by the scope of Section 41(1)(a), because disclosing the psychiatrist's diagnosis would inevitably reveal confidential information obtained from the patient.

### **Information relating to contracts**

17. The contents of a contract between a public authority and a third party generally won't be information obtained by an authority from another person.

18. This is because the terms of the contract will have been mutually agreed by the respective parties, rather than provided by one party to another.

### **Example**

In [\*Department of Health v ICO\*](#) (EA/2008/0018, 18 November 2008) the requester had asked for a copy of a contract between the Department of Health (the DOH) and a company called Methods Consulting Limited.

The DOH refused this information under Sections 41 and 43 of the FOIA.

The requester subsequently raised a complaint with the Commissioner, who ruled that the Section 41 was not engaged because the information in the contract was not obtained from another party.

The Tribunal agreed that the contract didn't fulfil the requirements of Section 41(a), stating;

*'If the Contract signifies one party stating: "these are the terms upon which we are prepared to enter into a Contract with you" by the acceptance of that Contract the other party is simultaneously stating "and these are the terms upon which we are prepared to enter into a Contract with you". Consequently the Contract terms were mutually agreed and therefore not obtained by either party' (Para 34)*

19. However, we recognise that in some cases a contract will contain technical information, given to the authority by the other party to the contract, in addition to the mutually agreed terms and obligations. Sometimes the technical material will form part of main body of the contract, although more often than not it will feature in separate schedules.
20. Where technical information is included, it may, depending on the circumstances of the case, constitute information obtained by the authority from another person.
21. If the contract contains information relating to the other party's pre-contractual negotiating position, then this could also qualify as information obtained from another person, although once again this will depend on the individual circumstances of the case.

## The disclosure of the information must constitute a breach of confidence

22. We would advise authorities to use the test of confidence set out by Judge Megarry at the High Court of Justice in *Coco v A N Clark (Engineers) Limited [1968] FSR 415* as a framework for assessing whether a disclosure would constitute a breach of confidence.
23. Judge Megarry suggested that three elements were usually required to bring an action for a breach of confidence:
  - the information must have the necessary quality of confidence,
  - it must have been imparted in circumstances importing an obligation of confidence, and
  - there must have been an unauthorised use of the information to the detriment of the confider.
24. However, authorities should take note that the law of confidence in respect of information on private matters has evolved since the *Coco v Clark* case.
25. Of particular significance was the introduction of the Human Rights Act 1998 (HRA), and more specifically Article 8 of that legislation which gives everyone the right to respect for their family and private life.
26. Once this came into force the courts recognised that the confider's Article 8 rights would have to be incorporated into the test of confidence.
27. This was acknowledged in the Court of Appeal in *Mckennitt V Ash [2006] EWCA Civ 1714* when Lord Justice Buxton stated;  
  
*'in order to find the rules of the English law of breach of confidence we now have to look in the jurisprudence of articles 8 and 10. Those articles are now not merely of persuasive or parallel effect but...are the very content of the domestic tort that the English court has to enforce...'* (Para 11)
28. These developments in case law aren't incompatible with Judge Megarry's test. However, they do mean that authorities should pay appropriate regard to the requester's right to privacy and a family life when considering each of the test's three limbs. This is addressed in more detail in the sections below.



## The necessary quality of confidence

29. Information will possess the necessary quality of confidence if;
- it is more than trivial; **and**
  - not otherwise accessible.
30. The information should be worthy of protection in the sense that someone has a genuine interest in the contents remaining confidential.
31. It does not have to be highly sensitive, but nor should it be trivial. The preservation of confidences is recognised by the courts to be an important matter and one in which there is a strong public interest. This notion could be undermined if even trivial matters were covered.
32. However, otherwise trivial information should be treated as more than trivial if;
- it relates to a personal matter; **and**
  - the confider or the person who the information is about obviously attaches some importance to that information.

### Example

In [S v ICO and the General Register Office](#) (EA/2006/0030, 9 May 2007) S had asked The General Register Office (GRO) for information connected to the registration of a relative's death.

