

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

### **Decision notice**

**Date:** 18 December 2014

**Public Authority:** Norfolk County Council  
**Address:** County Hall  
Martineau Lane  
Norwich  
NR1 2DH

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

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1. The complainant has requested information relating to the fee structure and charging of top-up fees at a specific nursery. The Commissioner's decision is that Norfolk County Council has incorrectly applied the exemption for information provided in confidence at section 41 of the FOIA and the exemption for commercial interests at section 43(2) of the FOIA.
2. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Disclose the letter from the nursery to the council dated 4 February 2014.
  - Disclose the email exchanges between the DfE and the council redacting the name of the complainant.
  - Issue a fresh response, under the terms of the FOIA, regarding the letter of 16 January 2014 from the council to the nursery.
3. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Request and response

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4. On 4 February 2014, the complainant wrote to the council and requested information in the following terms:

"Please send me a scanned copy (via email) of internal (within Norfolk County Council (NCC)) and external (between NCC and the Department for Education and from NCC to [name redacted] Nursery, Norwich) correspondence (emails, letters, faxes, memos) related to the fee structure and charging of top-up fees at [name redacted] Nursery, Norwich, including (but not limited to) correspondence related to complaint CMP10097 to Norfolk County Council.

If you need to request consent from DfE to release any information, please try to obtain this.

I do not wish [name redacted] Nursery to be contacted about this FOI request, but please also include any correspondence from [name redacted] Nursery to NCC that can be included without requesting the consent from [name redacted] Nursery."

5. The council responded on 21 February 2014 stating that, as the information is personal data about the requester, it will be dealt with under the Data Protection Act 1998 ('the DPA') as a Subject Access Request.
6. The complainant replied on the same day asking for the request to be dealt with under the FOIA. He said that the complaint was confidential so he doesn't expect there to be personal information on file except for the correspondence between him and the council and that he already has this on file and doesn't require a copy.
7. The council then asked the complainant to clarify his request. The complainant provided the council with the following on 21 February 2014;

"As I have already clarified, I am not after a copy of the personal correspondence with me related to the complaint (which would indeed be personal), but a copy of the correspondence

- within NCC
  - from NCC to DfE
  - from DfE to NCC
  - from DfE to [name redacted] Nursery
  - from NCC to [name redacted] Nursery
- and

- from [name redacted] Nursery to NCC, inasmuch as this information can be included without requesting consent from [name redacted] Nursery.

This correspondence relates to the statutory obligations of NCC with respect to the "Code of Practice for Local Authorities on Delivery of Free Early Years Provision for 3 & 4 year olds" and should not be personal (unless my request for confidentiality has been breached)."

8. The council then provided it's response under the FOIA on 6 March 2014. It refused to provide the requested information citing the exemptions at section 40, for information which constitutes the personal data of the applicant, and section 43(2) of the FOIA.
9. The complainant requested an internal review on 6 March 2014. The council provided its internal review on 23 June 2014. It said that the section 40(1) exemption was correctly applied to exempt from disclosure any information within the scope of the request that is the complainant's personal data and that the exemption at section 43(2) applied to correspondence between the nursery, the council and the Department for Education ('DfE'). It also applied the exemption at section 41 to information received from third parties confidentially.

## **Scope of the case**

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10. The complainant contacted the Commissioner on 18 June 2014 as he had not received the internal review response at that time. He then contacted the Commissioner on 8 July 2014, after receipt of the internal review response, to complain about the way his request for information had been handled. He pointed out that he had made a separate complaint to the Commissioner under the DPA (case reference RFA0544067) regarding the council's failure to provide a response to the Subject Access Request that the council referred to in its internal review response.
11. The Commissioner has not considered any information dealt with under case reference RFA0544067. He understands that this relates to the complainant's complaint file.
12. The council said that the withheld information consists of a set of email exchanges between the DfE and the council and a letter from the nursery concerned. The Commissioner noted that the internal review response said that s40(1) was not applied to correspondence between the council, the DfE and the nursery but its response to the Commissioner's enquiries said that s40(1) applies to the whole of information. Therefore the Commissioner contacted the council to seek clarification of its position in relation to section 40(1). The council

confirmed that it was not applying section 40(1) to the letter from the nursery concerned. In relation to the email chain, the council said that this constitutes the complainant's personal data as it clearly identifies him even if his name was redacted, as the information either directly identifies him or refers to his complaint.