The GRO released some information but applied Section 41 to a letter it had received from the deceased's partner confirming her whereabouts at the time of his death.

In the subsequent appeal, S argued that the withheld letter was trivial in nature. However, the Tribunal ruled that the information couldn't be trivial because of the importance that the deceased's partner attached to it.

*'...It is clear...that the Informant has attached a great deal of emotional significance to this information and that she feels that to have it disclosed by a third party against her wishes would cause her distress. On this basis we are satisfied that to the Informant it is clearly information worthy of protection...'*

(Para 36)

*'...We deal at this stage with the "defence" to an actionable breach of confidence raised by the Appellant namely that...the law will not concern itself with trivialities...Information cannot be said to be trivial if it is of importance to the person whose privacy has been infringed...Having seen the disputed information and for the reasons set out above we are satisfied that the information contained within the disputed information is not "trivial" or tittle tattle...'* (Para 37)

33. If the information is more than trivial then the authority must go on to consider whether the information is otherwise accessible.
34. Information that is already in the public domain won't possess the necessary quality of confidence.
35. This reflects the position taken by Judge Megarry in *Coco v A N Clark (Engineers) Limited [1968] FSR 415* where he stated;

*"...there can be no breach of confidence in revealing something to others which is already common knowledge."*

Information will be in the public domain if it is realistically accessible to the general public at the time of the request. This is a matter of degree and will depend on the specific circumstances of the case. For further explanation on this point please see our guidance [Information in the public domain](#)

36. In the case of commercial confidentiality, we consider that confidentiality will be permanently lost if the information has entered the public domain at any time, even if the material is no longer in the public domain at the time of the request.
37. If information on the same subject matter as the request does already appear to be in the public domain, the authority will still need to carefully consider the scope of the request and exact content of the withheld material to establish whether disclosure would reveal anything new.
38. For example, the material held by the authority may be more detailed than the information already in the public domain, corroborate a previously unreliable source or leak, or give a previously unknown context to the information.

39. If disclosure would reveal something new, then the material that would bring the new information to light may still retain its quality of confidence.

**Example**

In [\*Bluck v ICO and Epsom and St Helier University NHS Trust\*](#) (EA/2006/0090, 17 September 2007), the requester had asked the Trust for all the information it held about her deceased daughter, including medical records. The Trust considered this information to be confidential and withheld it under Section 41.

In the subsequent Tribunal case, the requester’s counsel argued that medical records had lost the required quality of confidence because much of the information had already passed into the public domain (for example through court and press statements).

Upon inspecting the withheld information, the Tribunal concluded that the records contained information beyond that which was already in the public domain, and ruled that this undisclosed material had retained the necessary quality of confidence.

*'We have [inspected the Medical records] and have concluded that they contain a certain amount of information, beyond that contained in earlier correspondence, press statements and court documents disclosed to the Appellant without restriction. In our view that body of non-disclosed information retains the necessary quality of confidence...'* (Para 16 )

40. Confidential information that was only disseminated to a limited number of recipients can retain its quality of confidence, provided that none of the recipients subsequently released the material into the public domain themselves.

**Example**

In [\*S v ICO and the General Register Office\*](#) (EA/2006/0030, 9 May 2007), S had argued that the withheld letter wasn't confidential because she was already aware of its contents. However, the Tribunal rejected this line of reasoning. It

stated;

*'The Appellant argues that the information cannot be considered confidential because it must be inaccessible in the sense of not being in the public domain. The Informant has said (as set out above) "there is nothing in this letter that [the Appellant] was not already aware of'. (Para 38)*

*'The Tribunal asks itself the question, does the information lose its quality of confidentiality if it is information already known to the applicant independently? In answering the question in the negative, the Tribunal takes into account the arguments set out in paragraph 38 above, namely that information in the public domain loses the quality of confidentiality but dissemination to a limited number of people does not stop information from being considered to be confidential'. (Para 78)*

41. The same principle will also apply if the information was disseminated to others on the condition that it was for their use alone.

### **Example**

A university provides a government department with a report into some new medical research it has carried out.

The university informs the department that the report is confidential, as the contents are commercially sensitive and have yet to be published.

The department disseminates the report to a selection of independent scientific experts for their views on its contents. However, it does so on the condition that the experts will only use the report for their own purposes and won't share the contents with anyone else.

As the department provided the report to experts on the understanding that it was for their use alone, the contents of that report would still retain the necessary quality of confidence.

42. The fact that part of the requested information, or similar material, has been disclosed in the past shouldn't be taken as

definitive proof that the undisclosed requested information doesn't have the necessary quality of confidence.

43. For example, the previous disclosure could have been due to an error, or a failure to follow good practice, as in the Tribunal case below.

### **Example**

In [S v ICO and the General Register Office](#) (EA/2006/0030, 9 May 2007), S made the point that information she had provided to the GRO had been disclosed in similar circumstances. In her view, this proved that the withheld letter wasn't subject to a duty of confidence.

However, the Tribunal viewed that disclosure as indicative of poor practice by the GRO, rather than evidence that the letter lacked the necessary quality of confidence.

*'...The inconsistency of approach in this case appears to be indicative of a lack of good practice and/or understanding of the scope and remit of FOIA within the GRO rather than evidence that there is no duty of confidentiality.'* (Para 86)

### **The obligation of confidence**

44. The second limb of Judge Meggary's test is concerned with the circumstances in which the confider of information passed it on.
45. 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.

46. Explicit conditions are most commonly used in connection with commercial information, (for example, confidentiality clauses in the terms of a contract). However, it is equally possible for a confider to attach explicit conditions to the provision of other types of information.
47. Some of the circumstances which typically give rise to an implicit obligation of confidence are reasonably well known, for instance, where information is provided in the context of the relationship between:
- a patient and doctor;
  - a client and lawyer;
  - a penitent and priest;
  - a customer and bank; or
  - a client and social worker.
48. Other circumstances can be more difficult to pin down. For instance, employees clearly have obligations of confidence towards their employees, although these are not all encompassing. Whilst it is fairly obvious that information contained in staff appraisals should not be disclosed, other information, such as names and job titles, is unlikely to be confidential.
49. Authorities should also keep in mind that there is more scope for uncertainty and misunderstanding when an obligation of confidence is implicit because there is always a risk that the expectations of the confider and the authority may be different.
50. If an authority is unsure whether any implicit obligation of confidence exists, then it may find it helpful to apply the 'reasonable person' test used by Judge Megarry in *Coco v A N Clark (Engineers) Limited [1968] FSR 415*.
51. Judge Megarry advocated that; *'...if the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised, that upon reasonable grounds the information was being given to him in confidence then this should suffice to impose upon him the equitable obligation of confidence'*.

52. If the authority is still in any doubt, then it would be best advised to seek the views of the parties who would be affected by the disclosure of requested information.
53. Some examples of cases where the Tribunal has accepted that there was an implied obligation of confidence are provided below.

### **Example**

In [\*S v ICO and the General Register Office\*](#) (EA/2006/0030, 9 May 2007) the withheld letter had been written by the partner of the deceased (the Informant) in response to a letter from the GRO asking her to clarify information she had provided to them at an earlier 'question and answer' session.

The Tribunal noted that:

- the GRO's letter did not give a specific undertaking of confidentiality to the Informant, and
- the Informant's response wasn't marked as being provided on condition it would remain confidential.

However, the Tribunal did accept that the information obtained by the GRO during the 'question and answer' session was subject to a duty of confidence, and also that the contents of the Informant's letter were connected to the information provided at that session.

It therefore concluded that the informant's letter was subject to an implied duty of confidence.

*'We are satisfied that the Informant is entitled to assume that the information given at the question and answer session (in so far as it does not appear on the death certificate) is to be kept in confidence and that this letter having been obtained in relation to a request to clarify the information given at that meeting, that the Informant would expect the subsequent provision of information arising out of that meeting to be treated similarly. We are therefore satisfied that the nature of and circumstances in which the information was provided gave rise to an implied obligation of confidence.'* (Para 55)

### **Example**

[Bristol City Council v ICO & Portland and Brunswick Squares Association](#) (EA/2010/0012, 24 May 2010) concerned a request for a viability report and feasibility costs estimate relating to a proposed building development. The requested information had been provided to the Council in support of a planning application from a developer.