13. Having seen the email chain, the Commissioner does not agree that if the complainant's name was redacted he could be identified. The emails only briefly refer to what the individual's complaint is and mainly focus on the council's handling of the complaint and the policy behind the issue rather than the individual's situation. He has taken his code of practice on anonymisation<sup>1</sup> into account in order to reach this conclusion. He considers that account can be taken of the context of disclosure and the type of information being disclosed. In this case, only a limited number of people may be able to identify the complainant (i.e. staff involved at the council, the DfE and the nursery) and the information that would be disclosed (i.e. the fact that a complaint has been made) isn't something that those individuals wouldn't already know. As the Commissioner considers that if the name of the complainant is redacted from the emails then the information is not the complainant's personal data, he does not consider that section 40(1) applies.
14. The Commissioner has considered the application of sections 41 and 43 to the withheld information.
15. The Commissioner notes that the letter from the nursery refers to an earlier letter sent from the council on 16 January 2014. He considers it likely that the letter of 16 January 2014 would fall within the scope of the request. The council did not provide the Commissioner with the letter referred to and it has not been considered as part of this decision notice. The Commissioner requires the council to issue a response regarding the letter of 16 January 2014.

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[http://ico.org.uk/for\\_organisations/guidance\\_index/~media/documents/library/Data\\_Protection/Practical\\_application/anonymisation-codev2.pdf](http://ico.org.uk/for_organisations/guidance_index/~media/documents/library/Data_Protection/Practical_application/anonymisation-codev2.pdf)

## **Reasons for decision**

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

16. Section 41(1) provides that information is exempt if it was obtained by the public authority from any other person and the disclosure would constitute an actionable breach of confidence.

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

17. The first step is for the Commissioner to consider whether the information was obtained by the council from any other person in order to satisfy the requirement of section 41(1)(a).
18. The letter from the nursery has clearly been obtained from another person and therefore this satisfies the requirement of section 41(1)(a).
19. The emails exchanges between the (DfE) and the council contain both information obtained from another person (that being the DfE) and information sent from the council. The Commissioner considers that the emails from DfE have been obtained from another person and therefore satisfy the requirement of section 41(1)(a). However, the Commissioner does not consider that the emails sent from the council, both internal and external, have been obtained from any other person. The requirement of section 41(1)(a) has not been met in relation to these and therefore the exemption at section 41 cannot apply to such information.
20. Having established that the letter from the nursery and the emails from DfE were in fact obtained from other persons, the Commissioner must next consider whether or not its disclosure to the public (otherwise than under the FOIA), would constitute a breach of confidence 'actionable' by that or any other person.

#### **Actionable claim for breach of confidence**

21. Whilst it is not the only test for establishing confidence, the Commissioner finds that the appropriate test for this case is that which is set out in the case of *Coco v Clark* [1969] RPC 41. According to the decision in this case a claim for breach of confidence can be established where:

"... three elements are normally required if ... a case of breach of confidence is to succeed. First, the information itself ... must 'have the necessary quality of confidence about it'. Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that

information to the detriment of the party communicating it..."

22. All three elements must be present for a claim to be made. However, for that claim to be 'actionable' within the meaning of section 41(1)(b) of the FOIA, a public authority must establish that an action for breach of confidence would, on the balance of probabilities, succeed. This requires consideration of whether or not there would be a public interest defence to such a claim.