The Council refused the request on the grounds that the report consisted of commercially sensitive information, the disclosure of which would be a breach of confidence.

The Tribunal accepted the Council's submissions that it was usual practice for viability reports and or other documents containing costings to be accepted in confidence (irrespective of the reasons for which they were provided), and ruled that the report and estimate were subject to a duty of confidence.

*'...in view of our findings...that at the relevant time the usual practice of the Council was that viability reports and cost estimates like those in question were accepted in confidence (apparently without regard to the particular purpose for which they were being provided)...we have reached the conclusion that the developer did have reasonable grounds for providing the information to the Council in confidence and that any reasonable man standing in the shoes of the Council would have realized that that was what the developer was doing. In these circumstances, an obligation of confidence was imposed on the Council by law in relation to the...viability report and cost estimate and, it follows, they were therefore "subject to confidentiality provided by law". (Para 12)*

### **Detriment to the confider**

54. Although Judge Megarry's ruling in *Coco V Clark* included consideration of the 'detriment' test, it left open the question of whether detriment to the confider is a necessary prerequisite in every breach of confidence case.
55. Since then, further developments in case law have 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.
56. Furthermore, case law also now 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.

### **Example**

In [Bluck v ICO and Epsom and St Helier University NHS Trust](#) (EA/2006/0090, 17 September 2007), the requester had asked the Trust for all the information it held about her deceased daughter, including her health records. The Trust withheld the information under Section 41.

At the Tribunal, the requester's counsel argued that a claim for a breach of confidence could not succeed because the deceased and her estate would be unlikely to suffer any detriment from disclosure.

The Tribunal refuted this argument, pointing out that previous case law had established that it was not necessary to show detriment in cases where the requested information concerned private matters.

*'We have already set out extracts from the judgments in both [Coco v Clark](#) and [AG v Guardian](#) which questioned the requirement for detriment as an essential ingredient of the cause of action in all circumstances. In [Ash v McKennitt](#) the Court of Appeal...went on to apply the law to the facts of the case before it, which involved private information about an individual...It did not require any detriment to be established beyond the fact that there had been an invasion of the Claimant's privacy and home life. We believe that the principle to be drawn from this is that, if disclosure would be contrary to an individual's reasonable expectation of maintaining confidentiality in respect of his or her private information, then the absence of detriment in the sense apparently contemplated in the argument presented on behalf of the Appellant, is not a necessary ingredient of the cause of action. As the Medical Records do fall within the meaning of the phrase "private information" the claim for breach of confidence would not in our view therefore be defeated on this ground...' (Para 15 ) address*

57. In practical terms, this means that, where the information relates to a personal or private information matter, the authority won't be required to demonstrate that the confider would suffer any tangible detriment from disclosure (such as financial loss).

58. However, authorities shouldn't interpret this to mean that they can completely disregard the third limb of Judge Megarry's test if the information is personal or private. This is because they will still have to show that disclosure would be an unauthorised use of the information.
59. If the requested information is commercial in nature then the disclosure will only constitute a breach of confidence if it would have a detrimental impact on the confider.

### **Example**

In [Higher Education Funding Council for England v ICO & Guardian News and Media Ltd](#) (EA/2009/0036, 13 January 2010) the requester had asked the Higher Education Funding Council for England (HEFCE) for various pieces of information it held about HEI's (Higher Education Institutions). HEFCE refused this request under Section 41.

The matter was then referred to the Commissioner who ruled that a breach of confidence wouldn't be actionable because the HEIs wouldn't suffer any detriment from disclosure.

At the Tribunal, HEFCE submitted that detriment was not an independent requirement for a breach of confidence. The Commissioner argued that the only cases where detriment isn't a requirement are those concerning private, personal information.

The Tribunal, acknowledged that there had been a divergence in the way in which the courts handled cases involving commercial information and those involving private information. However, it also confirmed that detriment is still a necessary element of a claim for breach of confidence in relation to commercial information.

*'The establishment of this distinction seems to have led some to doubt whether the test applied in cases of commercial information is still appropriate and, in particular, whether the requirement to show detriment should be retained. The existence of any such doubt does not, however, tempt us to follow the HEFCE's invitation to conclude that, regardless of whether the relevant information affects individual privacy, detriment is either not required or any requirement is satisfied by the fact of unauthorised disclosure. We feel sure that, for the time being, this Tribunal, when dealing with the type of information in question in this Appeal, should not depart from*

*the line of authority from the higher courts leading from Coco v Clark up to and including Vestergaard.'*

*We conclude, therefore, that the HEFCE must prove detriment flowing from disclosure before the hypothetical cause of action may be said to have been established (and the exemption thereby triggered).'* (Paras 43 & 44)

60. It therefore follows that, for commercial information, the authority will be expected to put forward an explicit case for detriment. Usually the detriment to the confider in such cases will be a detriment to the confider's commercial interests.

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

61. 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.
62. This means that when considering whether a disclosure would constitute a breach of confidence an authority may consider the expectations of, and the impact on, both:
- the person who gave the information directly to the public authority, and
  - any other previous confiders of confidential material within the requested information.

### **Example**

A school provides a local authority with a copy of a confidential report concerning the levels of truancy amongst its pupils. A local newspaper subsequently makes an FOIA request to the authority for a copy of this report.

This report includes names of the pupils concerned and contains details of the disciplinary measures taken against them. It also contains information that the parents of the pupils concerned gave to the school 'in confidence'.

In this case, the authority could not only take into account whether disclosure would breach the school's confidence, but also whether the parents who confided in the school would be

able to take court action against the authority for breaches of their confidence.

63. In effect, if confidential information has passed through several hands, more than one duty of confidence may arise, which could lead to more than one potential breach of confidence. 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.
64. In certain circumstances, the duty of confidence owed to a living individual will continue after their death.
65. This principle will be of particularly relevance for those authorities who hold records about an individual's personal details, such as health records, banking details or the provision of care.
66. Where a legally enforceable duty of confidentiality is owed to a living individual, after death it can be enforced by the deceased's personal representative.
67. It won't be necessary for the authority to establish the identity of the personal representative, indeed there may be no one appointed to the position at that time. However, it has to be satisfied that, if such a representative existed, they would be capable of taking action.
68. More detailed information about the application of Section 41 where the confider is deceased can be found in our guidance; ['Information about the deceased'](#).

## The action for breach of confidence must be likely to succeed

69. The final part of the test for engaging section 41 is whether the action for breach of confidence is likely to succeed. This is supported by the statements made by Lord Falconer (the promoter of the legislation), during a debate on the Freedom of Information Bill.
70. "*Actionable*", means that one can go to court and vindicate a right in confidence in relation to that document or information. It means being able to go to court and win." (Hansard HL (Series 5), Vol.618, col.416)

"... the word "actionable" does not mean arguable ... It means something that would be upheld by the courts; for example, an action that is taken and won. Plainly, it would not be enough to say, "I have an arguable breach of confidence claim at common law and, therefore, that is enough to prevent disclosure". That is not the position. The word used in the Bill is "actionable" which means that one can take action and win." (Hansard Vol.619, col. 175-176).