### **Obligation of confidence**

23. Even if information is to be regarded as confidential, a breach of confidence will not be actionable if it was not communicated in circumstances that created an obligation of confidence. An obligation of confidence may be expressed explicitly or implicitly.
24. Although there is no absolute test of what constitutes a circumstance giving rise to an obligation of confidence, the judge in *Coco v Clark*, suggests that the 'reasonable person' test may be a useful one. The test was described as follows:

"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."
25. The letter from the nursery is headed 'Strictly Confidential' and therefore the Commissioner accepts that it has been provided in circumstances importing an obligation of confidence.
26. The council appears to be claiming that the obligation of confidence in relation to the emails from the DoE can be implied from the circumstances. It said that the correspondence constitutes a frank discussion about the operation of the implementation of policy that could not be held in the same way if it was done in the public domain.
27. The Commissioner viewed the emails from DoE and does not consider that they contain a 'frank discussion about the operation of the implementation of policy'. Whilst they do briefly mention the implementation of policy, they are couched in general terms rather than being a frank discussion. The Commissioner does not therefore accept the council's argument as to why such emails were communicated in circumstances that created an obligation of confidence. However, given that the emails relate to a parental complaint, the Commissioner considers that a 'reasonable person' standing in the shoes of the council would have realised, on reasonable grounds, that the information was

being given in confidence and therefore considers that this element of confidentiality has been met.

### **Necessary quality of confidence**

28. For information to have the necessary quality of confidence it must be more than trivial and not otherwise accessible.
29. The Commissioner is satisfied that the information in this case, that being information relating to a complaint about a nursery and concerns as to how the council has interpreted a policy communication, is not trivial.
30. However, as stated above, this alone is not sufficient to indicate that the material has the necessary 'quality of confidence'. Therefore the Commissioner has considered whether the information is otherwise accessible.
31. The council has not specifically confirmed that the information is not otherwise accessible. However, given its arguments relating to preserving the confidentiality of the information, it is reasonable to deduce that the information is not accessible elsewhere. The Commissioner therefore accepts that the withheld information in this case has the necessary quality of confidence.

### **Detriment to confider**

32. Having considered whether the information in this case was imparted in circumstances giving rise to a duty of confidence and had the necessary quality of confidence, the Commissioner must also consider whether unauthorised disclosure could cause detriment to the confider.
33. The council said that it would prejudice the ability of both the council and the DfE to enter into frank exchanges of correspondence and resolve complaints if this type of information was subject to disclosure. It also said that this information could have a detrimental effect on the council in terms of public confidence in how policies are being managed and decisions made in relation to funding.
34. As stated earlier, the Commissioner does not necessarily consider the emails to constitute a frank discussion. He does not agree that disclosure of the specific information in this case would prejudice the ability of both the council and the DfE to enter into frank exchanges of correspondence and resolve complaints. Therefore, in relation to emails from the DfE, the Commissioner considers that the test of confidence fails on this limb and therefore section 41 does not apply.

35. He does agree that the both the emails from DfE and the letter from the nursery could cause detriment to the council, in terms of public confidence. However, the Commissioner's view is that it is not appropriate to consider the council's submission relating to the detriment to the council as it is only detriment to the confider that can be taken into account when considering whether there would be an actionable breach of confidence.
36. The council did say that if the information was published it could undermine public and service user confidence in the nursery. The Commissioner's view is that it is appropriate to consider this argument in relation to the letter from the nursery as, in this instance, the nursery is the confider of the information.
37. Having viewed the letter from the nursery, the Commissioner considers that the council has not supplied convincing arguments that demonstrate the detriment that would be experienced if the confidence was breached. He also considers that the detriment is not obvious from the content of the information itself. Whilst the letter does refer to a complaint having been made by a parent, the council has said all parents of the nursery would have been aware of the issue of withdrawing funds, but not necessarily aware that this was a result of a complaint received from a parent. The Commissioner is not convinced that the fact that the withdrawing of funds was the result of a complaint received from a parent would undermine public and service user confidence in the nursery given that all parents of the nursery would have been aware of the issue anyway. Therefore, the Commissioner considers that the test of confidence in relation to the letter from the nursery fails on this limb and therefore section 41 does not apply.
38. The council also said that to release information which would identify one individual as being instrumental in this decision to remove funding would not be fair to that individual. For clarity, the Commissioner cannot take the argument relating to fairness to the individual who made the complaint into account when considering the exemption at section 41.

## **Section 43(2)**

39. Section 43(2) FOIA provides an exemption from disclosure of information which would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it). This is a qualified exemption, and is therefore subject to the public interest test.
40. In this instance the council has applied the exemption at section 43(2) to the email exchange between the DfE and the council and the letter



from the nursery. It said that the party whose commercial interests would be likely to be prejudiced is the nursery.