71. Section 41 is an absolute exemption, so there is no public interest test to be carried out under FOIA.
72. However, the authority will need to carry out a test to determine whether it would have a public interest defence for the breach of confidence.
73. This is because case law on the common law of confidence suggests that a breach of confidence won't succeed, and therefore won't be actionable, in circumstances where a public authority can rely on a public interest defence.
74. The courts used to take the position that the public interest in maintaining confidentiality could only be overridden on exceptional grounds, for example if the information would bring to light evidence of misconduct, illegality or gross immorality.
75. However, this began to change following the Court of Appeal decision in *London Regional Transport v The Mayor of London* [2001] EWCA Civ 1491; [2003] EMLR 88, as this left open the question of whether exceptional grounds are a prerequisite for a public interest defence to succeed.
76. This ruling was subsequently interpreted by the Information Tribunal in [Derry City Council V ICO](#) (EA/2006/0014, 11 December 2006) to mean that an exceptional case is no longer required to override a duty of confidence that would otherwise exist.
77. Further case law has recognised the need to incorporate the provisions of the HRA into the test of confidence. The relevant provisions, in terms of the public interest, are the Article 8 right to privacy and a family life and the competing Article 10 right to freedom of expression (which includes the freedom to receive and impart information and ideas).
78. The effect of these developments around the law of confidence has been to modify the public interest test into a test of proportionality.

79. This was acknowledged by the Court of Appeal in *HRH Prince of Wales V Associated Newspapers Limited* [2008] Ch 57 when it stated;

*'...Before the Human Rights Act came into force the circumstances in which the public interest and publication overrode a duty of confidence were very limited. The issue is whether exceptional circumstances justified disregarding the confidentiality that would otherwise prevail. Today the test is different. It is whether a fetter of the right of freedom of expression is, in the particular circumstances, "necessary in a democratic society". It is a test of proportionality...'* (Para 67)

80. The test now, therefore, is whether there is a public interest in disclosure which overrides the competing public interest in maintaining the duty of confidence.

81. 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.

82. The key public interest factors inherent in this part of the test for Section 41 are summarised below.

### **Public interest defence arguments**

83. Some weight should always be afforded to the general public interest in ensuring that public authorities remain transparent, accountable and open to scrutiny, for example where disclosure would:

- further public understanding of, and participation in the debate of issues of the day;
- enable individuals to understand decisions made by public authorities affecting their lives and, in some cases, assist individuals in challenging those decisions; or
- facilitate accountability and transparency in the spending of public money.

84. Whether this will be enough to provide an adequate public interest defence to a breach of confidence will depend upon the facts of the case. However, in cases where the duty of confidence protects a person's private interests, it is hard to envisage circumstances where the public interest in transparency and accountability alone, would be sufficient to override the public interest in maintaining that individual's privacy.
85. If the information would reveal evidence of misconduct, illegality or gross immorality (such as misfeasance, maladministration or negligence) then this will carry significant public interest weight in favour of disclosure.
86. It is not necessary to establish as a matter of fact that wrongdoing has occurred. Indeed, an allegation of wrongdoing will also carry some public interest weight, provided it originates from a credible source. This is supported by the Tribunal Decision in [Moss v ICO and the Home Office](#) (EA/2011/0081, 28 February 2011). *'...the fact of wrongdoing is not a necessary prerequisite. Even an allegation of wrongdoing will justify exposure in the public interest if the allegation is a credible one from an apparently reliable source...'* (para 86).
87. Some weight may also be afforded to the public interest in disclosure if releasing the material would serve to protect public safety, for example by raising public awareness of a potential danger or threat, or by helping keep the public from harm in some way.

### **Arguments in favour of maintaining the confidence**

88. When considering the public interest in favour of maintaining the confidence, the authority should pay particular regard to:
- the wider public interest in preserving the principle of confidentiality, and
  - the impact of disclosure on the interests of the confider.

These factors are addressed in more detail below.

89. 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.

90. 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.
91. The weight carried by this factor will depend upon on the context and, more specifically, how the relationship of trust operates to serve the public interest.
92. In a medical context, for example, the principle of confidentiality is important because it reinforces the bond of trust between patients and doctors, without which people may be reluctant to seek medical advice.
93. A further example would be an authority which relies on the free flow of confidential information from the public to perform its statutory functions. Here, the relationship of trust serves to maintain that flow of information.
94. If the authority was to breach this trust then the flow of information could diminish, making it more difficult for the organisation to carry out its functions effectively.

### **Example**

A member of the public has concerns over the safety of a product sold by a local company and writes to the trading standards department of her local authority to complain. She does this on the understanding that her complaint will be treated in confidence.

The local authority informs the company that they have received a letter of complaint about the product. The company then submits an FOIA request to the local authority for a copy of the complainant's letter.

If the local authority was to breach the complainant's confidence by releasing the letter, then it could deter other members of the public from bringing consumer complaints to its attention.

This in turn would make it more difficult for the local authority to enforce consumer and trading laws in the local area.

Clearly it wouldn't be in the wider public interest for the authority's consumer protection functions to be impeded in this way.



95. The impact on the interest of the confider could take the form of a commercial impact (if the confider is an organisation) or loss of privacy (where the confider is a private individual acting in a personal capacity).
96. In respect of commercial impact, this is most likely to carry weight if the breach of confidence would damage the confider's competitive position or ability to compete, for example where disclosure would:
- reveal information that would assist competitors;
  - undermine the confider's future negotiations with the authority or other organisations; or
  - negatively impact on the confider's relationship with the authority or other organisations.

### **Example**

Decision Notice [FS50496241](#) concerned a request to the University of Sussex for a copy of a business case containing proposals to outsource catering and facilities management.

The University initially withheld the report under Sections 41 and 43 of FOIA. However, during the course of the Commissioner's investigation it decided to disclose the majority of the content and apply Section 41 to the remainder.

The withheld content contained material provided by a number of external suppliers, including information about their experience and approaches to business.

The suppliers were concerned that the disclosure of this information would allow their competitors to gain a competitive edge over them when trying to win over potential clients and submitting offers.

The Commissioner took into account the potential commercial impact on the suppliers when he came to consider the balance of the public interest;

*'...the majority of the report in question has now been released- the only information that remains is information that was supplied to the university on a confidential basis and which would be likely to cause*

*commercial detriment to those firms that supplied it if it were to be released...'*

*The Commissioner has accepted that disclosure could cause the remaining suppliers concerned commercial detriment and he does not consider there is any overwhelming further public interest in this case that would warrant prejudicing the ability of these firms to compete.'* (Paras 37 & 38)

97. If the information was confided by an individual acting in a personal capacity, for example:

- a resident's letter of complaint to a council regarding a noisy neighbour;
- a parent's application for child benefit; or
- information imparted by a patient during a doctor's surgery.

then the authority may take into account the likely impact of disclosure on that person.

98. The real impact of disclosing private, personal information will be an infringement of the confider's privacy, and there is a strong public interest in protecting the privacy of individuals.

99. This public interest is further underpinned by the Article 8 right to privacy, and the fact that the courts are obliged to interpret the law of confidence in a manner that respects that right.

100. Authorities should also note that, where the impact on privacy is a factor, there is likely to be some overlap with the other public interest factors in favour of maintaining the confidence. This is because any infringement of privacy may deter others from providing information to the authority in question. This in turn could work against the public interest by hampering that authority's ability to carry out its functions (see Section above entitled 'The wider public interest in preserving the principle of confidentiality'.)

## Protectively marked information

101. Often, central government departments (and some other authorities) will make use of systems of protective markings

(e.g. Official – Sensitive, Secret and Top Secret) to indicate that information is confidential.

102. However, whilst protective markings may provide a useful preliminary indication that information may be confidential, authorities should not rely on them to make final decisions.
103. For example, circumstances can change with the passage of time, and information which was considered worthy of protection at the time of its creation may have lost that quality of confidence by the time of the request.
104. Also, it is not guaranteed that information that is protectively marked will meet the test under section 41 (for example it may not have been obtained from another person).
105. If protective marking systems are to be of assistance it may be necessary to also record the period of time for which the marking is anticipated to be relevant together with any other information that might assist an FOI decision maker.
106. Similar considerations will apply to information that has been provided to an authority marked, 'Confidential' or 'Commercial in Confidence' and so on. Very often such markings do not provide a good indication of whether information has the necessary "quality of confidence".
107. As with internal markings, what was confidential at the time of writing may no longer be at the time of a request for disclosure and all the requirements of section 41 may not be met. If in doubt it will be sensible to check the position with the provider of the information and any other affected parties, bearing in mind that it is the authority and not a third party that must decide if the exemption is relevant.