41. The term 'commercial interests' is not defined in the FOIA. However the Commissioner has considered his awareness guidance on the application of section 43<sup>2</sup>. This comments that;  
  
    "...a commercial interest relates to a person's ability to participate competitively in a commercial activity, i.e. the purchase and sale of goods or services."
42. The Commissioner considers that running a private nursery is a commercial activity and therefore information related to the funding of the nursery does fall within the remit of section 43(2) FOIA.
43. Section 43(2) consists of 2 limbs which clarify the probability of the prejudice arising from disclosure occurring. The Commissioner considers that "likely to prejudice" means that the possibility of prejudice should be real and significant, and certainly more than hypothetical or remote. "Would prejudice" places a much stronger evidential burden on the public authority and must be at least more probable than not.
44. In this case, the council considers that the prejudice "would be likely to" occur.
45. The Commissioner has considered how any prejudice to the nursery would be likely to be caused by the disclosure of the requested information. This includes consideration of whether the prejudice claimed is "real, actual or of substance" and whether there is a causal link between disclosure and the prejudice occurring.
46. The council said that as a result of the requestor's complaint, funding was withdrawn from the nursery due to an issue with how they were agreeing and making funding decisions and their structure of their fees. This resulted in a loss of income to the nursery. It explained that whilst the nursery were given time to consult with parents in relation to places free of charge to allow a parent to move a child it was felt to release the information into the wider public domain would be likely to prejudice this further. It said that if parents do not have the confidence the nursery is

being managed appropriately this could result in children being withdrawn from the nursery giving a further loss to revenue.

47. When claiming that disclosure would prejudice the commercial interests of a third party, the Commissioner expects a public authority to obtain arguments from the third parties themselves. In his enquiries to the council, the Commissioner asked the council to clarify on what basis it has established that disclosure of a third party's interests may occur and to provide copies of any correspondence the council has had with third parties in relation to this request. The council has not confirmed that it has consulted with the nursery regarding whether disclosure of the requested information would prejudice its commercial interests. Neither has the council said that its submission represents its prior knowledge of the nursery's concerns. The Commissioner's guidance on Commercial Interests<sup>3</sup> states the following:

"It is important to note that in claiming the exemption on the basis of prejudice to the commercial interests of a third party, the public authority must have evidence that this does in fact represent or reflect the view of the third party. The public authority cannot speculate in this respect; the prejudice must be based on evidence provided by the third party, whether during the time for compliance with a specific request or as a result of prior consultation. This approach has been confirmed by the Information Tribunal<sup>4</sup>."

48. The Commissioner has considered whether there is a sufficient causal link between disclosure of the withheld information and the prejudice occurring. As the council has said that the parents of all children attending the nursery were aware that funding was being withdrawn, he does not consider that disclosure of the specific information in this case would result in the prejudice claimed. This, coupled with the lack of confirmation from the council that the nursery considers disclosure would be prejudicial to its commercial interests, has led the Commissioner to the conclusion that section 43(2) of the FOIA is not correctly engaged in this case.

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<sup>4</sup> Derry City Council v Information Commissioner (EA/2006/0014; 11 December 2006)

## Other matters

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### Internal Review

49. As he has made clear in 'The Guide to Freedom of Information'<sup>5</sup>, the Commissioner considers that internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the FOIA, the Commissioner's view of a reasonable time for completing an internal review is 20 working days from the date of the request for review, or 40 working days in exceptional cases. In this case the Commissioner notes that complainant first requested an internal review on 6 March 2014 but the council did not provide an internal review response until 23 June 2014, over three months later. The council should ensure that internal reviews are carried out promptly in future.

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[http://ico.org.uk/for\\_organisations/guidance\\_index/~media/documents/library/Freedom\\_of\\_Information/Detailed\\_specialist\\_guides/guide\\_to\\_freedom\\_of\\_information.pdf](http://ico.org.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/guide_to_freedom_of_information.pdf) page 52

## Right of appeal

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50. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
LEICESTER,  
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

51. 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.
52. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Signed .....**

**Andrew White**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
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