## Information shared between government departments

108. In cases where the authority and confider are both government departments (or two Northern Ireland departments), the confider would not be able to rely upon this exemption.
109. This is because Section 81(2)(b) of FOIA precludes government departments from relying on Section 41(b) in respect of information provided in confidence by other government departments. However, this wouldn't prevent the department that obtained the information from relying on other

exemptions, where applicable (see later section entitled 'Interaction between Section 41 and other exemptions').

## Interaction between section 41 and other exemptions

110. If the confidential material contains information about identifiable individuals then there is likely to be some overlap with Section 40 (the exemption for personal information).
111. Further information on the application of Section 40 can be found in our guidance [Personal information \(section 40 and regulation 13\)](#).
112. Where the information is of a commercial nature, there may be some overlap with Section 43 (the exemption for commercial interests) if:
- disclosure would be likely to prejudice the commercial interests of any person (as in a 'legal person'); **or**,
  - the information constitutes a trade secret.
113. This is covered in more detail in our guidance [Commercial Interests](#).
114. Whilst confidential information provided by one government department to another is unlikely to fall under Section 41, it may be relevant to consider other exemptions, such as those relating to [defence](#), [the economy](#) or prejudice to the [effective conduct of public affairs](#).
115. Information which a court might find was subject to an obligation of confidence because it had been obtained using statutory powers, may also be protected by the exemptions relating to [investigations and proceedings](#), [law enforcement](#) or [public audit](#).
116. These examples are not exhaustive. Other exemptions may apply. As always it is the specific circumstances of the case that will dictate the application of exemptions.
117. This guidance relates only to FOIA. If the information is environmental, public authorities will instead need to consider exceptions under the EIR.

## Duty to confirm or deny

**41.—(2)** The duty to confirm or deny does not arise if, or to the extent that, the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) constitute an actionable breach of confidence.

118. Section 1(1)(a) of FOIA places public authorities under a duty to confirm or deny whether they hold the requested information.
119. However, Section 41(2) provides an exclusion from this duty where the act of confirming or denying the existence of the information would itself result in an actionable breach of confidence. This provides the authority with the option to issue a neither confirm nor deny (NCND) response in such cases.
120. The test for an actionable breach of confidence in section 41(1)(a) is the same as in section 41(1)(b). This means that an authority can only rely on an NCND response if it wouldn't have a public interest defence against the breach of confidence that would result from a confirm or deny response.

## Managing expectations of confidentiality when contracting or corresponding with third parties

121. Part V of the [Section 45 Code of Practice](#) outlines good practice regarding a public authority's confidentiality obligations relating to contracts under FOIA. However, two points we would like to highlight in particular are:
  - When a public authority enters into a contract, it should let that other party know before the contract is drawn up that part or all of the contract may be disclosed in response to a freedom of information request.
  - Public authorities can use confidentiality clauses to identify information that may be exempt, but they should carefully consider the compatibility of such clauses with their obligations under FOIA. They may also help identify occasions where the other party to a contract should be consulted before disclosure. Such clauses cannot however

prevent disclosure under FOIA if the information is not confidential.

122. Similarly, when corresponding with third parties, public authorities should think carefully before giving assurances of confidentiality. They should manage expectations by explaining the limits that FOIA may place upon its ability to withhold information provided to it in confidence.

## More information

123. Additional guidance is available on [our guidance pages](#) if you need further information on the public interest test, other FOIA exemptions, or EIR exceptions.

124. This guidance has been developed drawing on ICO experience. Because of this it may provide more detail on issues that are often referred to the Information Commissioner than on those we rarely see. The guidance will be reviewed and considered from time to time in line with new decisions of the Information Commissioner, Tribunals and courts.

125. It is a guide to our general recommended approach, although individual cases will always be decided on the basis of their particular circumstances.

126. If you need any more information about this or any other aspect of freedom of information, please [contact us](#), or visit our website at [www.ico.org.uk](http://www.ico.org.uk).